

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 October 2016

**Public Authority:** Export Credits Guarantee Department

**Address:** 1 Horse Guards Road

London

SW1A 2HQ

### Decision (including any steps ordered)

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1. The complainant has requested information concerning payments made to agents involved in five projects applying for support from the Export Credits Guarantee Department. The public authority refused to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 41(2)(information provided in confidence) and 43(3)(prejudice to commercial interests). The Commissioner has concluded that the Export Credits Guarantee Department is entitled to rely on section 41(2) to refuse to confirm or deny whether it holds the requested information.

### Request and response

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2. UK Export Finance (UKEF) is the operating name of the Exports Credits Guarantee Department. UKEF is the UK's export credit agency. It exists to ensure that no viable UK export should fail for want of finance or insurance from the private market. It provides finance and insurance to help exporters win, fulfil and ensure they get paid for export contracts. For ease of reference in this notice, the Commissioner will refer to UKEF throughout.
3. On 20 March 2015 the complainant requested the following information from UKEF:

*'UKEF requires organisations submitting applications for support to provide information about payments to agents. I would like to be provided with information for the following five UKEF projects from 2013/14 (taken from your 2013/14 annual report):*

*Fluor Ltd/Sadara Chemical Co/Petrochemical complex  
Subsea 7 International Contracting Ltd/Petrobras/Oil and gas  
exploration  
Various/Nghi Son Refinery and Petrochemical Ltd/Petrochemical refining  
and petrochemical plant  
Carillion Construction Ltd/Meraas Malls LLC/Residential, retail and  
entertainment mall  
Airbus SAS/Emirates/Airbus aircraft*

*1) For each of these projects, please provide the number of payments made to agents, and the total value of those payments.*

*2) For each payment, please provide the description of services for which the agent was paid. Please ensure that your response makes clear to which contract each payment relates'.*

4. UKEF responded to the request on 21 April 2015 and advised the complainant that under section 41(2) of the FOIA, they could neither confirm nor deny whether they held information falling within both parts of the request (or whether the underlying assumption in the request – that agents were engaged in all of the transactions, was correct). UKEF confirmed that they request information about the use of agents from applicants when considering support for a transaction. As such, the exporters named in the request provided this information to UKEF in their applications for UKEF support. UKEF advised that this information was provided to them in confidence and *'as of the date of your request, it retained the necessary quality of confidence'*. UKEF stated that they could neither confirm nor deny whether agents were used in any of the named transactions, or whether they held information falling within both parts of the request, as that would constitute an actionable breach of confidence on their part.
5. UKEF confirmed that they had considered the availability of a public interest defence to an action for breach of confidence and they considered that the public interest in maintaining the duty of confidence between UKEF and exporters outweighed the public interest in disclosure. They stated that disclosure *'may undermine the principle of confidentiality, discouraging exporters from seeking UKEF support or providing information about their use (or not) of agents for fear that such confidences would not be respected'*. UKEF contended that it was vital to protect the free flow of information between UKEF and exporters to enable the public authority to perform its statutory function of supporting exporters, and perform necessary due diligence when considering support for a transaction.

6. UKEF advised the complainant that they were also unable to confirm or deny whether any of the named transactions involved the use of agents, or whether they held information within scope of the request by virtue of section 43(3) of FOIA. They stated that this was because disclosure of the information would, or would be likely to, cause commercial harm to the exporters concerned. *'Further, disclosure would, or would be likely to, harm UKEF's relationship with the exporters concerned, deterring them from seeking future support and putting them at a competitive disadvantage'*.
7. Having considered the public interest test attached to section 43, UKEF advised that they considered that any public interest in transparency was outweighed by the public interest in preventing damage to the commercial interests of the exporters named in the request and ensuring exporters can enter into transactions with UKEF in the knowledge that they will not suffer commercial harm as a result of UKEF disclosing commercially sensitive information.
8. On 22 April 2015 the complainant requested an internal review of the decision. He questioned the application of section 43(3) and stated his belief that in respect of both exemptions the public authority had not given sufficient weight to the public interest in disclosure. The complainant advanced a number of public interest arguments in favour of disclosure.
9. After a substantial period of delay, UKEF provided the complainant with their internal review on 1 October 2015. The review upheld both exemptions and yet advised the complainant that he should have been told that in four out of the five projects named in his request, UKEF did not hold the information requested (i.e. the exporter had confirmed that no agent was involved). The review confirmed that UKEF did hold the requested information in relation to one of the named projects. UKEF confirmed that the identity of which of the five projects this held information related to was exempt from disclosure for the reasons provided.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 15 October 2015 to complain about the way his request for information had been handled.
11. Due to the contradictory nature of the internal review (i.e. with UKEF maintaining a NCND and yet providing the complainant with confirmation that one of the five projects involved an agent) the Commissioner, in seeking submissions from UKEF, considered that the

relevant exemptions applicable in this case might actually be sections 41(1) and 43(2) rather than those applied by UKEF. For this reason, in seeking submissions from UKEF, the Commissioner also had sight of the information held concerning the confirmed (but not identified) agent.

