Appeal Number: EA/2006/0073

Environmental Information Regulations 2004 (EIR)

Heard at Employment Appeal Tribunal, Audit House, 58 Victoria Embankment, London EC4Y 0DS

Date: 26th and 27th June 2007 **Date Promulgated: 20th August 2007**

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Marks

And

LAY MEMBERS

Jacqueline Clarke

Pieter De Waal

Between

FRIENDS OF THE EARTH

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

EXPORT CREDITS GUARANTEE DEPARTMENT

Additional Party

Representation:

For the Appellant: **Mr Phil Michaels, Solicitor**
For the Commissioner: **Jason Coppel of Counsel**
For the Additional Party: **Monica Carrs – Frisk QC**
Gemma White of Counsel

Decision

The Tribunal allows the Appellant's appeal and substitutes the terms of the Decision Notice of 6 September 2006 with a determination that the Additional Party do disclose all the information which the Appellant requested in its request of 11 March 2005.

Reasons for Decision

Introduction

1. This Appeal involves two main issues which arise in connection with the operation of the Environmental Information Regulations 2004 (EIR). The first issue concerns the relationship between the underlying European Directive which the EIR purports to implement and Directive 2003/4/EC (the Directive) and the EIR. In particular, this issue concerns whether the EIR properly implements the Directive with particular regard to the question of so-called "internal communications" between Government Departments. The second principal issue deals with the applicability of the exception in Regulation 12(4)(e) of the EIR and in particular whether in all the circumstances, the public interest in maintaining the exception outweighs the public interest in disclosing the information".
2. Regulation 12(4)(e) is a qualified exception and provides that a public authority may refuse to disclose environmental information to the extent that:

   "(e) the request 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."

The Relevant Legislation: The Directive and the EIR

3. The Directive is entitled a directive "On public access to environmental information" and repealed an earlier Council Directive 90/313/EEC, in the process expanding the terms of existing access to environmental information. The relevant Recitals for present purposes are (1) and (16) which provide respectively as follows:

   "(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

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   (16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interests served by disclosure should be weighed against the interests served by the refusal. The reasons for a refusal should be provided to the applicants within the time limit laid down in this directive."

4. Article 1 sets out what it describes as the "Objectives" of the Directive which seek to guarantee the right of access to environmental information and also ensure that environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination. The phrase "environmental information" is defined by Article 2 and for reasons which shall become apparent below need not be further referred to for the purposes of this Appeal.

5. Article 2(2) defines "public authority" as meaning by subparagraph (a):

   "… government or other public administration, including public advisory bodies, at national, regional or local level; …".

   Article 4 deals with the exceptions to the right to obtain environmental information and provides in relevant part by Article (1)(e) that Member States may provide for a request for environmental information to be refused if: "(e) the request concerns internal communications, taking into account the public interest served by disclosure".

   Article 4(2) ends with the following passage, namely:

   "The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. "

6. As related by the Explanatory Notes, the EIR purport to implement the Directive. Regulation 2 contains a number of definitions echoing or reflecting those set out in the Directive, e.g. the definitions regarding environmental information and public authority, the latter expression being defined in terms as meaning "government departments" (see Regulation 2(2)(a)). Regulation 5 provides that a public authority that holds environmental information "shall make it available on request". Part 3 of the EIR sets out the exceptions to the duty to disclose. The first regulation under Part 3 is Regulation 12 which provides as follows:

   "(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 the disclosing the information."

7. Regulation 12(2) provides that:

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

   Regulations 12(4) and 12(8) have been set out above at paragraph 2.

8. Even from a brief overview of the above provisions drawn from the Directive and the EIR, in the Tribunal's view it is quite clear and perhaps largely self-evident that a number of general propositions can be made, namely:

   (1) the EIR are designed to implement the Directive regarding public access to environmental information;

   (2) Article 4(1)(e) of the Directive as reflected in the words of Regulation 12(4)(e) stipulates that a public authority may refuse to disclose environmental information if the information involves the disclosure of "internal communications", but subject to two matters, namely first that the exception is to be interpreted in a restrictive way taking into account in a particular case the public interest served by disclosure (see Article 4(2) of the Directive cited above) and secondly, the need to apply the balancing test expressed in Regulation 12(1)(b) of the EIR, namely the need to consider whether the public interest in maintaining the exception "outweighs" the public interest in disclosure;

   (3) as expressed by Regulation 12(8) "internal communications" <u>includes</u> communications between government departments (emphasis added); and

   (4) finally, as is made clear by (2) above, a public authority may refuse to disclose environmental information in the case of internal communications if in all the circumstances of the case, the public interest in maintaining that exception outweighs the public interest in

disclosure, mindful of the presumption in favour of disclosure articulated in Regulation 12(2) of the EIR.

The Relevant Facts: The Request

9. By email dated 11 March 2005, the Appellant, namely Friends of the Earth (FoE) requested the Additional Party, namely the Export Credits Guarantee Department (ECGD) to provide FoE with the information to be set out below in respect of what it called "the application of a credit in respect of the Sakhalin project made to the ECGD", namely:

"(1) The correspondence or notification from the ECGD to the Relevant Government Departments (defined below) notifying them that an [sic] the 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 response to that notification/request to the Sakhalin project.

The relevant Government [sic] Departments are:

No.10 Downing Street

DTI

UKTI

FSO

DfID".

10. ECGD is a separate government department, i.e. a Department of State whose existence and powers are governed by the Export and Investment Guarantees Act 1991. To paraphrase evidence given on behalf of the ECGD, it was first set up in the aftermath of the First World War to restore the United Kingdom's trade relations with overseas nations. It is an independent Department answerable to Parliament through the Secretary of State. Essentially, its function is to make arrangements to facilitate the export of goods from the United Kingdom and to insure overseas investment made by United Kingdom companies and other entities. It does this by providing or underwriting a mixture of financial guarantees to banks and export insurance policies to exporters. It functions much as a private sector insurer or bank, save that in practice it never effects any direct lending.

