Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0021
Information Commissioner's Ref: FS50128406

Heard at Procession House, Victory House and the Care Standards Tribunal, London
On 16, 17, 18 and 28 September 2009

Decision Promulgated
On 21 October 2009

BEFORE

CHAIRMAN

ANNABEL PILLING

AND

LAY MEMBERS

DAVE SIVERS
JENNI THOMPSON

Between

EXPORT CREDITS GUARANTEE DEPARTMENT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

CAMPAIGN AGAINST ARMS TRADE

Additional Party

Subject matter:
FOIA Public interest test s.2
FOIA Qualified exemptions - Inhibition of free and frank provision of advice s.36(2)(b)(i)
FOIA Qualified exemptions - Inhibition of free and frank exchange of views for purposes of deliberation s.36(2)(b)(ii)

Cases:
Guardian Newspapers and Brooke v Information Commissioner and BBC (EA/2006/0011 and 0013)
Department for Education and Skills v Information Commissioner (EA/2006/0006)

Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and 0030)
Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)
Department of Culture, Media and Sport v Information Commissioner (EA/2007/0090)
CAAT v Information Commissioner and Ministry of Defence (EA/2006/0040)
Department of Trade and Industry v Information Commissioner (EA/2008/0007)
The Office of Communications v Information Commissioner [2009] EWCA Civ 90
Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)
R (Corner House Research) V Serious Fraud Office [2009] 1 AC 756

Representation:

For the Appellant: Monica Carss-Frisk QC, Catherine Callaghan
For the Respondent: Ben Lask
For the Additional Party: Adam Sandell

Decision

The Tribunal dismisses the Appeal and orders the Appellant to disclose the relevant information within 35 calendar days from the date of the promulgation of this Decision.

Reasons for Decision

Introduction

1. This is an Appeal by the Export Credits Guarantee Department ('ECGD') against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 23 February 2009.

2. The Decision Notice relates to a request for information made to ECGD by the Campaign Against Arms Trade ('CAAT') under the Freedom of Information Act 2000 (the 'FOIA') for a copy of "the ECGD Underwriting Committee's assessment of the Al Yamamah deal with Saudi Arabia." The Appellant had withheld the information on the basis that it was exempt from disclosure under sections 27, 29, 35 or alternatively, sections 36(2)(b), 41, 42 and 43 of FOIA.

3. The Commissioner concluded that the information was not exempt under sections 29, 36, or 41. He exercised his discretion not to consider the exemption under section 42, which had been raised late by ECGD during the investigation process. He found that the exemptions in section 27 (international relations) and section 43 (commercial interests) applied in respect of some of the information and that the public interest in maintaining each of those exemptions outweighed the public interest in disclosure. He ordered disclosure of the remainder of the information on the basis that although the exemption in section 36(2)(b) was engaged, the public interest in maintaining the information did not outweigh the public interest in disclosure. The Commissioner also found that ECGD was in error in citing section 35 together with section 36 but as this was not relied on before him, he did not consider the application of section 35 in this case.

4. The central question in this Appeal is whether the Commissioner correctly applied the public interest balancing test.

Background

5. The ECGD is a Government Department, reporting to the Secretary of State for Business, Innovation and Skills, and is governed by the Export and Investment Guarantees Act 1991. Its principal role is to provide support in connection with the export of goods from the UK and to insure overseas investment made by UK firms. It does so in practice by issuing credit insurance policies to UK exporters, and unconditional repayment guarantees to commercial banks in respect of loans to overseas buyers and borrowers that are used to purchase goods and services from UK exporters. ECGD supports exporters more directly by issuing insurance policies against the risk of non-payment under export contracts and costs incurred by the exporter undertaking work in relation to an export contract.

6. The decision on whether to provide cover or support in respect of a transaction is taken by the Chief Executive of ECGD (in his role as Accounting Officer) or his delegate, on the basis of advice received from ECGD's Risk Committee[1]. Risk Committee considers and advises on buyers', borrowers' and countries' acceptability against ECGD's minimum risk standards and the particular terms and conditions on which any support might be provided. In order to provide advice to the decision maker, Risk Committee is advised by, and relies upon, written submissions made by underwriters, the purpose of which is to present and explain the risks of supporting a potential transaction, and to make a recommendation as to whether support should be provided.

7. The Al Yamamah programme, which together with another programme, the Salaam programme, is now called the Saudi British Defence Co-operation Package, is a Government-to-Government programme between the Kingdom of Saudi Arabia ('KSA') and the UK Government. Under the terms of the programme, the UK agreed to provide certain military equipment (mainly aircraft) and support services to KSA. BAE

[1] Previously known as the Underwriting Committee.

Systems (Operations) Ltd ('BAE'), a UK exporter, is the main contractor for the programme and during the course of the Al Yamamah programme, BAE applied to ECGD for a series of one year contracts for insurance against non-payment.

8. CAAT is the key organisation that opposes the arms trade, campaigning through numerous methods, including research, political lobbying, local meetings, protests at arms industry events and petitions. CAAT does not have a formal membership, it has supporters, and there are about 20,000 individuals on its database. One of CAAT's main objectives is to stop the UK Government's support for and subsidy of arms companies and exports. This includes campaigning for an end to the provision of export credits for military projects.

The request for information

9. By e-mail dated 16 September 2005, a request for information under the FOIA was made to ECGD by Ann Feltham, Parliamentary Co-ordinator for CAAT (the 'Requestor').

10. She requested that ECGD provide her with a "copy of the ECGD Underwriting Committee's assessment of the Al Yamamah deal with Saudi Arabia."

11. ECGD responded by letter dated 20 October 2005, explaining that it had interpreted the request to refer to the paper submitted to ECGD's Risk Committee that considered the provision of cover for the Al Yamamah programme for 2005/2006 (the 'Paper') and the minutes of the meeting recording the decision to provide cover (the 'Minutes'). ECGD withheld both documents under section 36(2)(b) of FOIA, and also informed CAAT that elements of the documents were also exempt from disclosure under sections 27, 29, 35, 41 and 43 of FOIA. ECGD obtained the approval of a qualified person, the Minister of Trade and Investment, in order to rely on the section 36 exemption.

