

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2018

Public Authority: Export Credits Guarantee Department

Address: 1 Horse Guards Road

London

SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information concerning applications for support by named companies received by the Exports Credit Guarantee Department between 1 July 2014 and 30 June 2015 which disclose the involvement of an agent. The public authority provided the complainant with redacted copies of the application forms requested and confirmed that information (including the names of the relevant companies) was being withheld under sections 41(1)(information provided in confidence) and 43(2)(prejudice to commercial interests). The Commissioner has found that the Exports Credit Guarantee Department is entitled to rely on section 41(1) to withhold the requested information.

Request and response

2. UK Export Finance (UKEF) is the operating name of the Exports Credits Guarantee Department. UKEF is the UK's export credit agency. It exists to ensure that no viable UK export should fail for want of finance or insurance from the private market. It provides finance and insurance to help exporters win, fulfil and ensure they get paid for export contracts. For ease of reference in this notice, the Commissioner will refer to UKEF throughout.
3. On 16 August 2016, the complainant requested the following information from UKEF:

'Copies of all 44 applications received during the period 1 July 2014 – 30 June 2015 disclosing the existence of an Agent.'

4. UKEF acknowledged receipt of the request on 9 September 2016 and informed the complainant that they needed additional time (as a public authority is entitled to in qualified exemption cases) to consider the public interest test as the '*principal relevant exemption*' which applied to the request was section 43(2)(prejudice to commercial interests). UKEF advised that they planned to provide a response by mid-October and that if it took longer than this they would keep the complainant informed. On 20 October UKEF apologised to the complainant for not having met the statutory deadline and advised that they had taken additional time to consult with the companies who had provided the information contained in the application forms in order to consider the balance of the public interest.
5. On 31 October 2016 UKEF provided the complainant with its substantive response. The Department provided the complainant with copies of the application forms requested but with redactions for information exempt from disclosure under sections 41(1)(information provided in confidence) and 43(2)(prejudice to commercial interest). UKEF explained that where the businesses had submitted multiple applications providing the exact same details of agents, they had provided only one copy of the application form. UKEF advised the complainant that one of the companies concerned had asked to know the identity of the requester. The Department advised the complainant that his personal data may be exempt from disclosure under section 40(2) of the FOIA but nevertheless asked him whether or not he agreed to his name being disclosed to the company concerned. On the same date the complainant made a supplementary information request for the names of the companies to which the application forms related.
6. On 1 November 2016 the complainant emailed UKEF and advised that he would agree for his identity to be revealed to the enquiring company only if they agreed to disclose their identity to him in return. The complainant requested an internal review of the decision and advanced the following public interest arguments for disclosure of the redacted information:
7. *'The public interest favours disclosing the requested information in full. That is because the applications you disclosed yesterday contain prima facie evidence of bribery. For example, one applicant disclosed an agent as providing "facilitation" services of 10% of the contract value (page 21). Another applicant disclosed an agent as providing "market entry facilitation" and "transaction negotiations" services for "\$4m over the development phase" and "\$2.5m pa over the duration of the construction phase" (page 24). These descriptions sound like bribery or at the very least they should raise major suspicions. This evidence provides you with a strong public interest argument for breach of confidence.'*

8. On 29 November 2016 UKEF responded to the complainant's supplementary request for the names of the companies concerned. It confirmed that this information was exempt from disclosure under the same exemptions as stated previously (ie sections 41(1) and 43(2)). The complainant requested an internal review on the same date.
9. On 29 December 2016 UKEF provided the complainant with its internal review of the decision of 31 October 2016. The review upheld the application of both exemptions and advised that the relevant companies had been contacted to obtain their views. On review, and in light of the responses received from the companies, UKEF considered that:
 - 1) the release of the redacted information would be considered by certain companies to be an actionable breach of confidence;
 - 2) the release of the redacted information would prejudice the commercial interests of the companies due to the sensitive nature of the information; and
 - 3) the release of the redacted information would damage the commercial interests of UKEF and would damage the trust that UK exporters have in dealing with the Department.
10. The review confirmed that the Department had considered the public interest arguments put forward by the complainant, but that the public interest balance favoured maintaining the exemptions to the redacted information.
11. The Commissioner notes that in neither the original response nor the internal review did UKEF address any specific public interest arguments in favour of disclosure of the withheld information. The internal review entirely failed to address the specific public interest arguments advanced by the complainant. The Department's application of the public interest test was therefore inadequate.
12. On 26 January 2017 UKEF provided the complainant with their internal review of the decision in respect of his supplementary request. The review upheld the exemptions cited to withhold the names of the companies concerned on the same basis as that provided in the internal review of the main request.

