

EIR Reg 12(4)(e) – exception: internal communications

Friends of the Earth v IC & Export Credits Guarantee Department

EA/2006/0073

20th August 2007

Cases:

Lord Baker v IC and the Department of Local Government [2007] UKIT EA_2006_0043

Department of Education and Skills v IC & The Evening Standard [2007] UKIT

EA_2006_0006_

Facts

The Appellant, namely the Friends of the Earth (FOE), requested ECGD to provide FOE with information regarding the application of a credit regarding the so-called Sakhalin project relating to the development of oil exploration etc made to the ECGD. In particular FOE requested any and all information received from a number of significant UK Government departments in response to the request regarding the Sakhalin project including but not limited to No. 10 Downing Street, the DTI, UKTI and the Department of International Development. All parties accepted the requested information constituted “environmental information” within the EIR. ECGD maintained that the public interest in disclosure of the notification outweighed the public interest in withholding the information.

However, ECGD concluded that departmental responses to the notification constituted internal correspondence and were, therefore, exempt from disclosure under EIR Regulation 12(4)(e) and that there was a “strong public interest in full and frank provision and discussion of advice within Government because that process makes for better quality decision making”. The notification attached to the ECGD letter stated it was a “politically sensitive case”. The ECGD maintained its response following an internal review relying in addition on the need not to undermine the principle of Government collective responsibility.

The IC referred to and relied upon the need to ensure that Government exchanges engaged what was known as a “safe space” or alternatively what is also called “a private space” policy. “Internal communications” apply to communications between Government departments as well as to communications within a single department so that the exception was engaged. As to the next issue the IC pointed to a number of specific considerations including the principle of collective responsibility that justified the upholding of the ECGD’s decision.

Findings

The Tribunal accepted the IC’s and the ECGD’s contentions that on its true construction article 4(1)(e) of the Directive included communications between Government departments so that the Directive specifically addressed a case in which a

public authority comprises a number of distinct Government departments such as to be properly regarded as a “public authority”.

The Balance of Public Interest

The Tribunal agreed with the earlier decision of *Lord Baker v IC and the Department of Local Government* that there are “dangers” in applying too “rigorously” principles developed with regard to eg section 35 of FOIA to the “quite different language” of EIR Regulation 12. However, the principles governing the weighing of competing public interests in the *DfES v IC* case (supra) did offer “broad guidelines”. In the event the Tribunal determined that the IC’s decision should be overturned.

Two grounds had been advanced for non disclosure, namely collective responsibility and candour. The Tribunal found 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” (see para 61). However, the Tribunal accepted that:

- (1) the relevance of and weight of a public authority’s own views especially those of Ministers will vary from case to case: one important fact will be the stage which the formulation of a particular policy is reached;
- (2) an ultimate Ministerial decision was subject to public scrutiny just as much as the views of officials “along the way”;
- (3) in accordance with the *DfES* case at para 75(iv) of that Decision the timing of the request would be important if not crucial;
- (4) there was no generalised principle that candour could be relied on in relation to the adverse effects on record keeping if disclosure were ordered.

The Tribunal held in this case that:

- (1) when the request was made the project was hardly in its infancy;
- (2) consequently in all the circumstances disclosure would enable the public better to understand the decision making process;
- (3) the ECGD had not properly demonstrated that disclosure of the responses would have impaired the candour attributable to inter departmental deliberations;
- (4) the request in this case was made two years after the date of the responses sought to be disclosed;
- (5) in particular there had been an “in principle” view taken in March 2004 and there was no suggestion that collective responsibility for that decision could be said to be hindered by disclosure given that the responsibilities had in effect been discharged some two years earlier even though technically no final decision had yet been come to regarding the project; and
- (6) on the facts disclosure of at least one response was highly unlikely to cause prejudice in terms of collective responsibility or candour.

Conclusion

The Tribunal allowed the appeal and substituted a new Decision Notice.