12. By e-mail dated 30 January 2006 CAAT requested an internal review of the decision not to disclose the requested information.

13. ECGD responded by letter dated 3 July 2006 and informed CAAT that the internal review found in favour of maintaining the exemptions cited in the response to the request for information.

The complaint to the Information Commissioner

14. CAAT complained to the Commissioner through Friends of the Earth ('FOE') by letter dated 28 July 2006 asking the Commissioner to consider whether the Appellant's decision to withhold the information was correct. CAAT's principal complaint was that the approaches taken to the application of section 36(2)(b) of FOIA and to the public interest balancing exercise were both flawed.

15. Although the Commissioner informed ECGD of the complaint by letter dated 22 August 2006, and although FOE requested an update on 5 December 2006, it appears that no case officer was allocated to this complaint until May 2008.

16. There followed a series of correspondence between the Commissioner and ECGD.

17. A Decision Notice was issued on 23 February 2009.

18. The Commissioner exercised his discretion not to consider the application of section 42 of FOIA (legal professional privilege) which had been raised by ECGD for the first time during his investigation but, in any event, agreed with ECGD that the information in relation to which that exemption had been claimed was exempt under section 43 of FOIA (commercial interests).

19. In considering whether the information should have been withheld, the Commissioner first considered the application of the exemptions provided by sections 27, 29 and 43 of FOIA. He concluded that some

of the information was exempt under sections 27 or 43 and that in each case the public interest in maintaining that exemption outweighed the public interest in disclosure. Accordingly he concluded that ECGD was entitled to withhold the information specified in Annex 3 of the Decision Notice. For all of the information which the Commissioner decided should not have been withheld under sections 27, 29 or 43 of FOIA, he went on to consider the application of the section 36 and 41 exemptions.

20. In relation to section 36(2)(b) of FOIA, the Commissioner concluded that all the information fell within the exemption but that the public interest in maintaining that exemption did not outweigh the public interest in disclosure. Accordingly he required ECGD to disclose the information specified in Annex 2 of the Decision Notice; this is the disputed information which is the subject of this Appeal.

21. He concluded that section 41 of FOIA (information provided in confidence) was not engaged.

22. The Commissioner also decided that ECGD had breached FOIA in relation to a number of procedural matters, including in respect of section 17(1) by excessive delay in responding to the request for information, section 17(1)(b) by not citing the relevant subsections and section 17(1)(c) by failing to provide reasons when applying the section 72, 29, 41 and 43 exemptions. These are not relevant in this Appeal.

The Appeal to the Tribunal

23. By Notice of Appeal dated 23 March 2009 the Appellant appealed against the Commissioner's decision. Originally the Appellant relied on six grounds of appeal, but subsequently considered it appropriate to confine its appeal to the second ground of appeal, concerning section 36 of FOIA and the public interest balance.

24. The Tribunal joined CAAT as an Additional Party to this Appeal.

25. The Appeal was determined at an oral hearing on 16, 17 and 18 September 2009, and a further session to deliberate on 28 September 2009. The Tribunal was provided with Open and Closed bundles of material[2], and a bundle of authorities.

26. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

27. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

> *(1) If on an appeal under section 57 the Tribunal considers-*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

28. The statutory jurisdiction is considerably wider than carrying out a judicial review of the Commissioner's decision on the principles that would be followed by the Administrative Court in carrying out a judicial review of a decision made by a public authority. The starting point for the Tribunal is the Decision Notice of the Commissioner but the

[2] Including Open and Closed versions of three witness statements from ECGD.

Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

29. Determining the balance of public interest is a mixed question of fact and law, and does not involve the exercise of discretion by the Commissioner.

The Legal Framework

30. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

31. The section 1(1)(b) duty to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

32. Section 36 of FOIA confers a qualified exemption. The relevant parts read as follows:

"(1) This section applies to-

(a) information which is held by a government department… and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

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

(a) …

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation…"

33. In this case, the qualified person was the Minister of Trade and Investment.

34. The Commissioner was satisfied that the opinion given by the qualified person that there would be prejudice had been reasonable in substance and reasonably arrived at on the basis of relevant factors, and that the exemption contained in section 36(2)(b) was engaged.

35. The parties agree that the Disputed Information falls within the exemption provided for by section 36(2)(b) FOIA, albeit by different reasoning.[3]

The issues for the Tribunal

36. It is not in dispute that section 36 of FOIA is engaged in respect of the disputed information and the only issue to be decided by the Tribunal is whether the Commissioner correctly applied the public interest balancing test under that section.

[3] CAAT does not accept that disclosure of the disputed information actually would or would be likely to inhibit either "(i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation", but accepts that the "qualified person" could reasonably arrive at this opinion.

37. At the start of the hearing, the Tribunal sought to clarify the scope of this Appeal. There was a dispute between the parties as to whether the Appeal extended to the application of the public interest balancing test under section 36 of FOIA in relation to the entirety of the Paper and the Minutes, including those parts which the Commissioner found should be withheld under other exemptions as set out in Annex 3 to the Decision Notice, or whether it was limited to those parts which the Commissioner ordered be disclosed as set out in Annex 2 to the Decision Notice. After hearing submissions from the parties, the Tribunal ruled that the disputed information for the purposes of this Appeal is limited to those parts of the Paper and the Minutes that the Commissioner ordered to be disclosed and identified in Annex 2 to the Decision Notice.[4]

Evidence

38. We received written and oral evidence that was not available to the Commissioner from four witnesses. As is usual practice, we received written statements that stood as evidence in chief and the witnesses were then cross-examined before us on behalf of the other parties. Three witnesses were called on behalf of ECGD and one witness was called on behalf of CAAT. The evidence of each witness fell into two distinct categories – factual and opinion regarding public interest. There was limited dispute as to the factual evidence and questions before us concentrated on matters relating to public interest.

39. The witnesses from ECGD all gave evidence during both Open and Closed sessions. In this Decision we do not refer directly to any evidence that was given during a Closed session although, for the reasons given in the Confidential Annex to this Decision, the evidence given during those Closed sessions was of particular relevance to the public interest test. This Confidential Annex is available only to ECGD and the Commissioner. It may not be disclosed to the public.