Scope of the case

13. The complainant contacted the Commissioner on 4 January 2017 to complain about the way his requests for information of 16 August and 31 October 2016 had been handled.

14. The scope of the Commissioner's investigation has been to determine whether UKEF correctly applied the stated exemptions to withhold the requested information (ie the information redacted from the application forms provided to the complainant and the names of the relevant companies).
15. The Commissioner has had sight of the withheld information, detailed supporting submissions from UKEF, copies of correspondence between the relevant exporters and UKEF and copies of UKEF's policies (not in the public domain) on Anti-Bribery, Due Diligence and Agents. Due to the confidential nature of some of the information provided by UKEF in its submissions, such information is not disclosed or discussed in this notice but is contained in a Confidential Annex. However, most of the submissions provided to the Commissioner by UKEF are detailed and discussed in the main body of this notice.

Reasons for decision

Section 41 – information provided in confidence

16. Section 41 of FOIA states that:

'(1) Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person'.

17. For this exemption to be engaged two criteria therefore have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
18. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgement suggested that the following three limbed test should be considered in order to determine if information was confidential:
 - Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and

- Whether an unauthorised use of the information would result in detriment to the confider.

If the requested information (as here) is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider.

19. The Commissioner is satisfied that the withheld information was provided to UKEF by third parties. The identities of the companies concerned are held by UKEF because they submitted the applications for support to the Department which are the focus of the complainant's request. The Department would not otherwise hold the withheld information. Section 41(1)(a) is therefore met.
20. In submissions to the Commissioner UKEF explained that in order to properly consider the financial risks associated with each export transaction it is asked to support, exporters must provide information about themselves, the overseas buyer and the export transaction. If the export transaction involves an agent, an exporter is also required to provide information which includes the agent's name, address, details of the services it is providing and the value of any remuneration it will receive. Commercially sensitive material relating to the agent; an exporter's commercial arrangements with that agent; and ongoing or prospective negotiations in relation to an export contract (in which the applicant will often be competing against another party) will often be included in the application.
21. UKEF stated that, *'the information provided by exporters in application forms would not otherwise be accessible and we consider that it is not trivial. In particular, the withheld information is commercially sensitive as it indicates commercial positions, commercial relationships and bargaining power, as well as market entry strategies for exporters'*. UKEF stated that this information is clearly important to the confider and as a result, the withheld information had the necessary quality of confidence.
22. UKEF advised that their application forms during the period in scope of the request contained various explicit provisions relating to the confidentiality of information provided to the Department. For example, UKEF advised that it is stated that *'information provided to UKEF shall be so provided on condition that any Confidential Information will be held by UKEF in confidence'* and *'nothing shall imply that the exporter considers any Confidential Information to be disclosable under the Information Legislation'*. UKEF contended that these explicit statements imparted an obligation of confidence on its part, and they advised that the exact wording and position on confidentiality was reached in 2006 following a public consultation by UKEF, *'thereby creating a legitimate*

expectation that UKEF would treat information provided in its application forms as confidential'.

23. In submissions to the Commissioner UKEF confirmed that prior to making a decision as regards the information requested it had sought the views of companies (exporters) who had supplied the information contained in the application forms. Having provided the Commissioner with copies of the representations received, UKEF considered that *'these responses, which were provided at least a year after the information was originally submitted and after the request for information was received, indicate that certain companies would consider the release of the redacted information to be an actionable breach of confidence'*. From the information provided to the Commissioner, it would appear that 29 companies were written to in respect of the request. UKEF advised that it was not possible to obtain responses from all exporters as some did not respond and one was in administration. Of those that did respond, 18 confirmed that they had objections to their confidential and commercially sensitive information being disclosed, and 3 confirmed that they had no objections to their particular information being disclosed.
24. UKEF considered that the responses provided by the companies about the contemplated release of the information clearly indicated the commercial detriment that would be caused if released. It stated that *'other companies, including competitors and those that the exporters do business with, would gain sensitive information about the exporter's operations and strategies. This information is of value and could be used to the detriment of the exporter'*. UKEF confirmed that at the time of its consulting the relevant companies the complainant had not submitted his subsequent linked request to know which companies the redacted information disclosed related to. UKEF advised that the majority of companies consulted identified prejudice to their commercial interest if the information were disclosed, even with their own identity being withheld. The Department stated that, *'the prevailing view formed from the companies consulted was that disclosure of the withheld information would be detrimental to their commercial interests. This could occur through competitors using information to their advantage to poach agents or understand details of contractual arrangements, through a breakdown in relationship between an exporter and their agent, or through unsigned contracts being jeopardised'*.
25. UKEF explained that even with the passing of time, the information retained the quality of confidence as the exporters who provided the information have ongoing relationships and possibly multiple transactions with their agents and other parties. It stated that a number of the transactions and/or agent relationships set out in the applications may be ongoing and active, and release would be likely to jeopardise the ongoing nature of these relationships.