11. The Government Departments which are set out in the final part of the request are self-evident: in the case of the abbreviation UKTI (namely, United Kingdom Trade & Investment), the same refers to a branch of the DTI. The last abbreviation, namely DfID refers to the Department of International Development. It is to be noted that no reference is made to the Department for Environment, Food and Rural Affairs, (DEFRA); this is because as will be explained below, DEFRA in fact provided related

information in a response to a separate request which does not feature in this Appeal.

12. The ECGD replied by letter dated 4 July 2005. In effect, it provided item 1 as requested. It stated that the information otherwise requested was subject to both the Freedom of Information Act 2000 (FOIA) as well as the EIR, adding that with regard to the information sought, it fell within the scope of Regulation 12(4)(e) as highlighted above. All parties were in agreement that the requested information constituted "environmental information" for the purposes of both the Directive and the EIR. It attached what it called a copy of a notification to other Government Departments of the Sakhalin project as a "potentially sensitive project". It confirmed that the public interest in disclosure of the notification outweighed the public interest in withholding the information. It confirmed that DEFRA was notified, although as noted above, DEFRA had not been referred to in the request. No.10 Downing Street was not informed of the project as the ECGD did not consider No.10 as being a department or entity to be consulted in relation to the project. The letter stated that the departmental responses to the notification constituted internal correspondence generated for the purposes of discussion and providing advice and was therefore considered to be exempt from disclosure under Regulation 12(4)(e) of EIR. The ECGD also contended there was and 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".

13. The notification attached to the ECGD letter was headed "Notification of a Potentially Sensitive Case". The entities which were the subject of the notification included all the entities referred to in FoE's request, as well as DEFRA. The notification stated that the Sakhalin II project was just such a "potentially sensitive case". As a result, those parties circulated with the notification were asked to indicate whether the department in question would like to contribute to ECGD's assessment of the project. The notification went on to define a "potentially sensitive case" as "one that may conflict with wider Government policies in the areas for which other departments have responsibility". The notification added that such cases were "large greenfield projects with significant and diverse environmental and social impacts". All the listed departments were therefore asked to indicate first whether they would like to be involved in the assessment of the project and also whether there were "any particular policy concerns" that they had at this point. Replies were requested by 14 March 2003, it being assumed that if there were no replies forthcoming by that time, the relevant department would not wish to have any further involvement.

14. The notification contained a brief description of the Sakhalin II project. The project, as the title suggests, is the second phase of Sakhalin II, being a major oil and gas project being developed by an entity known as SEIC, namely the Sakhalin Energy Investment Company Limited. SEIC is jointly

owned by Shell Petroleum as to 55%, Mitsui as to 25% and Mitsubishi as to 20%. The project involves the development of offshore oil and natural gas fields off the North Eastern coast of Sakhalin which is a Russian island North of Japan. A major UK engineering company called AMEC had by the date of the notification been awarded a £139.6m contract for what was called "detailed engineering, management and construction support of offshore structures". The notification stated that other contracts were expected to be awarded to UK companies, thereby increasing the value of UK involvement overall. The notification went on to say that ECGD has been working with SEIC as well as other potential lenders including the European Bank for Reconstruction and Development (EBRD) on the assessment of the overall project for some 18 months. EBRD was itself a lender as to the first phase of the project and had an in-depth knowledge of the area. ECGD then went on to say that some of the most significant environmental and social issues associated with Sakhalin II were matters relating to Western Grey Whales whose numbers could be as low as 100 and who inhabited the seas around Sakhalin as part of their migration route; secondly the risk of oil spills given the presence of offshore drilling and several hundred kilometres of pipeline and the use of tanker shipping; thirdly, the social impacts consisting of issues associated with the acquisition of land, the resettlement of indigenous people, public consultation and the influx of non-resident workers; fourthly, issues relating to contractual management, namely the proper implementation of arrangements on the ground with regard to the project as a whole and finally, issues relating to project monitoring, namely the putting in place of what was called a thorough and coordinated environmental and social monitoring regime, both during construction and operation. It should be perhaps added that the social impact referred to above was already referred to in a further attachment to this notification called an Executive Summary of the Environmental and Social Impact Assessment (ESIA). The notification ended with the comment:

"ECGD is reasonably confident that SEIC is committed to resolving all of these issues to lenders' satisfaction prior to financial close".

15. FoE's reply is dated 5 July 2005. As is perhaps clear from the brief chronology set out above, FoE complained about the time within which ECGD had responded. This aspect of the matter does not feature in the Appeal and nothing further will be said about it. FoE went on to dispute that interdepartmental communications were protected by any exception provided by or effected in the Directive and particularly as reflected in Regulation 12(8) of the EIR. It went on to contend that the release of the information sought would not affect the candour of interdepartmental discussions and advice. In the alternative, FoE contended that not all of the information could be withheld. FoE ended its reply by requesting an internal review.

16. ECGD's reply is dated 7 November 2005. It stated that the result of the internal review was in favour of continuing to withhold the responses requested of the other government departments. Reliance was placed not only on the need to ensure that full and frank provision of discussions and advice within Government was not inhibited, but also that the principle of Government collective responsibility not be undermined.

17. Reference should here be made to ECGD's letter of 4 March 2004 which was provided to FoE on 13 June 2007 following more recent exchanges that took place well after the Commissioner's decision was issued in respect of the 1 March 2005 request. In it, ECGD had informed SEIC it was able to support the contracts detailed in the letter namely what are called the Preliminary Contracts subject to six detailed conditions including in particular what it called:

    "… the acceptability by ECGD of the measures proposed and/or taken to identify and mitigate any adverse environmental and social impacts arising from the Project …".

18. In the letter of 13 June 2007 from ECGD to FoE, ECGD confirmed to FoE that as of that date no decision had been made to approve the Project and the ECGD reiterated the conditions recited above as well as the need to establish arrangements for the financing of the project in a form satisfactory to the ECGD.