[4] See separate Ruling on Scope of Appeal annexed to this Decision

40. Paul Radford, head of ECGD's Credit Risk Analysis Division ('CRAD') and a standing member of Risk Committee who has worked for ECGD since 1991, gave evidence during the first day of the hearing. He was able to give a unique level of insight in relation to Risk Committee and the material provided to it in order for it to be able to make decisions and provide advice. He has more than 20 years' knowledge relating to KSA and the Middle East, from his time at both ECGD and previously as a senior economist at Barclays International plc.

41. Mr Radford, in his position as head of CRAD, was involved in the preparation of the Paper by an underwriter that forms part of the disputed information in this case, because the provision in support of the Al Yamamah programme required detailed consideration of the country risk relating to KSA. Although ECGD's involvement in the Al Yamamah programme pre-dates Mr Radford's employment at ECGD, he has in depth knowledge of the programme and has provided input into the vast majority of Risk Committee papers on Al Yamamah. These types of paper are prepared by underwriters to assist Risk Committee in their consideration of potential projects. The purpose of the Paper was to advise Risk Committee of the nature and likelihood of the various risks involved in the provision of support to BAE.

42. As a standing member of Risk Committee, Mr Radford attends Risk Committee meetings, including the meeting in respect of which the Minutes that form part of the disputed information in this case were produced. At that meeting he had a dual function, participating in the discussion both by posing questions to the underwriter and by assisting the underwriter to answer questions posed by other members of Risk Committee in order to ensure that Risk Committee conducted a full examination of all relevant facts and opinions.

43. On the second day of the hearing, we heard from Patrick Cauthery and James Croall from ECGD, and from Ann Feltham from CAAT.

44. Mr Cauthery has been a Business Manager in ECGD's Business Division 1 since April 2006; prior to this he was an underwriter in a non-defence division. Because of his current position, if ECGD were to provide cover in respect of Al Yamamah going forward, and the responsibility for managing the case process was allocated to him, he would be responsible for drafting or overseeing the drafting of papers to be submitted to Risk Committee in respect of the provision of cover. During the period from May 2003 to April 2006 he also assisted ECGD's Communications Division with requests for information under FOIA because he had some relevant prior experience. He was responsible for co-ordinating ECGD's initial response to this request for information under FOIA. He was also consulted in relation to ECGD's response to questions raised by the Commissioner during his investigation.

45. James Croall has worked for ECGD since 1975, is a standing member of Risk Committee and has been in charge of the ECGD division called Credit Control and Portfolio Management Division ('CCPMD') since 1997. CCPMD is responsible for, among other things, ECGD's premium policy and procedures and for setting premium rates and calculating these on individual cases. CCPMD is also responsible for the Risk Committee Secretariat, which produces Minutes of meetings of Risk Committee. Mr Croall provides guidance to the minute taker on the sorts of issues and the level of detail that should be included. His guidance is that a sufficient level of detail should be included to enable decisions made to be reflected in the relevant documents once a case progresses so that, for example, those with responsibilities in the future will know not just the decision that was made but also the reasoning behind it. For that reason, it is common practice for Minutes of previous Risk Committees to be appended to future papers on the same issue.

46. Ann Feltham gave evidence on behalf of CAAT. She has been employed by CAAT since 1978, currently as Parliamentary Co-

ordinator, and has been an active supporter since 1975. She gave evidence concerning the BAE arms deals with KSA, including the Al Yamamah programme, and the cover provided by ECGD. Her evidence addressed, in particular, the public interest in UK arms deals with KSA.

Evidence: Approach to the evidence of civil servants

47. We were urged by ECGD to accept the evidence of the civil servants without reservation. It was submitted that ECGD officials are uniquely placed to determine the likely effect of disclosure upon their actions and that the Tribunal should be very slow to reject the evidence of those who are directly involved in the relevant provision of advice and exchange of views; "such evidence as to what would in fact occur cannot without good reason be disregarded" and ECGD was unaware of any such good reason.

48. The Commissioner did not agree that we were bound to accept the evidence of the ECGD witnesses and we agree that we must also bear in mind the comments of Keith J in *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 at paragraph 29:

> *"… The Tribunal is not required to defer to the views of Ministers or civil servants. The Tribunal is a body with its own specialist expertise which it uses to test the factors favouring disclosure and non-disclosure."*

Whilst we therefore fully acknowledge the particular expertise and experience in the subject matter that the civil servants giving evidence possess, our approach to their evidence does not endow it with any greater weight or significance than that of any other witness.

The Public Interest Test: General Principles

49. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information.

50. We consider that the following principles, drawn from relevant case law, are material, both generally and in with particular reference to section 36 of FOIA, to the correct approach to the weighing of competing public interest factors. We note that the principles established by these cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but remind ourselves that each case must be decided on its own facts.

    (i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld *(Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013) ('Brooke')* (at paragraph 82).

    (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (*DfES*) at paragraphs 64-65).

    (iii) The balance of public interest factors must be assessed "in all the circumstances of the case" (section 2(2)(b) of FOIA). This will involve a consideration of both direct and indirect consequences of disclosure, including "secondary signals" such as loss of frankness and candour, and the damaging effect of

disclosure on difficult policy decisions (see *DfES* at paragraphs 70 and 75).

(iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. Any policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information must be applied flexibly, giving genuine consideration to the particular request (*Brooke* at paragraph 87(2)).

(v) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect (*Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0030). In this case, the effective conduct of public affairs through the free and frank provision of advice and exchange of views for the purposes of deliberation.

(vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. *"A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so."* (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).

(vii) There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The

weight to be given to those considerations will vary from case to case. The cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between (per Mitting J at paragraph 38, *ECGD v Friends of the Earth* [2008] EWHC 638 (Admin))

(viii) Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would or would be likely to inhibit the free and frank provision of advice or exchange of views, weight must be given to that opinion *"as an important piece of evidence in [the] assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.* (*Brooke* at paragraph 91-92)

(ix) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner* EA/2007/0090 (*'DCMS'*) at paragraph 28)

(x) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the Appeal (see *CAAT v*

Information Commissioner and Ministry of Defence EA/2006/0040 at paragraph 53). In this case, the relevant time is the time of the internal review in July 2006.

