

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 18 December 2008

Public Authority: Royal Mail Group PLC
Address: 148 Old Street
London
EC1V 9HQ

Summary

The complainant made a request to Royal Mail Group PLC (the "Royal Mail") under the Freedom of Information Act 2000 (the "Act") for how much money it had spent on management consultants over the previous five years. The Royal Mail confirmed that it held information relevant to the request, but stated that it believed that it was exempt from disclosure under section 43(2) of the Act. After investigating the case the Commissioner decided that section 43(2) was not engaged, and the information requested should be disclosed. He also found that Royal Mail had acted in breach of the requirements of section 17(1)(b).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. The complainant emailed the Royal Mail on 2 July 2007 and requested the following information under the Act,

"Could you please tell me how much you have spent on [named consultancy] and all other outside consultants over the past five years?"

The consultancy named in the request will be referred to as "the named consultancy" throughout the rest of this Notice.

3. The Royal Mail responded in an email dated 25 July 2007 and confirmed that it held information relevant to the request. However, it stated that it believed that

this information was commercially sensitive and was exempt from disclosure under section 43(2) of the Act. In support of its use of this exemption it stated that,

“I have taken into account your comment that some public authorities have released similar information under the Act, however Royal Mail Group operates under wholly different circumstances. As a public limited company it competes in a fully liberalised and highly competitive market on strictly commercial terms. Our investment in consultancy is taken as a commercial decision and publishing the level of this investment, information that our competitors are not themselves obliged to publish, would prejudice Royal Mail's operations.”

4. The Royal Mail acknowledged that this exemption was subject to a public interest test, but argued that it believed that the public interest lay in maintaining the exemption, and stated that,

“There is a strong public interest in protecting the commercial viability of Royal Mail Group and in maintaining fair competition in the postal market, and having to disclose this information would prejudice that.”

It informed the complainant of her right to request an internal review, and her right to complain to the Commissioner.

5. In an email dated 27 July 2007 the complainant asked the Royal Mail to carry out an internal review of this decision.
6. The Royal Mail carried out an internal review and responded in an email dated 31 August 2007. It informed the complainant that her request had been considered by a Review panel, which had upheld the use of section 43(2). It stated,

“In your appeal you argued that disclosing the information requested is in the public interest, because Royal Mail is publicly owned and has received public money. You have also previously pointed out that other public authorities have disclosed similar information.

Both of these points were taken into consideration in the review. However, the Panel also noted that although Royal Mail is wholly owned by the Government it is a limited company operating on a profit and loss basis. In Royal Mail Letters our revenue funds the business and the provision of the Universal Service Obligation, with Government investment for modernisation provided purely on commercial terms. Therefore arguments for and against disclosure of information and accountability for 'spending public funds' apply differently. Royal Mail operates in a commercial market in the same way that private sector companies do, and there is a strong public interest in ensuring that Royal Mail is able to compete fairly in this market on similar terms to its competitors. This requires protection of commercially sensitive and confidential information in the same way that our competitors would protect their commercial interests.”

It went on to state that having considered the request the Review Panel had concluded that section 36 also applied, as it believed that disclosure of the withheld information would prejudice the effective conduct of public affairs. Finally it stated that the public interest was best met by maintaining both of these exemptions.

The Investigation

Scope of the case

7. On 25 September 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
8. Although not raised by the complainant the Commissioner has also considered whether the Royal Mail has complied with the requirements of section 17.

Chronology

9. The Commissioner wrote to the Royal Mail on 2 July 2008 and requested a copy of the withheld information. In relation to section 43(2) he asked it for further submissions to support its use of this exemption. He also asked it to provide further arguments as to why it believed that the public interest in maintaining this exemption outweighed the public interest in disclosure.
10. The Commissioner wrote to the Royal Mail again on 25 July 2008, and asked it some additional questions in relation to its use of section 36. He asked it to confirm which part of section 36 it was seeking to rely upon, and to confirm that the decision to apply this exemption had been made by the 'qualified person'. He also asked it to provide further information regarding its use of this exemption. He asked for a response to both his letters by no later than 26 August 2008.
11. The Royal Mail wrote to the Commissioner on 18 August 2008 and informed him that it would be unable to meet this deadline. It asked for an extension to the deadline until 2 September 2008.
12. The Commissioner contacted the Royal Mail by email on 19 August 2008 and confirmed that he would extend the deadline for a response until that date.
13. The Royal Mail contacted the Commissioner by email on 2 September 2008 and asked for a further extension to the deadline. The Commissioner agreed an extension until 9 September 2008.
14. In a letter dated 9 September 2008 the Royal Mail responded to the Commissioner. It provided a copy of the withheld information, together with its submissions in relation to section 43(2). It informed the Commissioner that as well as believing that the disclosure of the withheld information would be likely to prejudice its own commercial interests, it also believed that disclosure would be likely to prejudice the commercial interests of the named consultancy. It informed