19. The same exchange referred to an ECGD requirement that for projects with "high potential impacts", ECGD in turn required those concerned with the project to provide ECGD with information normally contained in a formal Assessment in the form of an ESIA as referred to in paragraph 14 above in connection with the notification. The ESIA was described as a "detailed assessment of all the potential environmental and/or social impacts of the project". ECGD claimed that such assessments had been carried out, and indeed, the same seems confirmed by the terms of the notification itself.

<u>The Decision Notice</u>

20. The Commissioner's Decision Notice is dated 6 September 2006. The first issue dealt with by the Notice is the argument raised by FoE that the EIR did not apply to the information requested on the basis that interdepartmental communications are not protected by an exception contained in the Directive. The Commissioner rejected that argument. He referred to the definition in Article 2(2) of the Directive which has already been set out above at paragraph 5, namely the definition of "public authority" as:

    "(a) Government or other public administration, including public advisory bodies, at national, regional or local level;…"

    The Commissioner found that in the light of that definition, the Directive recognised the need to ensure that the formulation and development of Government policy and decision making "can proceed in the self contained

space to ensure that it is done well." This concept, the Tribunal was informed, is often referred to not only as a "safe space" but also as a "private space" policy. The Commissioner pointed to a relatively obvious anomaly that might otherwise arise, namely that it would be hard to allow the Government of a country with a simple governmental structure to claim the use of the exception on the ground that it operated a smaller number of internal government departments than those administered in a larger and more complex government framework.

21. The Commissioner therefore determined that "internal communications" applied both to communications between government departments, as well as to communications within a single department. This in turn meant that the exception was suitably engaged.

22. The second issue concerned a consideration of whether, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosure. The Commissioner recognised that release of the disputed information would result in a greater degree of governmental accountability and decision-making. However, the Commissioner pointed to the following factors as militating against disclosure in the present case, namely:

    (i) the fact that consideration as to whether support should be afforded to the Sakhalin II project was still ongoing, i.e. the fact that a final decision to support the project had not yet been taken;

    (ii) the principle of Government collective responsibility already referred to above at paragraph 16; and

    (iii) the fact that, in the Commissioner's view, the public interest in accessing information about the various impacts of the project is met by the volume of information already in the public domain.

    In the circumstances, and in stressing both that he was satisfied that a "blanket" public interest test had not been applied by the ECGD and that no public interest would be served by considering any form of partial disclosure, the Commissioner upheld the ECGD's decision.

<u>The Evidence</u>

23. FoE called and relied upon the evidence of four witnesses, but only two gave evidence before the Tribunal. The two who did so were James Leaton and Nicholas Hildyard. Mr Leaton is a Senior Policy Advisor at the World Wildlife Fund in the United Kingdom (WWF). He has been closely involved with the Sakhalin project for the past three years. The WWF has spent a considerable amount of time and money in monitoring and seeking to protect the Western Grey Whale which as indicated above is a species particularly threatened by the project.

24. Inevitably, the Tribunal was impressed by the detailed nature of Mr Leaton's evidence. It is clear that abundant analysis has been conducted on the risks posed to the Grey Whales in the area. To paraphrase Mr Leaton's witness statement, the project has the potential to confront a

critically endangered whale species with extinction. This, he stated, emphasised the presence of a "very strong public interest in knowing exactly how, and why, public funding may be used to support a project of this scale …". It is fair to state that the focus of Mr Leaton's concerns was on the content of exchanges between DEFRA and ECGD. As indicated above, DEFRA did not feature in the list of government and government related entities which formed the basis of the request in this Appeal. However, the Tribunal notes that Mr Leaton recognises that DEFRA had, in or by, mid-2004 continued to be in regular contact with ECGD and DfID and had "repeatedly expressed concern over the project's potential impacts on the whales", in the words of a Ministerial Submission, submitted to the Minister of DEFRA on 5 May 2004. Mr Leaton summarised the position with regard to DEFRA as follows at paragraph 34 of his witness statement, namely:

"Three things are clear from the various DEFRA documents.

34.1 First, it is clear (in particular from the Ministerial letters) that DEFRA has a particularly important role as Government consortee in relation to this issue.

34.2 Second, DEFRA has promised (on behalf of the UK Government) that no support will be provided for the Project unless the best scientific advice is being followed.

34.3 DEFRA are of the view that they have suitably expressed their concerns to ECGD about the impact of the projects on the [whales]."

25. The Tribunal notes that in the Ministerial Submission of 9 February 2004 which is exhibited to Mr Leaton's witness statement, it is expressly noted that SEIC had by that date produced an Environmental Impact Assessment on the project, as well as a similar Assessment on the Grey Whale, both available on the appropriate SEIC website. The latter in particular indicated that the "most potentially significant impacts to the whales will be reduced from ""major" to "moderate" …". The same Submission also noted that as of that date, SEIC was finalising an Environmental and Social Action Plan, as well as Western Grey Whale Protection Programme adding that:

"ECGD are analysing all of these documents and DEFRA officials … are feeding into this process. ECGD's overall assessment of the project will be made publicly available".

26. As at February 2004, a final decision was then currently scheduled for July, but as confirmed in evidence, ECGD has still not come to any final decision. In the Tribunal's view there can be no doubt that the United Kingdom Government at least as represented by DEFRA has at all times expressed its view that it would only support the project if it were satisfied the best scientific advice was being followed and in particular that the risk to the whales from the project had been minimised (see DEFRA circular of

1 February 2005 exhibited by Mr Leaton to his witness statement at page 245).

27. In answer to questions put to him in cross-examination, Mr Leaton accepted that there was a continuing dialogue between organisations such as FoE and ECGD which enabled organisations such as WWF to contribute to the debate prior to ECGD coming to a final decision. He stated that he was not aware that in the past ECGD had published a decision note that set out broadly the reasons behind its decision, but as will be indicated below in relating to evidence provided to the Tribunal on behalf of the ECGD, there appears to be a precedent for this having occurred and the indications are that this will occur, or is likely to occur in the present case should a decision ever be made concerning the project.