(xi) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner* EA/2006/0007 at paragraph 50).

The Public Interest Test: Aggregation of public interest factors

51. An additional point arose, regarding the possible aggregation of public interest factors. The Court of Appeal has held[5] that, where several exemptions are in play, having considered each applicable exemption separately, it is necessary to weigh the aggregate public interest in maintaining the exemptions against the aggregate public interest in disclosure. Although this decision was decided under the Environmental Information Regulations, it is clear from the recent High Court decision in *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 161 (Admin) that the Court of Appeal's reasoning applies in the context of FOIA.

52. ECGD submitted that this principle is broad enough to permit the consideration of all relevant public interest factors even where another potentially relevant exemption has not been asserted in order to consider "all the circumstances of the case". It was submitted that it is relevant to consider the extent to which disclosure of the disputed information would cause direct and immediate harm to foreign relations or to commercial interests, even though neither of the exemptions that would exclude such information was engaged in respect of the disputed information.

53. We were not persuaded by ECGD's argument that the principle established in *Ofcom* can be extended in this way and consider that it

[5] *The Office of Communications v Information Commissioner* [2009] EWCA Civ 90 ('*Ofcom*')

applies only in relation to information in respect of which more than one exemption is specifically engaged. We have already identified one of the relevant guiding principles for the application of the balancing exercise as being that the assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which that exemption is designed to protect.

54. We agree with the Commissioner that the approach suggested by ECGD would amount to an impermissible extension of the test in section 2(2)(b) of FOIA, which requires consideration of the balance of the public interest in maintaining "the" exemption. Only section 36(2)(b) is engaged in respect of the disputed information, not section 27 (national security) and not section 43 (commercial information). We were surprised that ECGD did not raise these other exemptions in relation to the disputed information, but sought to rely solely on section 36(2)(b), bearing in mind the evidence we were given placed considerable emphasis on the sensitivity of the information with regards to international relations and/or commercial interests.

55. In this case, the exemption claimed, under section 36(2)(b), and the public interest factors associated with it relate to the effective conduct of public affairs through the free and frank provision of advice and exchange of views for the purposes of deliberation. It is not a catch-all exemption that can be used to embrace, either directly or indirectly, factors such as the potential of harm to foreign relations or to commercial interests. It is acknowledged that they are factors of importance and, for that reason, they were made the subject of these other specific exemptions that ECGD chose not to rely upon in this Appeal. In balancing the public interest in respect of this Appeal, we therefore can only consider factors that are relevant to the specific exemption that is engaged.

The Public Interest Test: Opinion of the qualified person

56. Differently constituted Panels of this Tribunal have considered the relevance of the opinion of the qualified person in assessing the public interest test. In *FCO v IC (EA/2007/0047)*, when rejecting a submission that when considering the balance of public interest the scales should be treated as already having some weight in favour of maintaining the exemption because of the existence of the opinion of the qualified person, the Tribunal said, at paragraph 25,

> *"Clearly a reasoned opinion from a Government Minister may help us to focus on the perceived importance of maintaining secrecy of specific information in a particular context. However, that is just one of a number of factors that we must evaluate and we believe that we would risk distorting our assessment of the overall balance to be achieved if we started from the premise that its very existence had particular inherent significance. The opinion, like any opinion, draws its authority from the reasoning that lies behind it."*

57. In *Brooke* the Tribunal addressed the application of the public interest test to the section 36(2) exemption as a "particular conundrum". It considered that it would be impossible to make the required judgment as to the balance of public interest without forming a view on the likelihood of inhibition or prejudice and concluded, at paragraph 92, that-

> *"In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the*

Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."

58. ECGD submitted that the Commissioner failed to give any weight to the opinion of the qualified person in the assessment of the balance of public interest; although he accepted the reasonableness of the opinion of the qualified person (see, for example, paragraph 27 of the Decision Notice), he effectively concluded that there could be no inhibition on those bound by the Civil Service Code (see, for example, paragraphs 39 and 40 of the the Decision Notice).

59. It is not apparent from the Decision Notice or from submissions before the Tribunal that the Commissioner had, in fact, been provided with a copy of the document containing the opinion of the qualified person. It did not form part of the Open or Closed bundles of material. The Tribunal requested a copy of this which was provided during the course of the hearing. ECGD maintained that as there was no dispute that section 36 was engaged, the opinion of the qualified person was not an essential part of their case. The Commissioner submitted that correspondence between himself and ECGD during his investigation demonstrates that he did have regard to this. We consider that this approach, by both the Commissioner and ECGD, failed to acknowledge the relevance the opinion has to the public interest balancing exercise at the heart of this Appeal. In future cases involving section 36(2)(b) we would expect the Commissioner to have examined the opinion of the qualified person and for a copy of the relevant document to be before the Tribunal.

60. Although we have seen the correspondence between the Commissioner and ECGD during his investigation, for the reasons we have given, we cannot be sure that the Commissioner did, in fact, give

any weight - and, if so, how much – to that opinion in his assessment of the balance of the public interest. If he did, it is not clearly reflected in the Decision Notice.

61. However, having requested and been provided with a copy of the document containing the reasoning of the qualified person, we are able to form our own view, taking into account the rest of the evidence, as to the "severity, extent and frequency" with which the inhibition of the free and frank provision of advice and/or exchange of views for the purposes of deliberation will, or may, occur.

The Public Interest Test: Factors in favour of maintaining the exception

62. In summary, it is ECGD's case that, in carrying out the public interest balancing exercise, the Commissioner placed inappropriate weight on factors favouring disclosure of the information, and failed to give proper weight to factors favouring withholding the information, such that the Commissioner effectively deprived the section 36 exemption of any real meaning or effect.

63. ECGD identified a number of factors in favour of maintaining the exemption, falling into two categories; the long-term consequences of release, insofar as a decision to this effect will create an expectation that similar information should in future be treated in the same way, and the more direct consequences of release in this case.