26. By way of further detriment, UKEF contended that UK exporters would *'perversely be likely to miss out on overseas opportunities'* if the confidentiality of information provided to the Department could not be assured. This was because their overseas competitors would be likely to be seen as better able to keep commercially sensitive information confidential, and overseas agents would likely be less willing to provide services to UK exporters because of concerns that their commercially sensitive information would be disclosed. UKEF stated that losing these relationships, which can assist in accessing new markets, would be likely to cause detriment to UK exporters who would need to invest further time and effort into building new agency relationships.
27. UKEF cited the Commissioner's decision notice FS50601388 (an October 2016 decision involving a similar request for confidential and commercially sensitive information relating to agents) and noted that the Commissioner had, in that case, accepted that such information was confidential and provided in circumstances imparting an obligation of confidentiality. UKEF noted that in that case the Commissioner had accepted that knowledge about whether a particular exporter had used an agent would provide *'competitors with commercially useful and confidential information which would be of detriment to the identified confider (exporter)'*. The Department confirmed that it was withholding the names of the companies concerned in the present case on the same basis.
28. The Commissioner is satisfied that the withheld information was provided to UKEF by the companies concerned with the clear and reasonable expectation, given the explicit assurances provided, that it would be treated confidentially and that disclosure of the information would be detrimental to the companies for the reasons described by UKEF above.
29. Although section 41 is an absolute exemption, the law of confidence contains its own built-in public interest test with one defence to a breach of confidence action being that disclosure is in the public interest.

Public interest arguments provided by the complainant

30. In submissions to the Commissioner the complainant contended, (as he had in his internal review request to UKEF of 1 November 2016) that the information already disclosed to him by UKEF (the redacted application forms) contained prima facie evidence of bribery. He stated that:

'A number of the completed application forms describe large, vague commissions and facilitation payments, the latter described as bribery by the Serious Fraud Office (SFO). The SFO's guidance on the 2010 Bribery Act is clear – a facilitation payment is a type of bribe and should be seen as such'.

31. The complainant noted that in one instance a company had responded to the requirement on the form to specify the services which the agent has provided or is providing with just one word, 'facilitation'. The fee for that service was 10% of the contract value. The complainant highlighted further such examples from the disclosed information and contended that, *'disclosure of the requested information would, or would be likely to, expose evidence of bribery; there is surely an overwhelming case for disclosure, particularly of the names of applicants who submitted the suspicious declarations and further details of their agents'*.
32. The complainant provided the Commissioner with examples of 'red flags' which, were they to be present in the withheld information, would, in his view, constitute a sufficiently strong and specific public interest so as to afford UKEF a public interest defence to any potential breach of confidence action. These red flags included:
- *'Large commissions for dubious or nebulous services which may not reflect a genuine commercial transaction (for example, payments for 'introductions', 'contract negotiation', 'relationship building' or 'facilitation', the latter of which the Serious Fraud Office say means bribery'*.
 - *Commissions exceeding 5% of contract value – the ceiling for commission payments above which most export credit agencies will not give support, in line with OECD anti-bribery recommendations.*
 - *Contracts in countries deemed to be high risk for corruption and/or whether reports of allegations of bribery on those contracts are in the public domain'*.
33. The complainant cited a number of articles from *Private Eye* magazine which concerned UKEF and 'facilitation' payments and other 'commissions' paid for *'equally nebulous services'*. Referring to the redacted application forms disclosed to the complainant in the present case, the magazine (November 2016) reported that Corruption Watch, a campaigning group of experts in the field, had looked at the documents and stated that, *'if UKEF signed off on these commissions without any questions asked, they will be at very high risk of having underwritten corrupt deals'*.
34. The magazine stated that, *'the temptation to win business abroad corruptly could grow post-Brexit as UK exporters face higher tariffs and other restrictions'* and cited some examples of controversial recipients of UKEF funding, such as Airbus and Petrobras. The complainant referred to an article in *Private Eye* (April 2017) which reported that OECD inspectors had found that *'in spite of its advanced disclosure requirements, UKEF has never itself detected foreign bribery committed*

by exporters – even though some of the companies receiving support have subsequently admitted that bribery had occurred in relation to UKEF-supported contracts¹.