28. The Tribunal also heard from Nicholas Hildyard , a director or The Corner House which is an organisation carrying out analysis, research and advocacy with the aim of stimulating, as it is stated, an informed discussion on critical environmental and social problems, both in the United Kingdom and overseas. His evidence was designed to explain why there exists a strong public interest in disclosing the disputed information. In his written statement he drew attention to the adoption by a worldwide group of export credit agencies similar to and including ECGD in 2003 of a "Recommendation on Common Approaches on Environment and Officially Supported Export Credits" generally known as the "Common Approaches". This in turn reflected aims previously enshrined in a Jakarta Declaration for Reform of Official Export Credit in Investment Insurance Agencies (the Jakarta Declaration). Both instruments reflect the adoption of a greater awareness on the part of export credit agencies such as ECGD with regard to environmental, human rights and development related safeguards and standards. In the Tribunal's view, there can be no doubt that entities such as ECGD must now take into account in granting any and all credit related assistance to a domestic exporter, considerations which are articulated and reflected in these instruments. Although Mr Hildyard praised the ECGD for having endorsed the Common Approaches, he nonetheless maintained that ECGD's, and indeed, the United Kingdom's approach generally to the Sakhalin project was "contrary to both the … Common Approaches and relevant World Bank standards".

29. Without intending any discourtesy to the careful manner in which Mr Hildyard's witness statement was prepared and indeed to the quality of his evidence generally, it is fair to say that Mr Hildyard made the following principal points, namely:

    (1) the sheer size and scale of the Sakhalin project represented what he called a key test of ECGD's commitment to place sustained development "at the heart" of its operations;

    (2) the environmental and social concerns inherent to the Sakhalin project went far beyond the particular concerns over grey whales

and indeed, beyond even the social and economic impacts already referred to, since they also included the following elements:

(a) the pollution risks generally and in particular the dumping of waste at sea;

(b) damage to wetlands and bird life in the affected areas;

(c) physical displacement of local people without proper planning or compensation;

(d) human rights implications; and

(e) greenhouse gas considerations,

such as to attract worldwide concerns as to these issues;

(3) the economic scale of the required overall funding approached some US$700 million (if not more) also reflected a marked degree of public concern;

(4) since Sakhalin II was categorised as having a High Potential Impact, ECGD would invariably require “as a minimum” an Environmental Impact Assessment expected to comply with international standards with similar safeguards being required in respect of socially related impacts, coupled with the need on behalf of ECGD to consult with other government departments such as those listed in FoE’s request;

(5) The Corner House had conducted a Compliance Review in July 2001 which had concluded that support of the project by ECGD would, in Mr Hildyard’s words “directly conflict with the ECGD’s stated policies across a range of issues from which it followed in his view that there existed a very strong public interest in knowing what advice and information were given to ECGD by the relevant departments in respect of each of these areas; and

(6) if the advice sought and obtained from the respective government departments listed in the request were “flawed, partial, incomplete or simply not provided in a timely manner”, then again in his words “it may well have a significant negative effect on the ability of ECGD properly to carry out its functions”; in particular, it would make it “extremely difficult” for members of the public, including the informed observer such as The Corner House to assess the “robustness” of the ECGD decision-making process, or even to assist ECGD in improving its assessment processes.”

30. The Corner House Compliance Review on Sakhalin II is dated 28 April 2006. The Tribunal has carefully taken its content into account. Of necessity, it constitutes an assessment of the risks which ECGD had regard to as at that date. The Review understandably took issue with such matters as SEIC’s track record, both in maintaining and in undertaking construction projects despite independent advice to the

contrary and with regard to the legal reverses it had by then experienced over environmental damage in the Russian courts.

31. Quite apart from the point as to timing made in the preceding paragraph, the Tribunal feels that what might in the future be regarded as possibly constituting the Compliance Review, even on its face, amounts to no more than an indication that continued support for Sakhalin II by ECGD represented what the Review called a "potential conflict" over what was regarded as ECGD's legal duty to manage its portfolio responsibly. To that extent it constituted no more than an exhortation of the basic contention advanced by Mr Hildyard, namely a call upon ECGD to make public how it engaged with other government departments and how it would proceed to engage with such departments with regard to continued consideration of the project.

32. It is perhaps appropriate at this stage to set out the relevant contents of ECGD's Business Principles since during the Appeal, all three parties referred to various sections and parts of the document in which these Principles are set out. The edition placed before the Tribunal was the December 2000 edition. At the outset of the document there is a Statement of ECGD's Principles: the relevant provision for the purposes of this appeal is the first highlighted bullet point on the page headed "Statement of ECGD's Business Principles", namely:

"We will promote a responsible approach to business and will ensure our activities take into account the government's international policies, including those on sustainable development, environment, human rights, good governance and trade."

In a further section headed "Sustainable Development & Human Rights", the following appears:

" • Objectives
    - ECGD will, when considering support, look not only at the payment risks but also at the end of the line quality of the project, including its environmental, social and human rights impact;
    - ECGD's approach in determining whether to support a project will be one of constructive engagement with a view to achieving necessary improvements in the project's impacts;
    - ECGD will press for reform on sustainable development and human rights issues in relation to export credits.
- Policies
    - ECGD will:

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- screen applications for cover to identify, and then analyse, any adverse or beneficial environmental, social or human rights aspects of relevant projects;

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- establish a mechanism for consulting other interested government departments on cases with significant project impacts;"

33. In a subsequent publication entitled "Export Credits Guarantee Department: Business Principles Unit: Case Impact Analysis Process" dated May 2004, ECGD set out its policy in similar terms beginning with a paragraph headed "1. ECGD's Policy" reading as follows, namely:

    "1.1 In processing applications for ECGD support, it is ECGD's policy to ensure that:

    - all cases supported by ECGD are compatible with its Statement of Business Principles; and
    - all decisions on ECGD support have taken into account Government policies on the environment, sustainable development and human rights."

