



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0071
Information Commissioner's Ref: FER01456

Heard at Audit House, London,
On 6, 7 and 8 July 2009

Decision Promulgated
11 August 2009

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

ANNE CHAFER
PAUL TAYLOR

BETWEEN:

EXPORT CREDITS GUARANTEE DEPARTMENT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

MR N HILDYARD (on behalf of THE CORNER HOUSE)

Additional Party

Subject matter:

Environmental Information Regulations 2004

Exceptions, Regs 12(4) and (5)

- Internal communications (4)(e)
- International relations (5)(a)
- Legal professional privilege (5)(b)

Cases:

Representation:

For the Appellant: Ms C Callaghan

For the Respondent: Ms A Proops

For the Additional Party: Mr P Michaels

Decision

The Tribunal upholds the decision notice dated 28 July 2008 and dismisses the Appellant's appeal in all respects except that the Appellant is entitled to make the redactions, which are identified in the Confidential Schedule to this Decision. The Tribunal also dismisses the cross-appeal filed by the Additional Party.

Reasons for Decision

Introduction

1. By the end of the hearing of this Appeal the only issues that remained for determination were:
 - a. The scope of the request for information sent by the Additional Party to the Appellant on 8th August 2005 ("the Request"); and
 - b. Whether the Appellant was entitled to redact certain sections of the information disclosed in response to the Request on the basis that they were covered by one of the exceptions defined in Regulation 12 of the Environmental Information Regulations 2004 ("the EIR") and the public interest in maintaining the exception outweighed the public interest in its disclosure.

2. We have been provided with a great deal of background information but the only parts of it that we need to record in order to put this decision into context are the following:
 - a. The Appellant is a Department of the UK Government which facilitates the export of goods and services by issuing credit insurance policies and guarantees.
 - b. One of the projects supported in this way was the construction of an oil pipeline linking Baku in Azerbaijan, Tbilisi in Georgia and Ceyhan on the Mediterranean coast of Turkey (“the BTC Pipeline Project”).
 - c. The Appellant has a Business Principles Unit, whose role is to carry out an assessment of the environmental and social impact of any project for which financial support is requested.
 - d. At the end of that process the Business Principles Unit submits to the committee having ultimate responsibility for recommending the grant or refusal of support an Assessment Report (“the Report”). In the case of the BTC Pipeline Project the Report was considered at a meeting of what was then called the Underwriting Committee on 5 December 2003.
 - e. The Report identified a number of environmental or social aspects of the BTC Pipeline Project and then, in respect of each one, set out:
 - i. An explanatory introduction;
 - ii. A summary of comments received from third parties; and
 - iii. An assessment of whether that aspect of the project complied with relevant international standards (“the Assessment Sections”).
 - f. At its meeting on 5 December 2003 the Underwriting Committee considered a broad range of issues in respect of the BTC Pipeline Project, in addition to the Report.
3. Until very late in the process the Appellant maintained that none of the Assessment Sections should be disclosed because they constituted “internal communications”

for the purpose of EIR Regulation 12(4)(e) and the public interest in maintaining that exception outweighed the public interest in disclosing it. It relied on the same provision to resist disclosure of the minutes of the meeting on 5th December 2003, (although a redacted form of that document had in fact been inadvertently disclosed to the Additional Party in response to the Request). At the close of evidence on the Appeal, in the middle of the third hearing day, the Appellant abandoned this part of its appeal. It was fiercely criticised by the other two parties for having persisted with its broad ranging opposition against disclosure for almost four years since the original request had been made. We will come back to those criticisms later. But it is only necessary to explain at this stage that the Appellant maintained its position that some parts of the Assessment Sections, as well as a few passages in the rest of the Report, should be redacted because they were covered by other exceptions. These were EIR Regulation 12(5)(a) (disclosure would adversely affect international relations) and Regulation 12(5)(b) (disclosure would adversely affect the course of justice or the ability of a person to receive a fair trial).

4. We will now deal with each of the issues identified in paragraph 1 above.

The scope of the Request

5. The Request opened as follows:

“We are writing to request the following environmental information held by the ECGD in relation to the Baku-Tbilisi-Ceyhan (BTC) oil pipeline.

A. The Business Principles Units Assessment of the BTC Project

(i) A copy of the Business Principles Unit’s Assessment Report on the BTC project as prepared for ECGD’s Underwriting Committee;

(ii) A list of all meetings held to discuss the BPU’s assessment report, including attendees;

(iii) All notes and/or minutes of meetings held to discuss the BPU’s assessment report, including any written comments or appraisals;

(iv) All correspondence with BP and/or BTC Co relating to the BPU’s assessment report.”

The Request then went on to ask for four categories of information about the coating used on the pipeline in question (which it did under a separate subheading – “*B. The selection and Use of SPC 2888 as the BTC pipeline coating in Azerbaijan and Georgia.*”) and three categories of information about an OECD complaint (under a subheading – “*C. Complaint Under OECD Guidelines on Multinational Enterprises*”).