Public interest arguments provided by UKEF

35. In its submissions to the Commissioner addressing the public interest, UKEF outlined its role in relation to anti-bribery and corruption matters, recognising its bearing on the same.
36. UKEF advised that the general principles which underlie its approach to anti-bribery and corruption were set out in the Government's Final Response to its 2005-06 Public Consultation on UKEF's role in relation to anti-bribery and corruption. UKEF explained that in summary this document sets out two principle policy objectives for UKEF in this area. Namely:
- i) playing a part in HMG's wider efforts to combat and deter corruption; and
 - ii) safeguarding taxpayer funds by taking reasonable precaution to avoid loss through becoming involved in export transactions tainted by bribery.

UKEF stated that in addition to the above was the expectation that UKEF does not promote or support contracts obtained through bribery or corruption.

37. UKEF noted that the Government's Final Response '*recognised that UKEF is not an investigatory body and does not have those statutory powers to investigate bribery possessed by law enforcement bodies. UKEF therefore cannot guarantee that it will be able to uncover incidents of bribery and corruption*'. The Department confirmed that it conducts its own due diligence, '*making reasonable enquiries about a case and the parties to it*'. UKEF advised that it may carry out further checks based on a risk assessment of factors such as jurisdiction and/or the particular circumstances of any given case which raise questions.
38. The Department confirmed that all applicants for UKEF support must, in all cases, provide details about the use of, identity of and payments to, overseas agents. It stated that, '*while the use of agents to secure export contracts is a normal, widely used and legitimate business practice, it is a heightened risk factor and UKEF therefore routinely*

¹ OECD Phase 4 Report: United Kingdom (Implementing the OECD Anti-bribery Convention) 2017

undertakes due diligence on every agent'. This due diligence involves the standard checks but additionally includes obtaining local legal advice to ensure the terms of engagement comply with local laws and regulations, as well as seeking advice and intelligence from local Foreign and Commonwealth Office posts on the agent, including any relationship between the buyer and the agent. UKEF confirmed that it also asks the applicant about the work the agent does, where they pay the agent and how much, and the experience the agent has which makes them suitable for the role in question. If this further information raises additional questions or concerns it will result in further scrutiny by UKEF.

39. UKEF explained that it *'supplements its due diligence by the taking of contractual rights of financial recourse to the applicant, which can be exercised if they subsequently admit to or are convicted of corruption'*. UKEF stated that its deterrent role is further augmented by its publicly stated policy of reporting suspicious circumstances to the Serious Fraud Office (SFO), and by its potentially withholding future support from those found guilty of or admitting to bribery and corruption. Applicants are required to declare that they have not and will not engage in corrupt activity relating to the transaction being supported and that they will monitor this requirement and take appropriate action against anyone who is found to have acted corruptly. Applicants must also report to UKEF details of corrupt or potentially corrupt activity should any subsequently come to light. UKEF explained that it was on account of this declaration, and the obligations which adhere to it, that Airbus was obliged to notify UKEF of discrepancies in the information it previously provided when requesting support, and it was the manner in which UKEF responded to this disclosure, consistent with its stated policies, which led directly to the SFO being notified.
40. The Department advised that it also requires representations by the applicant about its track record on corruption issues, including confirming that neither they nor anyone acting on their behalf is currently under charge or has been convicted within the previous 5 years for bribery offences.
41. The Department advised that the Export Guarantees Advisory Council (EGAC), a statutory Expert Committee independent of UKEF, is tasked by Ministers to oversee the application by UKEF of its ethical policies, including anti-bribery. EGAC routinely addresses anti-bribery, including support for transactions, to be satisfied that UKEF properly implements its obligations, including in transactions involving the use of agents.
42. UKEF confirmed that it applies the OECD Recommendation on Bribery and Officially Supported Export Credits, which establishes the basis upon which member ECAs should seek to deter bribery. The Department advised that unlike many other ECAs (Export Credit Agencies), it applies the Recommendation to its fullest extent, noting that very few routinely

enquire about the existence of overseas agents, as UKEF does before making a commitment to provide support.