64. ECGD submitted that the public interest factors which the section 36(2)(b) exemption is designed to protect in this case include:

    (i) The public interest in the effective conduct of public affairs through the free and frank exchange of views by public officials for the purposes of deliberation;

    (ii) The public interest in the effective conduct of public affairs through the free and frank provision of advice to

Ministers by public officials, and in Ministers being as fully informed as possible before reaching a decision, in this case about the risks involved in providing cover to BAE in respect of the Al Yamamah agreement;

(iii) The public interest in meetings about sensitive and significant matters being recorded efficiently and accurately so that information can be disseminated to the relevant persons and a record can be kept in case of subsequent queries or requests for clarification;

(iv) The public interest in the proper assessment of risk by ECGD in order to prevent unacceptable financial loss to the UK taxpayer.

65. ECGD submitted that, although the witnesses' evidence varied somewhat in their assessment of the likelihood and extent of inhibition, nevertheless the witnesses had provided "clear and cogent" evidence explaining that the effect of the disclosure of the passages making up the disputed information would inhibit the preparation of those types of passages in the future. Furthermore, the disclosure of the passages making up the disputed information would have a more general inhibiting effect on the provision and recording of Risk Committee advice in the future, including in relation even to passages of the type that the Commissioner agreed should be withheld.

66. The Commissioner recognised that it will be usually be appropriate to give some weight to evidence that goes to the predicted effects of disclosure and our attention was drawn to the comments made by Mitting J in *ECGD v FOE* [2008] EWHC 638 (Admin) at paragarph 38;

> *"….There is a legitimate public interest in maintaining confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to*

case. It is not part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."

67. This inhibition has been referred to as the "chilling effect" of disclosure. In this case, the inhibition could lead to specific harm, namely, that decisions of Risk Committee and the Accounting Officer would be less well informed, which could affect the accuracy and quality of risk assessment and lead to inadequate terms and conditions being imposed on ECGD's support, incorrect levels of premiums being set and consequent loss to the UK taxpayer.

68. Certainly Mr Radford considered the effect of disclosing the disputed information would be catastrophic. He did not know how the ECGD would manage, how it would conduct its affairs, how it would function to demonstrate it was doing a proper job. He regarded the effect of disclosure being not just "chilling" but a "freezing effect". We found this to be one example of what both the Commissioner and CAAT identified as the exaggerations that characterised his evidence.

69. His evidence was to the effect that if he had known in advance that the Paper would be disclosed, or partly disclosed, he would have altered the parts to which he contributed to make it "more bland, less detailed and less specific". If he had known in advance that the Minutes would be disclosed or partly disclosed he would have "spoken more circumspectly". He qualified this evidence by doubting that this would place him in breach of the Civil Service Code and he stated that he would continue to act with "integrity, honesty, objectivity and impartiality, provide advice based on evidence (as opposed to speculation) and accurately present opinions and facts, albeit not through the medium of Risk Committee papers."

70. We found that claims by Mr Radford and Mr Cauthery that parts of their advice would, in future, only be given orally was exaggerated. Mr Radford accepted that, in many instances, this would not be possible, as he had to have a paper record to demonstrate the analysis undertaken. By "taking the guts out of all the papers" he would not be doing his duty.

71. Along with his exaggerated claims and extravagant language, we also found Mr Radford's demeanour somewhat dismissive towards both the Tribunal and to the significance of the public interest balancing exercise. For these reasons, we found weighing his evidence a particularly difficult task. Ultimately, we could not accept his evidence in its entirety without reservation.

72. Mr Cauthery echoed Mr Radford's evidence that if the disputed information were to be disclosed, this would "inevitably lead to Underwriters and Business Managers such as me toning down underwriting papers". In "toning down" his underwriting papers, he would consider the effects of disclosure on matters relating to exporters, overseas purchasers, HM Government, ECGD, and the UK taxpayer.

73. Mr Croall's evidence concentrated on the reasons for non-disclosure of the Minutes that form part of the disputed information. His evidence was also to the effect that disclosure of Minutes on a matter as sensitive and confidential as Al Yamamah would result in him directing that the Minutes of Risk Committee to become "blander than they are currently and bereft of essential detail"; that is, a deliberate decision by him to exclude potentially relevant material. He accepted that the Minutes would therefore no longer serve the function or achieve the benefits they should, and that would be likely to cause significant harm to the policy and business analysis of future projects and programmes with ECGD. Mr Croall admitted that this would result in more e-mail traffic and matters dealt with on a less formal, un-minuted basis with

Risk Committees only being held and minuted once all the underlying decisions have been made.

74. This approach suggests a misunderstanding of the application of FOIA as the right it provides is the right of access to information held by public authorities. That would include, for example, information contained in e-mails or any other document, not just formal Papers or Minutes of meetings. The provision of written advice and exchange of views may take place by different methods but this would not necessarily remove the possibility of disclosure that Mr Croall wants to achieve.

75. In evidence, it appeared to us that the concerns raised as to the sensitivities of the disputed information and the reasons why it should not be disclosed were focussed on sensitivities surrounding the politically sensitive, that is relations with KSA, and the commercial, that is details relating to the Al Yamamah agreement, rather than any concern on the part of civil servants that their views or advice reflected in the disputed information might be open to wider scrutiny. Indeed, Mr Radford answered questions from one of the Panel to that effect; his concern was not that his views might be subject to public scrutiny but that the information contained in those views could cause harm if revealed.

76. We accept that particular sensitivities exist in relation to KSA but it seemed to us that those sensitivities cannot amount to factors relevant to our consideration of whether the balance of the public interest that lies in favour of maintaining the section 36(2)(b) exemption (that is, specifically, the free and frank provision of advice and exchange of views), outweighs that in disclosing the disputed information. We examine each part of the disputed information in the Confidential Annex to this Decision but consider that, as the exemption relating to international relations is not engaged, these particular sensitivities have no significant application.