    In section 3 headed "Responsibilities", the role of the Business Principles Unit is set out as not only that of producing a written report of the case impact with regard to a particular project along with any recommendations for covenants and monitoring, but also of informing of other government departments "of any potentially sensitive cases …" and the handling of their responses. The other government departments are then listed and correspond more or less to those set out in FoE's request, save for DEFRA, i.e. those departments being DfID, DTI including UKTI, FCO and MoD which are to be consulted on "potentially sensitive cases" being asked in particular to provide input on the areas of government policy for which they have responsibility, all underwriting decisions remaining otherwise with the Underwriting Authority.

34. The Tribunal notes however that the Unit's screening of a case is not only with a view to determining whether a case has a particular impact level (being as in this case a high level), but also necessarily involves answering questions which go to the critical issue of whether the project has potential for significant adverse environmental and related impact. There can be no doubt in the Tribunal's view that ECGD acting by its appropriate arm remains entirely alive to, and aware of, all environmental social and related issues which might conceivably relate to a particular project and has reminded itself in express terms of the particular need to conduct further investigations on those lines if necessary.

35. In cross-examination, Mr Hildyard stressed the following matters. First, he stated that The Corner House and similar organisations were anxious to

ensure that ECGD would not support the project if it failed to comply with its own stated policies. He amplified this point later in his oral answers by stating that it would be "useful" to see what sort of advice ECGD would be getting in relation to the project to ensure that it complied with ECGD's own compliance standards, coupled with a more general desire that decision making must in general, (and particularly in the case of the ECGD) be seen to be fairly implemented. He admitted however that even in the absence of the type of information which was sought, it would still be open for The Corner House and similar organisations to address their concerns to ECGD directly: he contended that knowledge of interdepartmental exchanges would help his organisation however, to target its comments more acutely. In answer to questions from Mr Coppel on behalf of the Commissioner, Mr Hildyard disputed the suggestion that it could not be known whether ECGD had or had not responded to any policy concerns until after it had come to a final decision to support the project or not. He pointed to another project which had involved possible ECGD support regarding a dam in South Eastern Turkey called the Ilusu Dam with regard to which the ECGD or the Government had, prior to the making of a decision, published a condition which he said necessitated a public discussion on the issues raised by the condition: in the event however, the project did not attract ultimate ECGD support.

36. Reference has already been made to the fact that FoE tended two further witnesses in the form of those witnesses' witness statements alone. Little if any reliance was placed on this additional evidence during the Appeal and the Tribunal proposes to say nothing further in relation to these two additional sets of evidence.

Mr Weiss and Ms Smith

37. Two individuals gave evidence before the Tribunal on behalf of ECGD. The first was Mr John Weiss CB, who was until September 2005 a Deputy Chief Executive and Business Group Director of ECGD. He had been employed by ECGD since 1964. He had been directly concerned with FoE's request in this case. He states in his witness statement that when FoE made its request, he was:

> "… concerned about the possible wider implications for Government of any decision by ECGD to disclose the initial views of officials in other Departments on a major issue such as ECGD support for the Project, which, because of the sums of public money potentially at risk and the other environmental and other sensitivities arising, would almost inevitably subsequently become a matter for Ministerial discussions and collective decision taking."

Mr Weiss admitted that he was not concerned with the internal review in this case. However, he maintained that frankness would be impaired by disclosure of the withheld information where the exchanges which were

sought in this case would necessarily occur prior to any formal decision being taken by ECGD with regard to the project as a whole.

38. In his oral answers, he confirmed that what he called a wealth of information was publicly available at the time of FoE's request, although he could not now be sure that the reports of the consultants employed by ECGD were included: he did however acknowledge that such reports would be published in due course. He also expressed the belief that as and when a final decision came to be made, there would be some form of explanatory note on how ECGD came to grant its support, or not as the case may be, although he admitted that the same did not represent ECGD's usual practice.

39. He was taken to the letter of 4 March 2004 (referred to in paragraph 17 above) issued by ECGD in favour of SEIC and characterised the letter as an expression of conditional commitment on the part of ECGD, i.e. it represented what he called an assurance that subject to the conditions specified in the letter being fulfilled which conditions related in large part to environmental acceptability on the part of the project, ECGD would be willing to finance it.

40. Mr Weiss was posed a number of questions regarding ECGD's Business Principles which have already been referred to. In particular he was asked questions with regard to ECGD's stated intention as regards sustainable development and human rights, i.e. the first business principle which has been set out above at paragraph 32. Mr Weiss confirmed that this aim embraced within the set of principles reflected in turn an intention to engage not only with other government departments, but also with external parties who were concerned with a particular project.

41. He also confirmed his belief that Sakhalin II represented one of the most high profile cases which had been considered by ECGD, the other case of a comparable size being in respect of a pipeline known as the Baku-Tbilisi-Ceyhan pipeline. He explained that in such cases, where any department was consulted by the ECGD to express a particular concern or a set of concerns regarding the project or aspects of a project, there would ensue an interdepartmental debate with a view to what he called a process of "constructive engagement" the aim being to achieve some kind of satisfactory solution to all concerned. In other words, the ECGD would attempt to raise the particular aspects of the project which were in issue to an acceptable level.

42. The other witness who was tendered by ECGD was Caroline Smith who currently acts as Deputy Director in the Chief Information Officer Directorate of DEFRA. Her evidence consisted in effect of various contentions in support of ECGD's case. She set out in particular the evidence which another panel of this Tribunal had heard in *The Department of Education and Skills v The Information Commissioner* (EA/2006/0006) in the form of written statements and oral evidence given by Lord Turnbull, formerly the Head of the Home Civil Service and Paul

Britton CB, Director General of the Domestic Policy Unit in the Cabinet Office. The evidence of these gentlemen was referred to in order to reinforce ECGD's reliance on the principle of collective responsibility, together with the importance of maintaining a high degree of confidentiality with regard to Government internal workings.

43. The Tribunal takes the view that Ms Smith's evidence does no more than reflect the contentions eventually made by Counsel on behalf of ECGD, and to a similar extent, the Commissioner and in due course reference will be made to the contents of the Tribunal's decision in the *Department for Education and Skills* Decision. The Tribunal fully accepts that in the context of its own evolving case law, there is a consistent reference on the part of public authorities, particularly Government Departments, to the themes echoed by Ms Smith. These themes include the importance of frankness and candour, the danger of a form of Government cabal, the damaging effect of disclosure on difficult policy issues, the importance of proper record-keeping and in the case of Government exchanges, the damage both relating to exchanges between Ministers and Civil Servants and to the role of Civil Servants as a whole with regard to the formulation of policy.