43. In respect of the OECD Working Group's Phase 4 Report, referred to by the complainant and published in 2017, UKEF noted that the report recognised that UKEF had *'developed advanced policies to prohibit bribery'*, some of which were *'very far-reaching'* and that these showcased *'higher standards than many members of the OECD Export Credit Group'*. UKEF stated that the complainant had cited less favourable observations from the report² to make a public interest case for disclosure, *'without taking into account that UKEF does not have the statutory powers to investigate bribery possessed by law enforcement authorities and cannot therefore guarantee that it will be able to uncover incidents of bribery and corruption'*. UKEF stated that this point was explicitly recognised in UKEF's response to the 2005-06 Public Consultation, and that the OECD itself ascribes to ECAs a role to deter, not detect, bribery.
44. UKEF stated that:
- 'The complainant appears to imply that the only check carried out by UKEF is to ask the relevant UK overseas diplomatic mission about the standing of that agent. To the extent that this is what the complainant intends to imply, it should be clear from the above that this is an oversimplification of UKEF's procedures and is misleading to the ICO and the public in general'*.
45. In light of the clear SFO guidance concerning bribery highlighted by the complainant, the Commissioner asked UKEF what action/steps it had taken upon receiving the specific application forms in which the complainant considered there was suspicious information.
46. UKEF confirmed that it conducted all necessary due diligence in line with its policies in respect of each of the applications within scope of the complainant's request. The Department confirmed that its policies, which comply with the aforementioned OECD Recommendation, list some of the following information as warranting additional probing, *'ownership structure of the agent or country of incorporation, the amount of agent's commission which is payable, listing of individuals or companies involved in the transaction on the World Bank List of Ineligible Firms and/or involvement of a politically exposed person'*. UKEF advised that its approach to due diligence *'includes additional scrutiny around risk factors such as relatively high payments to agents*

² See paragraph 34

as a proportion of total contract value, which the complainant has cited as a factor in favour of disclosure'.

47. The Department advised the Commissioner that the complainant was mistaken about the terms of the OECD Recommendation on this subject, as *'The Recommendation does not set any ceiling on commissions, let alone one of 5%'*. Rather, UKEF stated that the OECD's 2015 Review of Responses to the Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits *'simply notes that a small number (3) of ECAs apply a commission ceiling of 5%'*. The Commissioner addresses this correction in the Confidential Annex³.
48. UKEF noted that the complainant had contended that at least two of the applications within scope of his request should have raised suspicions. Specifically, the applicant disclosing an agent as having provided *'facilitation'* services for 10% of the contract value and another applicant disclosing that an agent provided *'market entry facilitation'* and *'transaction negotiations'* services for *'\$4m over the development phase'* and *'\$2.5m pa over the duration of the construction phase'*. The Department confirmed that neither application received UKEF support and for each of them UKEF carried out all necessary due diligence according to its policies up to the point at which the applications were closed as not proceeding. UKEF provided the Commissioner with a detailed account of the due diligence actions taken, and these are contained in the Confidential Annex. However, it is important to be clear that in neither instance did UKEF discover information which would have warranted a referral(s) to the SFO.
49. The Department noted that the complainant had mentioned *'only one term'* (*'facilitation'*) which relates to the Bribery Act 2010 and the SFO guidance, and stated that *'even in that case, the Act and the guidance explicitly focuses on payment and refers to a fuller and narrower formulation ('facilitation payment') than the term actually used'*. UKEF contended that the term *'facilitation'* (as distinct from *'facilitation payment'*) *'has common and legitimate everyday meaning, i.e. the act of facilitating something or making or assisting something to happen'*. However, the Commissioner would note that neither term would satisfy UKEF's own Agent and Agent's Commission policy⁴. Indeed, the Department's submissions confirmed that the application containing the description of the service provided as *'facilitation'* was incomplete and

³ Paragraph 5 of Confidential Annex

⁴ Paragraph 6 of Confidential Annex

after conducting all necessary due diligence on that point, did not proceed and UKEF did not provide any support.