12. However, it was clear from the submissions received from UKEF that despite the confirmation provided to the complainant, they still intended and maintained their NCND position (i.e. the relevant exemptions were sections 41(2) and 43(3)). In addition, the Commissioner would note that as UKEF have not specified to the complainant which of the five named projects the agent related information is held, they have not provided the information requested. For these reasons the Commissioner considers that the scope of her investigation is to determine whether UKEF were correct to neither confirm nor deny that they hold the requested information under sections 41(2) and 43(3).
13. Therefore, it is important to be clear that although the Commissioner has had sight of the held information the validity of UKEF's NCND position is dependent upon the merits of their arguments. In NCND cases, the Commissioner does not need to know whether the requested information is held or not in order to make a decision.

## **Reasons for decision**

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### *Neither confirm nor deny*

14. Section 1 of the FOIA sets out a two-part right to know. In accordance with the first part (section 1(1)(a)), a public authority must confirm or deny whether it holds information that is described in a request made to it. In accordance with the second part (section 1(1)(b)), a public authority must provide that information. Exemptions can apply to both parts.

### *Section 41(2) – Would confirmation or denial give rise to an actionable breach of confidence?*

15. Section 41(2) provides that –

'The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence'.

16. In other words, if providing confirmation or denial would, of itself, constitute an actionable breach of confidence, UKEF is not obliged to do it.

17. Section 41(2) should be read in conjunction with section 41(1) which applies where disclosure of requested information would constitute an actionable breach of confidence. It explains more about the circumstances in which a disclosure can be actionable.
18. 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'.
19. Section 41(2) is an absolute exemption so the Commissioner does not have to consider the balance of the public interest to determine whether the information can be disclosed. However, the common law duty of confidence contains an inherent public interest test. The Commissioner has therefore also considered this in order to decide if UKEF can rely on section 41(2).
20. To reach a decision on whether section 41(2) applies, the Commissioner will first determine whether the requested information, if held, would have been obtained by UKEF from a third party as described in section 41(2)(a). As noted, in their internal review, UKEF confirmed that they held information in respect of one of the five named projects in the complainant's request, but did not specify which project.

Was the information obtained from a third party?

21. It is clear from the wording of the complainant's request, seeking as it does information provided in applications to UKEF, that if information were held falling within scope of the request then it would have been provided to UKEF by one of the exporters. That is to say, any such information would have been provided to UKEF by a third party.

Would confirmation or denial that information is held constitute a breach of confidence?

22. The test of confidence was established in the High Court case of *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 ("Coco vs Clarke"). For the Commissioner to find that provision of confirmation or denial that the requested information is held would, of itself, constitute a breach of confidence, it must be shown that:
  - the requested information would have the necessary quality of confidence,

- if it had been imparted, the requested information would have been imparted in circumstances importing an obligation of confidence, and
- unauthorised use of the information, if held, would be of detriment to the confider.

*Information has the necessary quality of confidence*

23. Information will have the quality of confidence if it is more than trivial and not otherwise accessible. The information does not have to be particularly sensitive, but it must be more than trivial.
24. In submissions to the Commissioner, UKEF advised that in order for them to properly consider the financial risks associated with each export transaction they are asked to support, exporters must provide information about themselves, the overseas buyer and the export transaction and also make legally binding declarations and undertakings, including relating to anti-bribery. UKEF stated that *'commercially sensitive material will often be included with an application as it relates to an actual or prospective i.e. still under negotiation, export contract in which the applicant will often be competing against another party'*.
25. UKEF contended that the information provided by exporters in application forms, which would not otherwise be accessible and is not trivial, has the necessary quality of confidence. The Commissioner accepts that information within scope of the request, if held, would have the necessary quality of confidence. Such information would clearly not be trivial and would not be otherwise in the public domain.

*Information would have been imparted in circumstances importing an obligation of confidence*

26. UKEF noted that their application form states that:

*'(unless the parties agree otherwise) this Declaration and Undertaking, its attachments and all discussions and correspondence relating to it are confidential and should not be disclosed to any third party'*

27. Although this non-disclosure clause is subject to a number of specified exceptions (including FOIA) the Commissioner accepts UKEF's contention that this statement imports an explicit obligation of confidentiality on their part. UKEF also advised the Commissioner that, *'this exact wording and position on confidentiality was reached in 2006 following a public consultation with UKEF, thereby creating a legitimate expectation that UKEF would treat information provided in its application forms as confidential'*.