77. Despite Mr Radford's unwillingness to accept this, the evidence of any inhibiting effect that would result from disclosure of the disputed information, is naturally speculative; it amounts to the witnesses' opinions as to the predicted effects of the proposed disclosure. Witnesses cannot be sure how they or others will, in fact, behave in practice, particularly those who have important roles within a public authority such as ECGD, who are bound by a Code of Conduct and who are charged with significant responsibilities to protect the public purse. The Commissioner submitted that the Tribunal should therefore assess carefully the concerns identified by the witnesses and consider whether, in all the circumstances, those concerns can reasonably be expected to have the effects suggested. He accepts that section 36 of FOIA envisages circumstances in which inhibition may occur notwithstanding civil servants' professional duties. Such duties are, he submits, highly relevant to the question whether and if so to what extent that inhibition will or may in fact occur and he relied on comments made by other Panels of this Tribunal, for example in *DfES* at paragraph 75, *DCMS* at paragraph 40, *Brooke* at paragraph 107 and *HO v MoJ* at paragraphs 34-35. He submits that the existence of these professional duties can be expected to mitigate the severity, extent and frequency of any inhibition.

78. In reality, it was clear to us, from submissions made during the course of the hearing and from the evidence of the witnesses, that the matter of greatest importance to ECGD was to obtain guidance or even certainty from the Tribunal for its officials as regards future decisions to withhold information under section 36(2)(b) of FOIA. This is not, however, a "test case" – nor can it be - and our decision on this disputed information will have no binding effect on other information held, or created in the future, by ECGD. ECGD can never have certainty that section 36(2)(b), or any other qualified exemption, will apply in all cases to a particular category of information. Even if the disputed information were to be withheld in this case, this would provide no assurance to ECGD that similar information would be

exempt in the future; it would always be subject to the public interest test and public interests may change, for example with the passage of time, a regime change in KSA, a change in relationship with KSA or wider world considerations.

79. Even if officials would act in the way claimed by the witnesses, this is an effect of FOIA itself and not a mere consequence of disclosure in this case. Post FOIA, no civil servant could expect that all information affecting government decision making would necessarily remain confidential. He or she would be aware from then on that its withholding or disclosure would depend on whether it fell within the terms of an exemption, absolute or qualified, and, if the latter, how the public interest balance would be applied.

80. There is no evidence that since FOIA has come into force these chilling effects have in fact occurred. We share the scepticism expressed by other Panels of this Tribunal as to the extent of the "chilling" effects predicted in relation to the impact of disclosure.

> *"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants…" DfES v IC and Evening Standard EA/2006/0006*

We believe that senior civil servants have sufficient courage and independence to continue to give the relevant advice and to exchange views with the same robustness they have in the past, even in the face of potential public scrutiny.

81. Taking these matters into account with our analysis of the evidence, we consider that the claims for the severity, frequency and extent of inhibition on future conduct are weak.

82. Although there may well be some inhibition on the amount of detail recorded in a Paper or Minutes, we consider that in order to provide the advice needed and to ensure that Risk Committee made the appropriate decision, the possibility of disclosure would not cause a significant effect on the way in which officials conducted the necessary work. We are sure that they would not fail in their duties, especially where the public purse was at risk. As regards frequency of inhibition, we consider that to be limited to matters with the particular sensitivities of KSA. It must follow that the fear of causing offence would be extremely limited and there was no evidence that it would extend to other work of ECGD.

83. We have also had regard to the fact that there has been relevant disclosure of similar information of matters connected with the Al Yamamah programme or KSA that has not caused the effects the witnesses are concerned to avoid. There has been accidental disclosure of material to the National Archive, disclosure by ECGD following previous applications by CAAT under FOIA, disclosure by ECGD, with the consent of BAE, to The Guardian. In assessing the extent of the inhibition that would or might result from disclosure we must take into account this undisputed evidence. There is no evidence that there has been any inhibition. Further, there is no evidence that there have been any of the consequences feared by the witnesses as regards international relations.

84. We do not believe that the disclosure of the disputed information, or information of a similar nature, would discourage civil servants from complying with their duties. On the contrary, we agree with the Commissioner that such disclosure and scrutiny may enhance frankness and candour, thereby improving the quality and effectiveness of the decisions of ECGD.

85. In the absence of any decisions from the Commissioner or the Tribunal, it had been assumed by ECGD that such information would not be liable to disclosure under FOIA. The fact that a public authority

acted under a misapprehension as to how the legislation operated does not amount to a public interest factor in favour of maintaining the exemption.

86. We must bear in mind that there is a difference between documents coming into the public domain because they are intended for publication and those disclosed under FOIA or EIR. We consider that civil servants should have been alert to the fact that there would be a risk of subsequent disclosure under FOIA legislation once it was implemented. The fact that a document was not drafted with future publication in mind does not amount to a factor in favour of maintaining the exception and withholding it from disclosure.

87. It is of concern to us that ECGD and its witnesses appeared to be arguing that information generated by and for Risk Committee should effectively be entitled to an absolute exemption; that the public interest in ensuring the free and frank provision of advice or exchange of views would always be so great that it could never be outweighed by public interest in disclosure. Section 36 of FOIA is intended to exempt information based on the effects of its disclosure and not its status. We consider that the evidence given by the witnesses revealed a clear reluctance to accept that Risk Committee papers could ever be disclosed, and a consequent failure to contemplate constructively how the effects of FOIA might be factored into future working practices.

88. It may be that ECGD has to review the way in which it commits matters to writing to ensure that it is able to discharge its duties adequately, including its duties under FOIA. We were concerned to be told that no efforts had been made thus far to review working practices in light of the implementation of FOIA, that there did not appear to be sufficient structures in place to deal with requests made under FOIA and, as was evidenced before us, that there were marked differences within ECGD in regard to what particular pieces of information should be disclosed.

89. ECGD also submitted that the Paper and the Minutes should be considered as a cohesive whole rather than considering paragraphs or sections separately and that partial disclosure could be misleading.

90. ECGD submitted that even if disclosure were ordered of the disputed information, this partial disclosure would "rob the information of much of its essential meaning such that it would not properly be described as the requested information." We disagree with this in two regards.