50. UKEF stated that it did not accept that the complainant had been able to substantiate which commissions were 'vague' nor how the descriptions might contravene UK legislation or the SFO's guidance. The Department observed:

'It should be noted that the complainant himself is unsure what the information in the applications represents, referring to it at one stage as 'prima facie evidence of bribery' and later asserting that 'these descriptions sound like bribery or at the very least they should raise suspicions'. The complainant is not privy to any due diligence that was carried out on any of the applications, nor any other relevant information that UKEF may have drawn on to inform its decisions. A decision on whether or not to report to a law enforcement authority would rely on a consideration of all of that information'.

51. The Department stated that it had considered the public interest in disclosing the withheld information (despite not having acknowledged such public interest in its correspondence with the complainant). UKEF recognised that, *'there is a public interest in transparency and knowing what exports UKEF supports when it uses public money. Furthermore, there is a public interest in knowing that UKEF applies its anti-B&C policies that were agreed following a public consultation'*. UKEF acknowledged that issues of bribery and corruption are a subject of interest in the press, and the Commissioner notes that companies which UKEF has previously supported, such as Rolls-Royce and Airbus, have been or are being investigated by the SFO⁵.
52. UKEF stated that it seeks to meet appropriate levels of transparency and since 2000/01 has published a list of export transactions on an annual basis in its Annual Report and Accounts, including details such as the identity of the exporter, supplier, destination market, description of the goods involved and the maximum financial liability that has been

⁵ <https://www.theguardian.com/business/2017/feb/05/rolls-royce-faces-civil-service-inquiry-over-uk-state-funding>

<http://www.independent.co.uk/news/business/news/airbus-bribery-investigation-launched-by-serious-fraud-office-a7178326.html>

assumed⁶. UKEF considered that the public interest in understanding how public money is being used to help facilitate export transactions is met in this way, but the Department does not routinely disclose other information (such as agent related information) which if made public could be detrimental to the exporter or to other parties, including, in some instances, UKEF and the Exchequer.

53. In respect of the information falling within the scope of the complainant's request UKEF confirmed that it determined that there is a public interest in understanding what services agents may have provided and at what cost, for export transactions that UKEF had supported. However, UKEF did not consider that the public interest in transparency of this information was greater than the public interest in protecting the commercial interests of the exporters who provided the Department with the confidential and commercially sensitive information and whose commercial interests would be prejudiced by a full disclosure of the information which would allow for them and their contractual relationships to be specifically identified. For this reason, UKEF explained that it had balanced both sides of the public interest, by disclosing information that would not reveal the identity of specific exporters or agents and thus avoid commercial prejudice.
54. In deciding to redact (withhold) certain confidential and commercially sensitive information in a consistent manner, UKEF confirmed that it took into account the individual views of the exporters, as well as its own interest in the continued ability to deliver its mandate and the interests of third parties.
55. Whilst accepting that there is a public interest in knowing what support UKEF has provided to businesses, UKEF contended that *'the same level of public interest does not apply to export contracts for which businesses may have applied for UKEF's support but not received it'*. UKEF noted that a large number of applications within scope of the request did not progress to the stage where UKEF extended support. UKEF submitted that disclosing such information *'would undermine the principle of confidentiality, discouraging businesses from seeking UKEF support or providing information for fear that such confidences would not be respected'*.

⁶ UKEF advised that the one exception is for export transactions supported by an Export Insurance Policy where releasing the identity of the seller and buyer would cause commercial prejudice to the exporter and UKEF through the moral hazard of non-payment by the overseas buyer who comes to the knowledge that the transaction is backed by insurance.

56. UKEF noted that *'a large number of the applications within scope of the request did not contain any of the complainant's suggested 'red flags', nor do they meet any of the criteria that UKEF applies to qualify for additional probing'*. The Department stated that the use of agents is a legitimate and normal business practice, and indeed, for many exporters, particularly smaller exporters without the resources to maintain overseas offices, they have to be represented by agents in order to help win export orders.
57. For all the applications within scope of the request, UKEF confirmed that it had considered whether there may be a public interest defence to an action for breach of confidence (and/or public interest argument in favour of disclosure under section 43(2)). The Department had concluded that there are not sufficient public interest reasons for disclosing the information. UKEF accepted that agents could possibly be a conduit for paying bribes and stated that it is for that very reason that it requests this information from exporters and has policies in place to carry out anti-B&C due diligence.
58. UKEF addressed the complainant's contention that disclosure of the withheld information would, or would be likely to expose evidence of bribery and therefore disclosure would enable the public to form their own view on whether bribery and corruption had taken place. It stated:
- 'This argument does not address the fact that it is the law enforcement authorities' responsibility to address the payment of bribes, including through commissions paid to agents, not the general public who, in any event, would not be well placed to make a judgement about the appropriateness of the commissions without full knowledge of all the relevant facts, only some of which would be contained in the application form'.*
- The Commissioner considers that the public interest in preventing and tackling the payment of bribes is not restricted to the relevant law enforcement authorities. It could be counter-argued that if the public were provided with full details of the facts concerning any contract involving commissions paid to agents, then such transparency might dispel any unfounded or undue concerns or criticisms about such payments.
59. UKEF cited the responses received from the relevant exporters, in that a significant number of them considered that the release of the withheld information would be a breach of confidence (and/or prejudicial to their commercial interests).
60. In view of the above, UKEF advised the Commissioner that it was not persuaded that there is a public interest in publishing confidential and commercially sensitive information that would prejudice UK exporters,