28. The Commissioner is satisfied that the requested information, where it is held, would be provided by the exporters listed in the request in circumstances importing an obligation of confidentiality. This includes an obligation of confidentiality as to whether any of the transactions involved the use of agents.

*Unauthorised use of the information would be of detriment to the confider*

29. UKEF's approach is to refuse to confirm or deny whether it holds agent related information in respect of the specific projects named in the complainant's request. In order to be effective, a consistent approach with regard to confirmation or denial has to be maintained.
30. The Commissioner is mindful of the First-Tier Tribunal's decision in *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090]* in which the Tribunal held that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for information to be protected by the law of confidence because the loss of privacy in its own right is sufficient.
31. In submissions to the Commissioner UKEF explained that confirmation or denial as to whether a named exporter had used an agent in relation to any specific transaction would be likely to prejudice the commercial position of the exporter concerned as competitors would obtain information about the strategic approach of the exporter to new markets.
32. Such competitors may decide that they can break into a new market without an agent, but (without confirmation or denial as to whether an agent was involved) they would not know whether and to what extent the exporter's success in anticipating the flow of work and the needs of a customer was due to the use of an agent or for other reasons. The fact that the use of agents is common practice and one which many competitors may be aware of would be irrelevant. It would still be to the commercial disadvantage/detriment of the identified exporter if their competitors became aware that they use (or have used) agents in a particular market.
33. The Commissioner accepts that confirmation or denial as to whether UKEF holds agent related information in respect of any of the five *identified* projects in the request would be of detriment to the respective exporters for the reasons explained by UKEF. Whilst that detriment would not be as serious or significant as actual disclosure of requested agent related information if held, confirmation or denial as to whether any of the five identified projects involved agents would still provide

competitors with commercially useful and confidential information, which would be of detriment to the identified confider (exporter).

34. Although the Commissioner is satisfied that the three steps identified in *Coco vs Clarke* have been satisfied, she must now consider the inherent public interest test within the common law duty of confidence.

*Inherent public interest test*

35. It is important to emphasise that what the Commissioner is assessing here is the public interest in knowing whether agents were involved in any of the specific projects named in the complainant's request and whether UKEF would have a public interest defence to an action for breach of confidence were they to confirm or deny that they hold the information requested
36. As noted, although UKEF informed the complainant in internal review that they held agent related information in relation to one of the five projects, they did not identify which project and at all times have maintained their NCND position in respect of the information requested. Consequently, any public interest in the *content* of the held information which has incidentally been seen by the Commissioner has not had any bearing or influence on the public interest considerations of the NCND response.
37. Both in his request for an internal review and in submissions to the Commissioner, the complainant put forward a number of arguments in favour of a public interest defence by UKEF to disclosure of the particular information requested.
38. The complainant noted that UKEF's financing of projects involves the use of public money to enable projects that would not otherwise be possible and *'the public has a right to know how public money is being used'*. Where public money is being used in support of a controversial activity such as the payment of commissions (which he argued can be a cover for bribery) then the complainant contended that this strengthens the public interest defence.
39. The complainant contended that commissions which are disproportionate to the value of the relevant contract can indicate corruption or bribery<sup>1</sup>. He suggested that were UKEF to release information relating to the size

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<sup>1</sup> As support for this contention the complainant provided the Commissioner with links to the websites of The Corner House and Transparency International, two anti-corruption NGOs



of commissions for the five most high-value contracts listed in their 2013/14 financial report, then the public would be able to form their own judgements as to whether or not it was appropriate for sizable commissions to be paid.

40. With regard to the public interest in there being transparency and accountability as to what kind of business practices are being endorsed or financed with public money, the complainant contended that without disclosure of the requested information, the public are unable to form a view as to whether UKEF are using public finances appropriately.
41. The complainant advised the Commissioner that in 2003 the then government did confirm whether or not payments were made in connection with a contract which it underwrote (contract by BAE Systems<sup>2</sup> to sell Hawk jets to South Africa) and this was reported in the press at the time. He contended that this '*precedent*' ought to be followed by UKEF in the current case (i.e. they should confirm which of the five named contracts the agency payment was made in connection with).
42. The complainant noted that UKEF has previously underwritten contracts connected to bribery allegations and gave the example of the arms deals between BAE Systems and Saudi Arabia (known as the Al Yamamah agreements).
43. Finally, the complainant noted that one of the five projects cited in his request (the Subsea contract) was a Petrobras<sup>3</sup> contract. The complainant referred to the corporation being '*currently at the centre of the biggest corruption scandal in Brazilian history*<sup>4</sup> and contended that, '*if the UKEF project involving an agent's payment was the Petrobras contract, then I believe the (already substantive) public interest in disclosure is even further enhanced: the public has a right to know if the British government has potentially financed grand corruption*'.
44. In submissions to the Commissioner, UKEF confirmed that they had considered whether there could be a public interest defence to an action