The Directive and EIR

44. As indicated above at paragraph 20, FoE has questioned whether the EIR properly implement the Directive in relation to the exception of "internal communications" between Government Departments.

45. FoE's contentions are relatively straightforward. The Directive is of direct effect. Article 4(1)(e) confines "internal communications" to persons or parties either within a single Government department or as between Government departments themselves. Regulation 12(8) therefore represents not only an inaccurate but also an unlawful transpiration of Article 4(1)(e) into English domestic law.

46. Article 4(1)(e) has been set out above. The ECGD and the Commissioner both contend that on its true construction Article 4(1)(e) of the Directive includes communications <u>between</u> Government Departments. Article 2(2)(a) has also been set out above at paragraph 5 and defines "public authority" as meaning

    "Government or other public administration, including public advisory bodies, at national, regional or local level;"

    Both the ECGD and the Commissioner contend that the definition within the Directive itself specifically addresses a case in which a public authority comprises a number of distinct government departments such as to be properly regarded as a "public authority".

47. The Tribunal respectfully agrees with ECGD and the Commissioner. Its attention was taken to the relevant European Commission Proposal COM (2000) 402 final, from which it is clear that the purpose of the exception

was to safeguard the "safe space" already referred to. It is abundantly clear that this purpose would be emasculated if a distinction were drawn for present purposes between Government policy formulated within a single department and that engendered between distinct departments. As Ms Carrs-Frisk QC pointed out, Article 4(1)(e) is silent in relation to the term or concept of "public authority". Moreover the Directive applies equally to all Member States and the distinction contended for by FoE would, if correct, create not only an unintended anomaly between Member States but also an obvious and clearly unwarranted disparity between those States.

48. The Tribunal, therefore, finds no inconsistency between the Directive and Regulation 12(4)(e) read with Regulation 12(8) from which it follows that there is no need to decide whether and, if so, to what extent the Directive has direct effect.

The EIR: The Relevant Test

49. Before considering both the manner in which the Commissioner addressed the balance of the respective public interests as well as the manner in which those issues were addressed in this Appeal, the Tribunal feels it is important to draw attention to the context in which the applicable exception in the EIR is placed. Ms Carrs-Frisk QC rightly in the Tribunal's view highlighted various provisions in the Directive which are relevant. Recital 1 has already been referred to above at paragraph 3 as has the fact that the Directive was designed to "expand" on the existing access formerly afforded by an earlier Directive 90/313/EEC.

50. The presumption referred to in the EIR and in Regulation 12(2) has also been set out above at paragraph 7. No such presumption appeared in the predecessor Regulations to the present Regulations, namely the Environmental Information Regulations 1992 (SI 1992 No. 3240). ECGD argued that the effect of the expressed presumption in favour of disclosure is that in a case in which the competing public interests are equally balanced, the information will fall to be disclosed. In the context of FOIA the presumption has been described as an assumption or as a default setting so that relevant information must be disclosed unless FOIA specifies that it be withheld. See generally *Secretary of State for Work and Pensions v Information Commissioner* (EA/2006/0040) especially at paragraphs 25-29.

51. On the other hand the EIR were considered in another decision of this Tribunal, namely *Lord Baker v Information Commissioner and Department of Communities and Local Government* (EA/2006/0043). In that case Regulation 12(1)(b) was also engaged. At paragraph 18 the Tribunal noted that there were "dangers" in applying "too rigorously" principles developed in that instance in respect of section 35 of FOIA (which deals with the formulation of Government policy) to the "quite different language" of Regulation 12 of the EIR. However, the Tribunal also accepted that the

principles regarding the weighing of the respective public interests articulated in *DfES v Information Commissioner* (EA/2006/006) did offer "broad guidance". That decision, ie the decision in the *Lord Baker* case involved the Tribunal allowing the disclosure of information on the basis that there had been a previous promulgation of the relevant Ministerial decision.

52. For reasons which will become apparent below, the Tribunal considers that the Information Commissioner's Decision should be overturned. The Tribunal takes the view that on a balance of probabilities the ECGD has failed to demonstrate that there is a sufficiently demonstrable public interest in withholding the interdepartmental responses to the case notification in March 2003 as to outweigh the public interest in disclosure.

53. The Tribunal however is not minded to speculate on what, if any, difference exists between the so-called default setting attributable to the disclosure of information requested under FOIA on the one hand, and on the other the express presumption set out in the EIR. It is sufficient to point to the onus which clearly rests on a public authority in the context of the EIR whenever it chooses to rely on an exception, such as the present case, that onus being to specify clearly and precisely the harm or harms that would be caused were disclosure to be ordered. If no such harm can be clearly made out given the terms and effect of Regulation 12(2), the balance must fall in favour of disclosure under the test in Regulation 12(1)(b).

Ministerial Collective Responsibility and Candour: Generally

54. Put shortly, the ECGD advanced two principal areas of public interest which it claims justified non-disclosure of the requested information. These two grounds can, for present purposes, be characterised as collective responsibility and candour respectively. The Tribunal accepts that the notion of ministerial collective responsibility represents a fundamental constitutional principle in broad terms: moreover a Minister is accountable to Parliament for the workings and decisions of and within his department. Both notions, though interdependent, have no real content if a minister and its department cannot engage in decision making without the so called "safe space" being available to them in order to exchange views in connection with that process with their counterparts within government. The safe space concept therefore permeates both forms of exchanges.

55. In this case it is abundantly clear that ECGD can only come to a considered decision, if at all, on the basis of eliciting the views of other Government departments where those departments' interests are such as to concern the subject matter of potential approval by ECGD.