the Commissioner that this third party also wished to provide submissions regarding the likelihood of potential prejudice to its commercial interests. In relation to section 36 it informed the Commissioner that upon reflection it was no longer seeking to rely upon this exemption, and was relying solely upon section 43(2).

15. In an email dated 12 September 2008 the Royal Mail provided the Commissioner with further submissions from the named consultancy as to why it believed that the disclosure of the withheld information would be likely to prejudice its commercial interests.

Analysis

Procedural matters

Section 17

16. The Commissioner has initially considered whether the Royal Mail has complied with its obligations under section 17(1) of the Act.
17. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice which
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
18. In the internal review the Royal Mail informed the complainant that it was relying upon 'section 36'. However, it did not refer to the specific sub-section number of section 36. For this reason the Commissioner believes that the Royal Mail did not comply with section 17(1)(b).
19. The full text of section 17 can be found in the Legal Annex at the end of this Notice.
20. The Commissioner has gone on to consider the Royal Mail's application of section 43(2).

Exemption

Section 43

21. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
22. The full text of section 43 can be found in the Legal Annex at the end of this Notice.

23. The Commissioner accepts that Royal Mail is a publicly owned company which is engaged in commercial activities and that the information requested relates to those activities. He also accepts that the information relates to the commercial activities of the named consultancy. Therefore he believes that the information in question falls within the scope of the exemption.
24. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of either of these parties.
25. During the investigation of this case the Royal Mail confirmed to the Commissioner that it believed that the disclosure of the withheld information would be likely to prejudice the commercial interests of itself and the named consultancy. In other words, the limb of the prejudice test upon which it was relying was “would be likely to prejudice” rather than “would prejudice”.
26. Therefore the Commissioner has considered whether the disclosure of the withheld information would be likely to cause prejudice to the commercial interests of either Royal Mail or the named consultancy.
27. In reaching a decision on the question of prejudice the Commissioner has been mindful of the test of ‘likely to prejudice’ as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073*, and followed by the Information Tribunal in the case of *John Connor Press Associates Limited V The Information Commissioner*, where the Tribunal interpreted the expression ‘likely to prejudice’ within the context of the section 43 exemption as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility, that there must have been a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such that there ‘may very well’ be prejudice.”¹
28. The Commissioner has first considered whether disclosure of the withheld information would be likely to prejudice the commercial interests of the Royal Mail.

Prejudice to Royal Mail

29. In its letter to the Commissioner the Royal Mail argued that the disclosure of the withheld information would:
 - be likely to damage its business reputation, and
 - limit its decision making.

These effects would, in turn, be likely to prejudice its commercial interests.

30. In relation to the potential damage to its business reputation the Royal Mail argued that it was,

¹ EA/2005/0005.

“...particularly concerned that customers, especially consumer customers, would view the use of management consultants negatively and that the information provided would be reported in an adverse way, with a corresponding negative impact on consumer perception.”

31. It argued that figures relating to its operations were often reported by the media out of context and in a negative manner, which in turn damaged its business reputation. It stated that,

“...we therefore believe it is reasonable to expect that the information will be used to generate adverse publicity for Royal Mail, and that this publicity will have a negative impact on the perception of Royal Mail's customers regardless of the additional context that may be provided.”

32. It argued that this potential impact on its business reputation would, in turn, impact on customer satisfaction and give rise to adverse publicity. Low customer satisfaction is not only likely to impact on the customer's use of postal services, but also to the extent that they will recommend Royal Mail's services to others. It stated that the probable consequence of this would be that, “low advocacy rates and negative perceptions of the service are highly likely to impact on the use of Royal Mail's services.”

33. This, the Royal Mail believed, would be likely to prejudice its commercial interests. It pointed out that it no longer operated with a monopoly in any area of the postal market, and relied upon its business brand in this highly competitive market.