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<sup>2</sup> British multinational defence, security and aerospace company

<sup>3</sup> The semi-public Brazilian multinational corporation in the petroleum industry headquartered in Rio de Janeiro

<sup>4</sup> On 31 August 2016 the Senate of Brazil voted in favour of impeachment against President Dilma Rousseff for her alleged involvement in the Petrobras scandal

for breach of confidence in this instance but had concluded that there was not.

45. UKEF agreed that there is a public interest in knowing which export transactions benefit from UKEF support, but stated that there is also a public interest in UK exporters being able to access support on the same basis that their overseas competitors are able to obtain from their ECAs (Export Credit Agencies), including confidentiality. UKEF explained that they seek to strike a balance in regards to transparency by publishing a list of export transactions they support in their Annual Reports, *'which normally includes details such as the identity of the exporter, supplier, destination market, description of the goods involved and the maximum financial liability that has been assumed'*. UKEF advised that they considered that the public interest in understanding how public money is being used to help facilitate export transactions was met in this way and they do not routinely disclose other information which if made public could be detrimental to the exporter (or to other parties).
46. Addressing the complainant's contention that agents could possibly be a conduit for paying bribes, UKEF stated that:
- *'the use of agents is a normal business practice; indeed, for many exporters, particularly SMEs (small to-medium-sized enterprises) without the resources to maintain overseas offices, they have to be represented by agents in order to help win export orders. Information around the services performed by an agent and how much commission it is paid will have commercial value to both agent and exporter;*
  - *UK exporters are obliged to follow all relevant laws including the UK's Bribery Act. It is the responsibility of the law enforcement authorities to address the payment of bribes, including through commissions paid to agents, not the general public who, in any event, would not be capable of making a judgement about the appropriateness of the commissions without full knowledge of all the relevant facts;*
  - *UKEF is subject to the OECD Recommendation on Bribery and Officially Supported Export Credits which informs the anti-bribery due diligence Export Credit Agencies should address in order to deter bribery in international business transactions. The Government set out UKEF's role in deterring bribery in its response to a Public Consultation on the matter in 2006;*
  - *The Export Guarantees Advisory Council, a statutory non-Departmental Body independent of UKEF, is tasked by Ministers to oversee the application by UKEF of its ethical policies, including anti-*

*bribery. The Council routinely addresses anti-bribery, including support for transactions, to be satisfied that UKEF properly implements its obligations including in transactions involving the use of agents; and*

- *If commercially sensitive material about agents were to be routinely published, it would deter exporters from seeking support from UKEF, putting them at a commercial disadvantage to exporters in other countries and adversely affecting their commercial interests'.*
47. In view of the above, UKEF advised the Commissioner that they did not consider that the public interest required the disclosure of confidential and commercially sensitive information concerning agents in order for there to be a public audit of such information alongside UKEF's anti-bribery due diligence obligations.
48. In response to the Hawk jets to South Africa example cited by the complainant, UKEF stated that that case could never have set a precedent, as they consider all information requests individually, on their merits. The Commissioner understands that the disclosure that an agent was involved in that transaction was made via a Parliamentary Question and is therefore subject to Parliamentary Privilege. UKEF advised that their records do not show conclusively how the decision to make this disclosure was made but they believed that the fact that an agent had been used may have already been in the public domain due to the transaction's high profile in South Africa and therefore the issue of breach of confidence may no longer have been relevant.
49. The Commissioner both acknowledges and recognises the very serious corruption allegations surrounding Petrobras. As the Guardian newspaper reported on 20 March 2015, *'hundreds of contracts for energy projects, from refineries to oil rigs, have been implicated in the scandal which has seen executives at Brazil's state-owned oil company Petrobras and many of its contractors charged in connection with alleged bribery and money-laundering'*. The newspaper noted that the UK had provided significant financial support to numerous Petrobras deals, *'but most significant is a \$52m (£35m) loan underwritten by the UK taxpayer in 2005 which helped finance construction of one of the world's largest oil platforms'*.
50. The Commissioner considers that the complainant has advanced legitimate and important public interest arguments for transparency and accountability with regards to which projects UKEF chooses to provide financial support, especially those involving the use of agents. However, the Commissioner is of the view that the confirmation or denial as to which of the five projects specified in the request involved the use of an agent would not in itself address the public interest arguments advanced

by the complainant. That is to say, simply knowing which of the five projects named in the request involved the use of an agent (and nothing more) would not provide any information or evidence as to whether payments to that agent were indicative of bribery or corruption.