agents and UKEF, in order for there to be a public audit of the withheld information alongside UKEF's anti-B&C due diligence obligations. The Department contended that, *'there is a strong public interest in protecting the free flow of information between UKEF and businesses in order to enable UKEF to perform its statutory function of supporting export businesses, and to perform due diligence to deter corruption and safeguard public funds'*.

Balance of the public interest arguments

61. The Commissioner recognises that bribery and corruption are seriously inimical to the public interest. Like all public authorities, UKEF has a duty and responsibility to ensure that taxpayer monies are not used to fund corrupt or illegal practices and the Department's approach to anti-bribery and corruption were set out in the Government's Final Response⁷ to its 2005-06 Public Consultation on UKEF's role in this area.
62. That response made clear that *'the responsibility for the detection, prevention and suppression of criminal offences resides with law enforcement bodies, who carry out investigations when appropriate'* (page 13) but stated that *'it is legitimate and appropriate nevertheless for ECGD, in view of both the moral and business cost of corruption, to play a wider part in that effort than one restricted solely to the protection of the Exchequer interest in transactions to which it makes a commitment'*. However, the Response stated that this wider role *'does not extend to its conducting a more thorough-going pre-contract investigation of the potential existence of bribery and corruption. As a result, it cannot guarantee to expose every incident of bribery and corruption'*. The Response was clear that *'whilst ECGD is not an investigatory body, and this imposes restrictions on what it can do, it should do all it reasonably can to avoid taxpayer's money being used to support transactions tainted with bribery and corruption, and to support wider efforts to deter these practices'*.
63. It is therefore important to put the complainant's public interest arguments into the correct context. That context, as submitted by UKEF in submissions and supported by the Government's Response above, is that UKEF's role is to *deter* bribery and corruption, rather than detect such activity.

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http://webarchive.nationalarchives.gov.uk/20080609160914/http://www.ecgd.gov.uk/lrgtxt/index/pi_home/pi_pc/final_response_to_ecgd_public_consultation.htm

64. In support of his arguments for disclosure of the withheld information, the complainant has cited certain comments from the OECD Phase 4 Report into the UK's implementation of the OECD anti-bribery convention, in which the lead examiners, although finding that some of UKEF's policies in this area are '*very far-reaching*' and '*showcase higher standards than many members of the OECD Export Credit Group*', questioned '*how effective UKEF policies are in practice*'. The examiners noted that in spite of its advanced disclosure requirements, '*UKEF has never **itself detected** (Commissioner's emboldening) foreign bribery committed by exporters – even though some of the companies receiving support have subsequently admitted that bribery had occurred in relation to UKEF-supported contracts, nor has UKEF turned down an application from an exporter following due diligence on its agents*'. However, given that UKEF is not an investigatory body and its role is to *deter* rather than to detect bribery and corruption (an important distinction) the Commissioner considers that the above critical commentary by the OECD lead examiners is at variance with UKEF's role in this area.
65. The Commissioner notes that the complainant's public interest arguments in this case were prompted by sight of the redacted application forms provided to him by UKEF. The wording and content of some of the forms (eg 'facilitation') in respect of the services provided by the relevant agent, are what led the complainant to assert, based on the relevant SFO guidance, that they are either '*prima facie evidence of bribery*', or '*sound like bribery*'. UKEF submitted that there is a difference between the descriptors 'facilitation' and 'facilitation payment'. However, the Commissioner notes that neither descriptor (without more) would be sufficient to comply with the level of detail required by UKEF's policy in respect of agents and agent's commission.
66. Therefore, if it were the case that UKEF had accepted such un-specific agent related information (in the cases flagged by the complainant as being suspicious) '*without any questions asked*', as hypothesised by Corruption Watch, then the Commissioner would agree that there would be a real risk that UKEF could find itself underwriting a corrupt deal(s). In the absence of information as to the due diligence steps/action taken by UKEF in these specific applications, the complainant appears to assume that no such due diligence was undertaken. Had this actually been the case, the Commissioner would agree that there would be a strong public interest in the withheld information since UKEF would not have adequately discharged its deterrence role in respect of bribery and corruption (or adhered to its own policy) with regard to the specific applications.
67. In actual fact, as the Department confirmed in confidential submissions to the Commissioner, UKEF carried out all necessary due diligence according to its policies in the applications highlighted by the