34. In concluding this argument the Royal Mail stated that,

“Consequently, we consider that damage to customer confidence is likely to prejudice Royal Mail's commercial interests. Customers have alternative choices to using Royal Mail, and therefore negative perceptions of Royal Mail (even if inaccurate) could spur customers to use an alternative...Royal Mail is dependent on customer loyalty for its commercial success and must guard its relationship with its customers carefully.”

35. The Royal Mail also argued that the impact that the publishing of a breakdown of its budget allocation and/or aggregated spend in certain areas would have on its decision making would, in turn, be likely to prejudice its commercial interests.

36. It stated that if it was required to routinely disclose its budget allocation and/or aggregated spend, this would lead to press coverage of these figures. Consequently it would need to take into account the probable impact of disclosure when making decisions which result in budget allocation or spend, and, “this would be likely to limit Royal Mail Group's ability to develop its business strategy and hence its competitiveness in an open market.”

37. It went on to argue that the way in which information such as this would be interpreted (were it to be disclosed) would be a serious factor that it would have to

take into account if such information were to be routinely published on demand. This would place constraints on the activities of the Royal Mail, and prejudice its ability to take business decisions, which would in turn have a negative impact on its commercial interests. It also pointed out that its competitors are not subject to the Act, and therefore would not themselves be subjected to similar constraints.

38. The Royal Mail went on to argue that the disclosure of the withheld information may disclose to its competitors certain elements of its future business plans as,

“Companies such as [the named consultancy] are also known to specialise in specific areas of management consultancy and therefore a noticeable increase in the level of spend in certain areas would in itself provide insight to Royal Mail’s strategic priorities.”

39. In conclusion the Royal Mail argued that,

“...it is critical that decisions regarding the level of investment in given areas are taken based on commercial expertise and the internal business strategy developed by the company. Royal Mail, as with any other commercial organisation, needs free space within which it can develop its business strategy and the ability to take decisions that are right for the future success of the company. Having to factor the extent to which these decisions may or may not be popular to a very wide audience will inevitably hinder this process...Publishing this information for Royal Mail Group but no other postal operator would therefore adversely affect the ‘level playing field’ required in the postal market. It would place additional constraints on Royal Mail Group’s commercial decisions that inevitably would place it at a commercial disadvantage to its competitors, who are not themselves subject to the [Act] and would not face similar constraints.”

40. The Commissioner has reservations about the Royal Mail’s approach to the application of this exemption in regard to the potential prejudice to its commercial interests. Its arguments appear to be promulgated on the idea that this *kind* of information should not be disclosed, as it may be misreported, which in turn may lead to customer dissatisfaction and damage to its business reputation. This suggests a blanket approach to the use of this exemption – i.e. that it is applicable to any information of this type. This is clearly not what is intended in the Act. The Royal Mail has provided little specific argument as to how the release of the specific information requested would be likely to cause the prejudice described in its letter to the Commissioner, and even where specific reference is made, there is insufficient demonstration of the causal link between the release of the specific information and the likely prejudice.

41. Section 43 is a prejudice based exemption, not a class based exemption, and as such the correct interpretation of the application of this exemption is whether the disclosure of the actual withheld information (as specified in the request) would have the potential to cause the prejudice as described in the exemption. Simply put, the question should not be: ‘what would happen if this sort of information were to be disclosed’, but should instead be the narrower question: ‘what would happen if this particular information were to be disclosed’. The distinction can

often lead to a different outcome as the question requires a much more specific consideration of the relevant factors in the particular case. The Commissioner has therefore considered the application of this exemption specifically in reference to the information withheld in this case.