51. Even if the project which involved the use of an agent was the Petrobras contract, confirmation of such information alone would not necessarily suggest (and would certainly not show) that there was anything corrupt or improper about the use of any such agent. As UKEF have noted in submissions, the use of agents in such transactions is a normal business practice, and whilst the Commissioner recognises and accepts that such practices can be open to abuse and exploitation, she does not consider that it must follow that all contracts involving Petrobras are tainted by bribery or corruption, although in view of the scandal engulfing the Brazil state-owned oil company concerns about such contracts would not be unreasonable.
52. The Commissioner has previously recognised the importance of protecting confidentiality in similar situations to this case. In FS50525689 (a case which concerned the Export Control Organisation (ECO) – part of the then Department for Business Innovation and Skills) the Commissioner found that, *'there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are applying for licences properly cooperate and engage with government departments. The Commissioner accepts that if information provided as part of the application process is disclosed, in this case the identities of two companies, this would undermine DBIS' confidentiality obligations and undermine this process'*. In the above case the Commissioner was satisfied that there was a strong public interest in maintaining the obligation of confidence and that this public interest outweighed the public interest in disclosure in that case.
53. The Commissioner considers that there is a similar strong public interest in maintaining the obligation of confidence between UKEF and the exporters who apply to UKEF for finance and insurance. In the ECO case referenced above, the Commissioner did not accept that there was any significant public interest in disclosure which had not already been met by the disclosures already made and information already in the public domain on export licences and applications.
54. Similarly, in the present case the Commissioner acknowledges and accepts that UKEF provide a significant amount of information about their activities in their Annual Reports, including details as to the identity of the exporter, supplier, destination market, description of the goods involved and the maximum financial liability that has been assumed. The Commissioner also notes that UK exporters are obliged to follow all relevant laws, including the Bribery Act, and the Export Guarantees

Advisory Council, which is independent of UKEF, routinely addresses anti-bribery, including support for transactions, so as to be satisfied that UKEF properly implements its obligations in transactions involving the use of agents.

55. The Commissioner does not agree with the suggestion from UKEF that the general public would be incapable of making a judgement about the appropriateness of commissions paid to agents without full knowledge of all the relevant facts. Any such judgement made may not be a fully informed one but the public interest in preventing and tackling the payment of bribes is not restricted to the relevant law enforcement authorities. It could of course be counter-argued that if the public were provided with full details of the facts concerning any contract involving commissions paid to agents, then such transparency might dispel any unfounded or undue concerns or criticisms about such payments.
56. The Commissioner is satisfied that the information provided to UKEF by each of the five exporters (including whether or not agents were involved in the respective projects) was given in circumstances importing an explicit obligation of confidence. UKEF have explained that confirmation or denial as to whether a named exporter had used an agent in relation to any specific transaction would be likely to prejudice the commercial position of the exporter concerned and the Commissioner considers that there is a strong public interest in ensuring that the UK's finance and insurance system for exporters is not undermined and that exporters are not placed at a competitive disadvantage to their international competitors.
57. The Commissioner considers that the limited public interest in transparency and accountability that would be served by UKEF simply confirming whether or not an agent(s) was involved in each of the specific named projects, is outweighed by the strong public interest in maintaining the confidentiality of UKEF's application process and she does not consider that UKEF would have a public interest defence for breaching their duty of confidence to the exporters concerned. UKEF is therefore not obliged to comply with section 1(1)(a) by virtue of section 41(2). Having reached this finding, the Commissioner has not gone on to consider the application of section 43(3).

## Other matters

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58. The Commissioner expects most internal reviews to be provided within 20 working days, with a maximum period of 40 working days being permissible in exceptional cases. A delay of over five months in providing an internal review is clearly manifestly excessive and not

acceptable. In submissions to the Commissioner, UKEF expressed deep regret for the delay, which was due to a combination of factors. The Commissioner notes that UKEF have confirmed that they have adopted a new process for conducting internal reviews to ensure that these are completed and provided within the appropriate timeframes.

## Right of appeal

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59. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

60. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
61. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Gerrard Tracey**  
**Principal Adviser**  
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