91. Firstly, the disputed information would still be information relating to ECGD's assessment of the Al Yamamah deal, whether it was a complete reflection of the decision making process or not.

92. Secondly, it is not for a public authority to consider what meaning can be taken from information disclosed pursuant to a request made under FOIA. We therefore do not regard this as a factor in favour of maintaining the exemption.

The Public Interest Test: Factors in favour of disclosure

93. The public interest factors in favour of disclosure were identified by the Commissioner as follows:

> (i)The sales of military equipment to a country located in a region of conflict and to a regime accused of human rights violations were matters of legitimate public concern and debate.
>
> (ii) A substantial sum of public money would potentially be at risk from ECGD agreeing to underwrite parts of the Al Yamamah agreement. This was a matter for legitimate public concern and debate that would be assisted by appropriate transparency of information.
>
> (iii) When public authorities are promoting and defending a particular policy decision (such as underwriting a high value

contract), it is beneficial if the public has a clear understanding of the preceding discussion and advice in order to better gauge the thoroughness and robustness of the policy formulation process.

(iv)Given the high monetary value of the underwriting contract, there was an inherently strong public interest in ECGD being transparent in its policy decisions in order to promote accountability with regard to the commitment of public money.

(v) There was a strong argument that increased transparency would improve the quality of future advice and decisions, and enable the public to judge whether public authorities such as ECGD were acting appropriately. In particular, disclosure of parts of the Paper and Minutes would enable the public to appreciate the quality of the advice and the issues considered prior to the decision.

(vi) There was a continuing public interest in relation to the Al Yamamah agreement and, consequently, a public interest in providing further information to the public about the various issues that were being considered prior to the ECGD's decision.

94. We considered each of these in turn. For ease, we have set out our analysis and findings by linking some of these factors together. We also make reference to these factors in our detailed examination of each part of the disputed information in the Confidential Annex to this Decision.

(i)The sales of military equipment to a country located in a region of conflict and to a regime accused of human rights violations were matters of legitimate public concern and debate, (iii) When public authorities are promoting and defending a particular policy decision (such as underwriting a high value contract), it is beneficial if the public has a clear understanding of the preceding discussion and advice in order to better gauge the thoroughness and robustness of the policy formulation process.

and (vi) There was a continuing public interest in relation to the Al Yamamah agreement and, consequently, a public interest in providing further information to the public about the various issues that were being considered prior to the ECGD's decision.

95. ECGD submitted that there is nothing to suggest that disclosure of the disputed information would have "materially assisted" any public debate about sales of military equipment generally and Al Yamamah specifically. While we agree with the submission that the decision to enter into an agreement to provide military equipment to KSA was not one made by ECGD, the decision of ECGD to enter into a business relationship with BAE that gave support to that decision is still part of the public debate. We consider that there is a strong public interest in UK arms deals abroad, both in the deal itself and in the process by which it is effected. The involvement of a government department, providing a service, and a possible commitment of public money, that enables a private company to pursue a contractual arrangement to provide military equipment and services to another country, regardless of its particular status, is clearly a matter of public concern.

96. That concern is compounded when the country involved is one with a public profile such as the KSA regime. We do not feel that we need to address each of the allegations raised by CAAT as to conflict, corruption and human rights abuses but would note that these allegations are not made by CAAT alone. We have been provided with a selection of newspaper and other articles concerning the Al Yamamah agreement and events surrounding it. We are aware of the abandoning of the SFO investigation into allegations of bribery by BAE in relation to the contract after a threat made by KSA to terminate the contract and to terminate the intelligence and diplomatic relationship with the UK[6]. We consider that the Al Yamamah agreement has caused, and continues to cause, intense public scrutiny and concern.

[6] See *R (Corner House Research) V Serious Fraud Office* [2009] 1 AC 756.

97. In relation to ethical questions about the propriety of providing military equipment to a particular country, ECGD would refer to other authorities, such as the Export Control Organisation or, in the case of a government to government transaction, the Ministry of Defence/Foreign Office, which would apply what is known as the Form 680 procedure to determine whether the UK will export equipment to that particular country. While the disputed information could not, therefore, relate to any detailed consideration of the ethical issues involved, Mr Radford accepted that there is a public interest in what matters were taken into account when deciding whether to do business in a particular region. He indicated that matters suggested by CAAT as relevant may be taken into account, such as the impact of human rights concerns in the context of whether there could be a default and advice that might be sought from the FCO on the UK position regarding business relationships with other countries. We consider that there is great public interest in understanding the different approaches taken and the basis for the decision made by ECGD to offer support to BAE in respect of the Al Yamamah agreement.

98. The disclosure of information by public authorities on request is, in itself, of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. We acknowledge that this is not conclusive and the strength of that interest must be assessed on a case by case basis.

99. ECGD submitted that weight should be placed on the fact that the ECGD's decision making processes are subject to a considerable amount of scrutiny in any event, in particular, by Ministers being accountable to Parliament and through judicial control. However, parliamentary oversight does not provide the public with detailed information of the type sought in this request; disclosure provides an additional, rather than alternative, form of public scrutiny. We were not persuaded by ECGD's submission that the availability of judicial review of decisions made by ECGD provided any support to the argument

advanced that there is sufficient public accountability without there being disclosure under FOIA. Judicial review will only be available where powers are exercised unlawfully, irrationally or unreasonably and cannot consider the merits of a decision or the process by which a decision was reached. We agree with the submission made by CAAT that both the existence of, and the significant challenges involved in bringing a claim for, judicial review favour the public interest in disclosure and not in maintaining the exemption.

100. Additionally, the Commissioner pointed out that there is no evidence of any previous disclosure of information relating to the process by which Risk Committee decides whether to approve cover for a transaction. We agree that disclosure of the disputed information would therefore provide significantly greater insight into that process than presently exists.

(ii) A substantial sum of public money would potentially be at risk from ECGD agreeing to underwrite parts of the Al Yamamah agreement. This was a matter for legitimate public concern and debate that would be assisted by appropriate transparency of information and (iv)Given the high monetary value of the underwriting contract, there was an inherently strong public interest in ECGD being transparent in its policy decisions in order to promote accountability and spending of public money.