56. However, Regulation 12(1)(b) of the EIR raises a straightforward issue of whether "in all the circumstances" the public interest in maintaining the

exception which relates to the non-disclosure of "internal communications" outweighs the public interest in favour of disclosure. There is and can be no immutable rule in terms of reliance upon the collective ministerial responsibility and/or the individual accountability of ministers to Parliament. The Tribunal refutes any suggestion that those notions, either singly or together represent some form of trump card in favour of maintaining the particular exception.

57. A number of general observations, however, should be made in the Tribunal's opinion. First, the public authority in this case as might perhaps be expected laid great emphasis on the perceived view by ministers and officials as to their ability to exchange views freely and in confidence. The Tribunal shares the views of the Tribunal which dealt with the appeal in the *Department for Education and Skills* case that the relevance and weight of this consideration will necessarily vary from case to case. It is self evident that an official may often be bound to take into account the risk that his views may be disclosed even if he thinks he is operating within a safe space. The Tribunal also has in mind and duly adopts the remarks regarding the concept of a "safe space" reflected in the Tribunal's decision in *Office of Government Commerce v Information Commissioner* (EA/2006/0068 and 0080) especially at paragraph 85, ie the degree of justification in protecting safe space being stronger in circumstances which related to the early stages of policy formulation and development.

58. Too much however can be made of the alleged virtues of candour and frankness. Factors such as the size of the project and the expense attendant upon the particular object of the policy in question may often be significant factors though by no means determinative. The touchstone is, and remains at all times, the public interest. If a project such as Sakhalin II entails extensive public debate prompting a Minister to make a public statement even prior to a formal Government decision then information relating to such statement may well be justifiably disclosable.

59. Next, ECGD in its submissions and reflecting on the issues raised in the previous observation argued that it is "the ultimate Ministerial decision" and not the views expressed by officials along the way that should be subject to public scrutiny. The Tribunal feels such a contention is far too broad. Indeed, even in the decision of this Tribunal which is relied upon in support of such a contention, namely *Lord Baker v Information Commissioner and Department for Communities and Local Government*, although the Tribunal there accepted in paragraph 26 that it is a Minister's decision set out in a fully reasoned formal document or decision letter which should be subjected to public scrutiny and that officials are "properly not accountable to the public in the same way that an elected representative is", the Tribunal added that that feature was only "a factor to be given appropriate weight in favour of maintaining" the relevant exemption or exception.

60. Third, the Tribunal endorses the observations made at paragraph 75(iv) of its decision in *Department for Education and Skills* to the effect that the timing of a request is of paramount importance in the sense that the earlier the request in relation to the process of policy making or formulation, the greater the consideration that should be afforded to whether the particular exception or exemption should be maintained.

61. Fourth, in this case as well as in other cases in which these issues have already been canvassed, reliance is frequently placed on what is said to be "the very real risk" that over time disclosure of the type of information sought will undermine good government, in particular the process of collective policy formulation. One aspect of this argument that is often stressed is the possible adverse impact upon record keeping. This Tribunal remains unimpressed by such generalised contentions. Life after FOIA has changed and had to change. In the case of the EIR if, as arguably might be the case, a higher hurdle has to be overcome in establishing that an exception should be maintained than would perhaps be the case in a FOIA related context, officials in all public authorities as well as Ministers in government should now be fully aware of the risk that in a given case their notes and records, and indeed all exchanges, in whatever form are in principle susceptible to a request or order for disclosure. It is not enough in this Tribunal's view to fall back on a plea that revelation of all information otherwise thought to be inviolate would have some sort of "chilling effect". The Commissioner and the Tribunal have been charged with the responsibility of resolving on a case by case basis where the proper balance should be struck regardless of such ulterior considerations.

<u>The Relative Public Interests in this Case</u>

62. FoE attacked two aspects of the Commissioner's Decision Notice, first with regard to his reliance on the need for candour and secondly, his resort to collective responsibility both being factors pointing in the Commissioner's view to maintaining the exception in question. There were in effect five principal contentions advanced during the Appeal.

First, FoE claimed that disclosure of the disputed information would not affect the full and frank exchange of views. Reliance, it was argued, was placed in the Commissioner's Decision on the so-called "chilling" effect of disclosure without due regard to the specific facts in this case. The real question it was contended was whether any loss of frankness would in fact harm the decision-making process given the particular facts in issue in this case.

63. As at the date of the request however, the project in this case was hardly in its infancy: Given the long-standing undisputed public debate regarding all the relevant issues, particularly environmental and social issues regarding Sakhalin II as is clearly apparent from the FoE's own witnesses' evidence, there appears to this Tribunal to be a weighty public interest

inherent in the need for the public to be acquainted with such exchanges which were likely to represent far more than preliminary and unparticularised views, the critical question remaining whether disclosure of the information requested would in all the circumstances be shown to cause or be likely to cause the suggested harm.

64. The second contention by FoE is related to the first. FoE alleges that the Commissioner expressed the claimed effect on candour in generalised terms. The Tribunal agrees that its appellate function includes an ability to reappraise the position. As will be made clear in the light of the evidence that it has heard as a whole, the Tribunal respectfully agrees with the thrust of this contention.

65. The third limb of FoE's argument took issue with the question of whether the principle of "collective responsibility" was in the words of FoE's written submissions "a legitimate focus" of the internal communications exception in the Regulations. Again, in general terms the Tribunal agrees to the extent that the convention in question is merely as FoE put it, a means to an end, the end being good government, the final question being whether the public interest, ie the need to ensure and police such good government is served in a particular case by reliance on this convention.

66. It appears to the Tribunal however that FoE was in this context concentrating rather upon the fact that there was a likelihood of inter-department disunity, ie a lack of agreement, and that this of itself justified the existence of a public interest in disclosure. If so, the Tribunal respectfully disagrees. This is not to say that reliance can in all cases safely be placed on a so called "united front" approach being a policy which appears in a DEFRA Guidance Notice No. 7 which was put before the Tribunal. As stated above and given the stage at which the request was made in the context of this case, coupled with the light of the public spotlight on the project as a whole at that stage, it is inherently unlikely that demonstrating disunity as such would add any real weight to the public debate and further any public interest. More importantly as has been clearly demonstrated by the evidence, ECGD itself was and is fully committed to addressing the environmental, social and other related aspects of the project not only by virtue of its own declared Business Principles but also by virtue of its adherence to the particular process entered into.