6. The Additional Party argued, by a Cross Appeal which it was permitted to file out of time towards the end of the pre-hearing timetable, that the Request covered the whole of the minutes of the meeting on 5 December 2003, and not just those parts dealing with the Report. In effect it was said on its behalf that if a minuted meeting had included consideration of the Report as part of the business conducted, then the whole of the minutes fell within the scope of the Request. However, the Additional Party stated that it was in fact only interested to see those parts of the minutes in question that related to the BTC Pipeline Project. The argument in support of the more extensive disclosure was based on what was said to be the plain language of the Request or, to the extent that it was said to be ambiguous, on the principle that the ambiguity should be resolved against the Appellant because it had failed, at the time of the Request, to provide the advice and assistance which it was required to do under EIR Regulation 9. Some elements of the events that occurred later were also relied on; these included the Information Commissioner’s own statement that he had intended to order disclosure of the whole of the minutes in the Decision Notice dated 28 July 2008, on which this Appeal is based. It was said that it was inadvertence that had resulted in the language of the Decision Notice directing that the Appellant was to disclose only those parts of the minutes dealing with the Report.
7. In our view the language of the Request is quite clear. It is a carefully structured document which starts by providing an indication of the general subject matter (environmental information about the BTC pipeline). It then narrows the focus to the categories defined under headings A, B and C, with heading A covering the Report. It seems to us that in then further refining the information sought under that sub-heading by reference to “*All notes and/or minutes of meetings held to discuss the BPU’s assessment report*”, the Request was clearly asking for minutes relating

to that report and that it would strain the language of request A, when read in context, to interpret it to mean that it covered all minutes provided that they included consideration of the Report. In reaching this conclusion we are conscious of the need to apply a common sense approach to the interpretation of requests for information and not to expose them to an overly strict analysis more suited to formal legal documents. However, we believe that the approach to interpretation should take account of the sophistication of the document being reviewed and that where, as here, it is quite evidently a document to which some care has been taken in both structure and choice of language, we should let it speak for itself and should resist the temptation to expand its scope beyond that to which it naturally applies.

8. In light of our decision on the interpretation of the language of the Request it is not necessary for us to consider the other arguments mentioned, which would only have arisen if we had found the Request ambiguous.
9. It follows that, subject to the exceptions to disclosure, the Appellant is only required to disclose the minutes of the meeting on 5 December 2003 to the extent that they dealt with the Report.

The exceptions to disclosure

10. Once the Appellant had conceded the main part of its case, as we have described above, it agreed to disclose the Report and the Minutes with all redacted sections restored, save for those sections of the former covered by the remaining arguments against disclosure, namely EIR regulation 12(5)(a) and (b).
11. EIR regulation 12 is headed "*Exceptions to the duty to disclose environmental information*". The parts that are relevant to this Appeal read:

"(1)...a public authority may refuse to disclose environmental information requested if-

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

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

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

...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(a) international relations ...

(b) the course of justice, the ability of a person to receive a fair trial ...”

12. It was necessary, for obvious reasons, to consider in closed session those passages of the Report which the Appellant argued should remain redacted. However, the Additional Party did address us, in general terms, on the approach which it said we should adopt and urged us to test carefully the Appellant’s arguments for withholding information.

13. We have decided that the Appellant was justified in withholding some passages in the Report. We have set out in the Confidential Schedule to this Decision our reasons in respect of the passages on which we have accepted the Appellant’s arguments. This is to remain confidential and the Appellant may therefore redact the passages in question from the material to be disclosed. In the following sections of this open part of our decision we provide the background to the decisions recorded in the Confidential Schedule and deal with those parts of the evidence and arguments that do not need to be dealt with in confidence.

14. We will deal with each of the exceptions relied on by the Appellant in turn.

International Relations.

15. The exception was claimed in respect of one part of the Report that referred to the State of Turkey and to others that referred to certain international organisations,

which were involved in the BTC Pipeline Project. We will refer to this as “Partners’ Information”.

16. Turkey.

- a. The relevant information appears in Paragraph 2.2.7 of the Report. The Assessment Section under this paragraph, headed “Turkey – Ceyhan Marine Terminal”, included a sentence reading *“The BPU concurs with MM’s view that, based on a review of the EIA report, insufficient information had been provided to justify the location of the terminal. However the information provided in the SLIP goes some way to correct this”*. We received a certain amount of evidence suggesting that the Foreign and Commonwealth Office (“FCO”) had already disclosed other criticisms of the Turkish national petroleum organisation, in the form of a “Flash Report” of a site visit to the BTC Pipeline Project, so that the sensitivity was overstated. After that evidence had been aired during the hearing the Appellant informed us, through its counsel, that it had sought further guidance from the FCO who considered that international relations would not be harmed if it were disclosed now. The Appellant immediately made it available to the Additional Party. However, it maintained its position that it had been entitled to refuse to do so in response to the original request and we therefore have to determine that issue.
- b. Given that the Flash Report was only disclosed in October 2008, some three years after the FCO had advised the Appellant that it considered that the Appellant should redact the sentence quoted above in any material released in response to the Request, we see no inconsistency in the position adopted by the FCO at the time of the Request.
- c. Of course it is not enough for the Appellant simply to say that it relied on FCO guidance. We have to consider the objective reasonableness of its explanation for non disclosure, whether that resulted from its own assessment of the risk or was based on guidance from another department. Nevertheless, the reasons given by the FCO, in the course of exchanges with the Appellant which were included in the closed bundle and remain