42. In reaching a view on the Royal Mail's arguments, and whether the disclosure of the withheld information would be likely to cause the prejudicial effects as referred to above, the Commissioner has first of all considered the nature of the withheld information.
43. In this case the withheld information is the total aggregated figures for how much money the Royal Mail spent on the named consultancy, and other management consultancy companies, over a specified five year period. The information contains no detailed breakdown of spend, no details of individual projects the money was spent on or details of contracts between the public authority and these companies, and no details of the fees charged by the different consultancy companies.
44. The Commissioner is not convinced that, given the high level nature of the withheld information, it is as commercially sensitive as the Royal Mail has argued.
45. Given this, the Commissioner does not find the Royal Mail's arguments persuasive. In relation to its argument that customers may view its use of management consultants in a negative way he notes that it has not refused to confirm or deny whether it used management consultants during the period in question (in the refusal notice it confirmed that it held information which fell within the scope of the request).
46. In relation to the argument that the information might be misreported (which would in turn damage customer confidence and business reputation, leading to a likely prejudice to its commercial interests), the Commissioner again notes the general nature of the Royal Mail's arguments – that no information of this type should be disclosed, in case it is misreported or damages consumer confidence. The Royal Mail has provided no solid evidence as to how the disclosure of the specific information requested in this case would cause (or be likely to cause) the prejudicial effects it has described. Given the general nature of the withheld information, the Commissioner is not persuaded by the arguments of the Royal Mail.
47. In relation to the Royal Mail's arguments about the potential impact on its decision making the Commissioner again notes the nature of the withheld information. Given this, and after considering the details of the Royal Mail's arguments, he does not believe that the aggregated figures of spend on management consultants over a five year period could reveal the strategic priorities of the Royal Mail. Nor is he persuaded that disclosure would constrain the Royal Mail's decision making, development of business strategy, or allocation of budget, were these aggregated figures disclosed. Bearing in mind the nature of the withheld information, the Commissioner simply does not accept that its disclosure would be likely to have the prejudicial affects on decision making as argued by the Royal Mail.

48. Therefore after considering the Royal Mail's arguments, the nature of the withheld information, and the test of likelihood of prejudice (as described in paragraph 27 above), the Commissioner is not persuaded that the disclosure of the withheld information in this case would be likely to cause the prejudice as argued by the Royal Mail.
49. The Commissioner has now gone on to consider the potential for prejudice to the commercial interests to the named consultancy.

Prejudice to the named consultancy

50. During the course of the investigation the Royal Mail presented the Commissioner with further arguments as to why it believed that the disclosure of the withheld information would be likely to prejudice the commercial interests of the named consultancy.
51. These arguments were:
- The fees paid by clients are business secrets.
 - The market is highly competitive, and details of fees charged by the consultancy company would be of use to its competitors, which would therefore be likely to cause prejudice to its commercial interests.
 - "The disclosure will reveal not only the potential market to competitors but may well better inform them of the likelihood of supplanting [the named consultancy] and the terms which would enable them to do so."
 - Disclosure would place the named consultancy at a disadvantage in retaining work from the Royal Mail, and bidding for other work in the postal sector in the UK and elsewhere.
 - "Free access to accurate data would be *undoubtedly* immensely valuable to competitors and actual or potential clients. Competitors would benefit at the expense of [the named consultancy] owing to their knowledge of [the named consultancy]'s fees; customers would improve their bargaining position at the expense of [the named consultancy] by reference to whatever benchmark may have been established by the disclosure."
52. In considering these arguments the Commissioner has again referred to the nature of the information requested in this case. He would reiterate that the request was for general aggregate figures for how much money the Royal Mail has spent on the named consultancy, and how much it has spent on other management consultants, over one specified five year period. The information gives no details of the fees charged to Royal Mail, or the projects of work undertaken by the consultants. Given this lack of detail the Commissioner does not see how this information could give an insight into the fees charged by the company to Royal Mail. Nor does he see how these aggregate figures would be of use to its other clients – either actual or potential. Furthermore, the Commissioner again notes that the Royal Mail has provided no specific arguments in relation to the specific information withheld in this case.

53. Given the nature of the withheld information, the Commissioner is not persuaded that the disclosure of the information would be likely to prejudice the commercial interests of the named consultancy.
54. Therefore the Commissioner is of the view that section 43(2) of the Act is not engaged and does not provide an exemption from disclosure. As he does not believe that the exemption is engaged, the Commissioner has not gone on to consider the public interest test.

The Decision

55. The Commissioner's decision is that the Royal Mail did not deal with the request for information in accordance with section 1(1)(b) of the Act, in that it inappropriately relied upon section 43(2) to withhold the requested information. In failing to comply with the requirements of section 1(1)(b) within twenty working days it also breached section 10(1).
56. The Royal Mail also acted in breach of section 17(1)(b) in that it did not fully quote to the complainant the exemption it was seeking to rely upon.

Steps Required

57. The Commissioner requires the Royal Mail to take the following steps to ensure compliance with the Act:

The withheld information, i.e. the aggregate figures for the Royal Mail's spend on the named consultancy and all other outside consultants for the five year period 2002 until 2007, should be disclosed to the complainant.

58. The Royal Mail must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

59. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

60. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 18th day of December 2007

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where –

 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under section (1), (3) or (5) must –

 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 43

- (1)** Information is exempt information if it constitutes a trade secret.
- (2)** Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3)** The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).