67. It follows that the Tribunal agrees with this ground of appeal to the extent that it contends that disclosure of the information would enable the public better to understand the decision making process.

68. The fourth ground relied on points to a failure on the part of the Commissioner to make out a proper case of prejudice to good decision making. The Tribunal agrees for the reasons set out below.

69. Finally, FoE claimed that any prejudice stemming from release of the information in question would be slight when weighed against the very strong interests in disclosure.

The Respective Public Interests in this Case

70. The Tribunal finds that the evidence of Mr Weiss addressed the two principal contentions advanced by the ECGD only in the broadest of terms and then again only in the context of what he characterised as the "possible" wider implications of disclosure of the internal communications. The Tribunal finds that Mr Weiss was unable to advance any evidence of any real or persuasive weight which could have led the Tribunal to determine that there existed a real, as distinct from an imagined, harm or prejudice which would necessarily result from the requested disclosure.

71. In the Tribunal's view, Mr Weiss was in particular unable to provide evidence demonstrating that disclosure of the March 2004 responses would have impaired the candour that applied to interdepartmental deliberations, either at the time of the request or subsequently. Nor is the Tribunal satisfied that he successfully showed that disclosure of the requested exchanges impaired collective responsibility both as to the in principle support decision of March 2004 referred to above in paragraph 17, or as to any "final decision" which is yet to be made.

72. Put shortly therefore, the Tribunal regards Mr Weiss' concerns as being of a generic nature only and were the information to be withheld on the basis he suggested pursuant to Regulation 12(4)(e), the same would effectively amount to a blanket exception. The Tribunal takes the view that in such circumstances, this would not meet the requirements of the public interest test which has to be determined and will also be inconsistent with the restrictive approach required under the directive cited above at paragraphs 3 and 5.

73. The Tribunal is fortified in arriving at these conclusions in the light of the relevant chronology. In February 2003, the ECGD requested that interdepartmental responses be forwarded by 14 March 2003, a matter of some two weeks from the date of its notification. The Tribunal totally rejects any suggestion that as a matter of fact the candour of such responses would have been harmed by their disclosure in March 2005, when the request of March 2005 was made by FoE and in circumstances when the responses had been provided some two years earlier. Equally, there can be no suggestion that collective responsibility for the in principle decision of support in March 2004 could be said to have been undermined by disclosure in response to the request since again the responsibility had already been discharged some two years previously.

74. Both Ms Carrs-Frisk QC for the ECGD and Mr Coppel for the Commissioner argued strongly in favour of the proposition that ECGD's failure to come to a final decision with regard to its support for the project necessarily meant the collective responsibility and candour represented sufficient potential indicators of public interest in favour of maintaining the relevant exception. While the Tribunal accepts that a final decision has yet to be made, the ECGD presented no evidence to the Tribunal or indeed to the Commissioner of how, and if so, to what extent ongoing

interdepartmental or governmental deliberations regarding any prospective final decision would be harmed or might be harmed by disclosure of the 2003 inter-departmental responses in March 2005. Nor did the ECGD present any evidence of how any ongoing fashioning of a policy or decision as from the time when the in principle decision was made in March 2004, might be harmed in such a way up to and including the time of the request made by FoE, or indeed until the time of this Appeal being considered. The Tribunal is simply not willing to accept in the absence of such evidence that disclosure of the 2003 inter-departmental responses in March 2005 was likely to pose a threat to the candour of further deliberations or that as at the time the request was made in 2005, protective thinking time or space was required as a matter of overriding importance. There is simply no factual evidence to support the suggestion that time and space was required, let alone used, over the long period in question.

The Requested Information

75. The Tribunal wishes to stress not unnaturally that its decision in this case, and in particular its determination of the public interest test, relates specifically to the disclosure of information requested by FoE. The Tribunal is not requested, nor is it required to determine as a matter of general application, the extent to which "internal communications" might be refused by public authorities in response to EIR requests generally, outside the confines of this case.

76. The information requested in this case consists of a number of items of correspondence to ECGD from a number of the recipients of the notification. The Tribunal takes the view, having seen this information, that disclosure of at least one of the responses is highly unlikely to cause prejudice in terms of collective responsibility or candour when it comes to applying the public interest scales. On the contrary, the Tribunal feels most strongly that disclosure of the type of information in question in that particular exchange is, if anything, likely to improve the quality of the deliberative process. A further response provided by another government department is also in the Tribunal's view not of a particular sensitive nature. As indicated above, it does no more than acknowledge concerns already known; it welcomes the work of independent consultants and requests that the department in question be kept informed. It is impossible to see how disclosure of this type of information is likely to impinge on the public interest inherent in candour between government departments and the notion of collective responsibility.

Information in the Public Domain

77. In argument, the Commissioner stressed that the public interest in accessing information about "various aspects" of the Project was substantially met by a large volume of information already in the public domain. In the Tribunal's view, this is not relevant. First, the Tribunal is here dealing with the regime prescribed by the EIR: unlike the regime under FOIA, there is no exemption for what could be called alternative access, and secondly, it is accepted it seems by all parties that the information which is the subject of FoE's request is not in the public domain and that the request could not be satisfied by reference to the volume of information already collated by interested parties and those associated in or commenting upon the project. For those reasons, the Tribunal rejects any suggestion made that public interest elements enter into play on the basis of the information being requested already being in the public domain.

Partial Disclosure

78. In the light of the decision the Tribunal has come to that the Appeal should be allowed the Tribunal finds it unnecessary, therefore, to consider whether the Commissioner or indeed the Tribunal itself, should entertain the idea of there being a particular disclosure.

Conclusions

79. For all the above reasons, the Tribunal allows the Appeal and substitutes a Decision Notice in the terms of the decision set out at the beginning of this judgment.

David Marks 20 August 2007