confidential, satisfied us that disclosure at the time would have adversely affected international relations, that the public interest balance at that time was in favour of maintaining secrecy and that the Appellant had accordingly been entitled to refuse disclosure at the time.

17. Partners' Information. The Information Commissioner accepted that the Partners' Information fell within the meaning of EIR regulation 12(5)(a) and that the exception was engaged in respect of each of the passages for which it was claimed. In his Decision Notice dated 28 July 2008 he concluded that the public interest in maintaining the exception did not outweigh the public interest in its disclosure. He reconsidered his position on that aspect of the case in response to certain evidence adduced by the Appellant, which was not before him when he issued his Decision Notice. We record the position he adopted during the hearing of the Appeal, and our own conclusions, in the Confidential Schedule. We also record, in this public part of our decision, that it was accepted by the Appellant that there was a significant public interest in the transparency of its activities, although it maintained the position that, in respect of these parts of the Report, it was outweighed by the public interest in preventing the damage which it said disclosure would cause to its relations with the organisations concerned. Our detailed consideration of those passages is set out in the Confidential Schedule, together with our directions as to the redactions that should be made in the form of the Report to be disclosed to the Additional Party.

Legal Professional Privilege

18. The Appellant drew attention, in open session, to certain passages of the Report which contained what appeared to be legal advice but in respect of which the exception had not been claimed. However, we have concluded that the reason for this was not that the Appellant was being inconsistent in its claim to protection. The unredacted passages dealt with material for which privilege had been lost when it had been placed in the public domain, before the Request had been received. Our detailed consideration of those passages is set out in the Confidential Schedule, together with our directions as to the redactions that should be made in the form of the Report to be disclosed to the Additional Party.

Miscellaneous

19. The Introduction section of the Report and the final section on page 59 both identified the person who carried out a site visit to the BTC Pipeline Project. As both the “Flash Report” of the visit referred to above and the evidence placed before us identified that individual there is no reason for it to be redacted. The form of the Report to be disclosed to the Additional Party should therefore include this information.

Conclusion and remedy

20. In light of the Appellant’s abandonment of its claim to exception under EIR regulation 12(4)(e) and, (in respect of the other exceptions relied on), for the reasons set out in the Confidential Schedule the Appeal is dismissed and the Decision Notice upheld except that the Appellant may redact the information set out in the Confidential Schedule . The information, redacted in that manner, should be made available to the Additional Party within 28 days of the date of this decision.

21. Our decision is unanimous.

22. We mentioned in paragraph 3 above that the late abandonment of the main part of the Appellant’s case drew criticism from the other parties. We were invited to reflect that criticism in our decision. Counsel for the Information Commissioner suggested that some parts of the evidence given by the Appellant’s witnesses betrayed an attitude to the release of information which was not consistent with the approach which the Information Commissioner believes public authorities should adopt under the regime introduced by the FOIA. While we understand the Information Commissioner’s role in explaining freedom of information obligations, we do not consider it appropriate for hearings before this Tribunal to be used as a platform for public statements about the general attitude to those obligations which an individual is perceived to have displayed, except to the extent that they may have a direct effect on an issue the Tribunal is required to decide. In this case they did not because the issue had been withdrawn by then. We were also concerned that the criticisms seemed to be based on a selective analysis of oral evidence given in response to questions which addressed the particular facts of the case at the time when the Request had been considered. In our view they were not, therefore, a

necessarily safe basis for reaching any conclusion about the individual's overall approach to freedom of information issues today. As to any more general criticism of the Appellant's behaviour we were told by counsel for the Information Commissioner that she had not been able to obtain instructions as to whether an application would be made for costs against the Appellant, but she reserved her client's right to do so. We think that there is a danger of being seen to pre-judge any such application in favour of one side or the other if we dealt with those criticisms at this stage and we accordingly decline to do so. The Additional Party's criticism focused on the delays in the process which it said the Appellant had caused. However, that issue was addressed in the Decision Notice. It was not an issue in the Appeal and it was not suggested that the Appellant should be criticised for any delays that had occurred in preparing for the Appeal hearing. Accordingly we also say nothing on that subject at this stage.

Signed:

Chris Ryan

Deputy Chairman

Date: 11 August 2009