complainant⁸, up to the point at which both applications were closed as not proceeding. Since neither application received financial support from UKEF, the Commissioner considers that the public interest in transparency and accountability of the withheld information is significantly reduced.

68. In submissions to the Commissioner the Department has recognised and accepted that there is a public interest in knowing what support it has provided to exporters, but has contended that *'the same level of public interest does not apply to export contracts for which businesses may have applied for UKEF's support but not received it'*.
69. The Commissioner would agree that there is clearly a difference in the public interest of transparency and accountability between applications which do and do not receive financial support from UKEF, this being stronger in the former instance. The Commissioner considers that this public interest is appropriately and proportionately met through the information published by UKEF in its Annual Report and Accounts (which includes the identity of the exporter and the maximum financial liability assumed).
70. However, as the Department has acknowledged, there is also a public interest in knowing that UKEF applies its anti-bribery and corruption policies that were agreed following a public consultation. In fairness to the complainant, the Commissioner recognises that he (and other members of the public) is not privy to the details of the due diligence measures undertaken by UKEF in those applications which he 'red flagged' as being suspicious. Whilst there is, as UKEF has recognised, a public interest in *knowing* that the Department has applied its policies in this area, the Commissioner considers that there is also a public interest of transparency and accountability in knowing *how* UKEF applies its due diligence policies, especially as regards applications of the type highlighted by the complainant.
71. However, the Commissioner considers that this specific public interest must be balanced against the strong public interest in ensuring that the UK's finance and insurance system for exporters is not undermined and that exporters are not placed at a competitive disadvantage to their international competitors.
72. The Commissioner has previously recognised the importance of protecting confidentiality in similar situations to this case. In FS50525689 (a case which concerned the Export Control Organisation

⁸ Details contained in Confidential Annex

(ECO) – part of the then Department for Business Innovation and Skills) the Commissioner found that, *'there is a strong public interest in the export licence application process operating effectively and ensuring that exporters who are applying for licences properly cooperate and engage with government departments. The Commissioner accepts that if information provided as part of the application process is disclosed, in this case the identities of two companies, this would undermine DBIS' confidentiality obligations and undermine the process'*. In the above case (as in the Commissioner's later decision in FS50601388) the Commissioner was satisfied that there was a strong public interest in maintaining the obligation of confidence and that this public interest outweighed the public interest in disclosure of the relevant information.

73. The importance of confidentiality to the export licence application process, and the reasonable expectation that companies have that UKEF will treat information provided as confidential, is clear from the Government's Response, where it is stated (at page 28) that, *'ECGD will scrupulously operate the provisions of the Freedom of Information Act which provide exemptions, amongst others, for information protected by the law of Commercial Confidence. Information which is properly protected by the law of Commercial Confidence will not be liable to publication by virtue of that Act'*.
74. The Commissioner considers that the public interest in knowing how UKEF has complied with its due diligence policies in respect of anti-bribery and corruption is appropriately and proportionately met through the independent oversight of EGAC, which routinely addresses anti-bribery, including support for transactions, to be satisfied that UKEF properly implements its obligations, including in transactions involving the use of agents. The Commissioner considers that the additional public interest which would be served by disclosure of the specific withheld information in this case (agent details and identities of the connected companies concerned) is outweighed by the strong public interest in maintaining the confidentiality of UKEF's application process and she does not consider that UKEF would have a public interest defence for breaching its clear and explicit duty of confidence to the exporters concerned. The Commissioner is therefore satisfied that UKEF correctly withheld the residual redacted information under section 41(1). Having reached this finding, the Commissioner has not gone on to consider the Department's application of section 43(2).

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Signed

Gerrard Tracey
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Wycliffe House
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