101. ECGD submitted that although there is a general public interest in transparency in relation to decisions which affect taxpayers' money, this would not be sufficient to outweigh the countervailing public interest in permitting the disputed information to be withheld. With respect to ECGD, this bald submission fails to acknowledge that transparency in relation to decisions which affect taxpayers' money is just one factor in favour of disclosure which must be balanced with all the other factors in this case. The weight to be attached to that factor will vary from case to case depending on, for example, matters such as the amount of money affected, the body making the decision, other

information available about that decision and the risk of loss to the taxpayer.

102. We do not accept that this is a factor carrying minimal weight but regard it as an important factor in favour of disclosure.

103. In this case, it is not disputed that a decision agreeing to underwrite parts of the Al Yamamah agreement would potentially place a *substantial sum* of taxpayer's money at risk. Ms Feltham suggested that in 2007/2008 the £750million committed in respect of BAE's transactions with KSA was "by far and away the ECGD's biggest liability."

104. Although Mr Radford suggested that the UK taxpayer would only become liable for losses where, and if, ECGD's financial reserves were insufficient, this would still represent a call on public funds. Further, this does not alter the nature of the risk and the fact that a decision was made to take that risk. It therefore seems to us that the public has a clear and compelling interest in understanding, and assessing for itself, the process by which the level of risk assumed on its behalf was reached and the considerations that were taken into account.

(v) There was a strong argument that increased transparency would improve the quality of future advice and decisions, and enable the public to judge whether public authorities such as ECGD were acting appropriately. In particular, disclosure of parts of the Paper and Minutes would enable the public to appreciate the quality of the advice and the issues considered prior to the decision.

105. Mr Radford accepted that generally there is a public interest in knowledge of the processes and degree of scrutiny but argued that it does not apply in this case because of the unique position of ECGD within Government.

106. We note that ECGD no longer provides cover for BAE but that the Al Yamamah programme is ongoing. Mr Radford explained that

provision of cover by ECGD was not essential to BAE's involvement; cover could be obtained from other sources if BAE considered it necessary to seek this from an outside source, but he had to accept that ECGD facilitated that involvement.

107. It therefore is our conclusion that there is significant public interest when a government department underwrites an "arms deal" with public money, in understanding how that decision is made, in the process of how a public authority reaches decisions of importance, and in understanding how a public authority approaches a decision involving KSA, including in a situation where the Serious Fraud Office was conducting an investigation.

108. CAAT submitted that a further factor in support of disclosure was that the public interest included what is in the interests of the people of Saudi Arabia and the interests of those against whom arms may be used.

109. This argument seemed to us to stretch the boundaries of relevant public interests too far. If it is a factor that we should take into account, it is not one to which we attach very much weight.

The Public Interest Test: Where does the balance lie?

110. In passing section 36 of FOIA, we accept that Parliament considered that disclosure of information *could* inhibit the free and frank provision of advice and exchange of views. It does not follow that information will be exempt from disclosure simply because that could be, or would be, the likely effect. Information will only be exempt if the public interest balance lies in favour of maintaining the exemption.

111. ECGD submitted that the problem with the approach taken by the Commissioner is that it denies the premise upon which section 36 is based, namely, that disclosure of information may in fact cause inhibition regardless of the scope of the public servant's duties. Further, that if the Commissioner's reasoning is correct, it would

deprive the exemption in section 36(2)(b) of any real meaning or effect. The same argument is made in relation to the suggestion that civil servants should not feel inhibited in committing information to writing because there is appropriate protection from disclosure.

112. While we acknowledge the public interest in avoiding the "chilling effect" or, as Mr Radford called it, the "freezing effect", we do not consider that in the circumstances of this case and the content of the disputed information, it carries great weight.

113. On the other hand, in relation to factors in favour of disclosure, we have analysed each one and found each carries, at least, some weight with some factors carrying what we have assessed to be great weight.

114. In the Confidential Annex to this Decision we detail our findings in relation to each part of the disputed information.

115. In assessing the public interest, we have therefore concluded that, at the relevant time, the public interest in maintaining the exemption did not outweigh the public interest in favour of disclosure.

Conclusion and remedy

116. For the reasons set out above, we conclude that the Commissioner was right to decide that the public interest in maintaining the exception did not outweigh the public interest in disclosure.

117. ECGD was not entitled to refuse CAAT's request and must now disclose the disputed information.

118. Our decision is unanimous.

Other matters

119. While not a matter that has any bearing on the issues we have to decide, we think it appropriate to comment on the inordinate delay by the Commissioner in this case. As detailed above, although the Commissioner informed ECGD of the complaint by letter dated 22 August 2006, and although FOE requested an update on 5 December 2006, it appears that no case officer was allocated to this complaint until May 2008. It then took a further nine months for the investigation to be concluded as the Decision Notice was not issued until 23 February 2009. There is a suggestion that the Commissioner was delaying commencing an investigation into this complaint pending the outcome of other cases involving KSA before this Tribunal.

120. However, in the Decision Notice, the Commissioner refers to this delay; "Regrettably, due to the heavy workload at the Commissioner's office, the investigation into the complaint did not get underway until Spring 2008." It is clear, therefore, that the delay was not pursuant to any policy to wait for the decision in another case but rather that no steps were taken to fulfil the Commissioner's statutory duty under section 50 of FOIA until approximately 20 months had elapsed since the complaint was made.

121. Concerns have been raised by differently constituted Panels of this Tribunal that such inordinate delays seriously undermine the operation of FOIA. While we are not in a position to identify the cause, or causes, of the delay in this case, we consider that it was excessive and cannot properly be justified by the Commissioner. The delay has meant that this Appeal was not heard until four years after the request for information was made and CAAT has still not received the information that we consider it is entitled to. There do not appear to be any effective methods by which CAAT, or any other Requestor, could challenge the delay by the Commissioner and force him to act in a timely manner. This completely and unacceptably undermines the

spirit of FOIA and the general right of public access to information held by public authorities.

Signed

Annabel Pilling

Deputy Chairman Date: 21 October 2009