

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 March 2010

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

Summary

The complainant requested a copy of an agreement between the public authority and the UK government regarding the authority's modernisation plans. Parts of the agreement were disclosed and the remainder withheld by virtue of the exemptions at sections 43(2) (commercial interests) and 36(2)(c) (prejudice to effective conduct of public affairs) of the Act. During the Commissioner's investigation, the public authority disclosed some information from the agreement but maintained its reliance on the above exemptions in respect of the remaining information. After considering the agreement, the Commissioner finds that some information was correctly withheld under sections 43(2) and 36(2)(c). However, he finds that in respect of the remainder of the withheld information, either the information was not exempt or the balance of the public interest was in favour of disclosure. Details of the Commissioner's decision can be found in Annex B to the Notice.

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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 02 August 2007, the complainant requested the following:

'....a copy of the Commercial Agreement that exists between Royal Mail and the Government.'

'....details of any agreement on the matter of colleague-share.'

3. The public authority responded on 31 August 2007. It confirmed it held the requested information but refused to disclose it by virtue of the exemptions provided by sections 41 and 43 of the Act. It also concluded that the public interest was in favour of maintaining the application of both exemptions.
4. On 14 September 2007, the complainant requested an internal review of the decision to withhold the requested information.
5. The public authority completed its review and responded to the complainant on 15 October 2007. It upheld the original decision to withhold the requested information by virtue of the exemptions provided by sections 41 and 43, and explained that it also considered the requested information to be additionally exempt by virtue of the exemption at section 36(2)(c) of the Act.
6. However, in response to the request, it agreed to disclose the following information from the 'commercial agreement':
 - '£900 million senior debt facility, repayable in 2014 at commercial interest rates;
 - £300 million Shareholder loan, repayable from 2016 at commercial interest rates;
 - £1 billion escrow established as security for the Royal Mail Pension Plan (£850 million funded principally from the Mails Reserve, and £150 million funded from Royal Mail Group resources);
 - An incentive package for employees based on the ColleagueShares worth up to £5,300 per person and linked to performance
 -loan facilities are for a maximum aggregate of 1.2 billion.....no detailed breakdown in the relevant loan agreements of what proportions are to be used for purchase of new machinery or any other specific purpose.'
7. The public authority also referred the complainant to a copy of a letter he had received from the Department of Trade and Industry dated 14 May 2007 containing a *'summary of the objectives and key points'*

from the commercial agreement, and further provided the complainant with copies of;

- 'The Rules of the Royal Mail 2007 ColleagueShares Plan:
- The 2007 ColleagueShares Plan brochure.'

The Investigation

Scope of the case

8. On 12 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the strong public interest in the disclosure of parts of the agreement which clarify the following:
 - "Implications of the change of status of Royal Mail Group from a public limited company to a private limited company.
 - The timescale of the commercial loan, i.e. the length of the repayment period and interest rate.
 - The scope of the commercial loan (a) what money has been loaned and to what ends the money is to be used? (b) what portions are to be used for the purchase of new machinery, redundancy payments etc?
 - (Details of the) ColleagueShare agreement as it directly impinges upon our members' terms and conditions."
9. Notwithstanding his focus on the above issues, the complainant also argued that it would in any case be in the spirit of the Act for a complete copy of the agreement to be disclosed.
10. During the course of the Commissioner's investigation the public authority agreed to disclose some information from the Agreement and this was therefore not included in the investigation. The investigation did not consider the exemption at section 41 as the public authority withdrew its reliance on this exemption.
11. The Commissioner's investigation therefore covered the remainder of the information in the Agreement (as outlined in Annex B) withheld under sections 43(2) and 36(2)(c).

Chronology

12. Unfortunately, due to a backlog of complaints that had accrued at the Commissioner's office, there was a delay of nine months before the investigation began. The Commissioner initially wrote to the complainant on 12 August 2008 outlining the intended scope of his investigation and invited the complainant to comment.
13. The complainant did not express any disagreement with the scope of the Commissioner's investigation. Therefore, on 9 September 2008, the Commissioner wrote to the public authority inviting its submissions in relation to all of the exemptions applied and requesting copies of the withheld information.
14. The public authority responded to the Commissioner's letter on 4 November 2008. It explained that the withheld information is contained in an agreement between itself and the then Department for Trade and Industry, subsequently Department for Business Enterprise and Regulatory Reform and Department for Business, Innovation and Skills. It added that it had decided to make additional disclosures to the complainant and provided the Commissioner with a revised redacted version of the agreement it had subsequently disclosed as well as a complete copy of the agreement.

Findings of fact

15. The requested information is an agreement between Royal Mail Holdings Plc, Royal Mail Group Plc (now Royal Mail Group Limited) and the then Secretary of State for Trade and Industry (hereinafter referred to as 'the Agreement'). The Agreement is dated 19 March 2007 and generally covers the provision of access to debt facilities by the government as shareholder and the pension fund escrow to facilitate the public authority's 'modernisation plans'.
16. Royal Mail Holdings Plc is the parent company of Royal Mail Group Plc which operates the brands Royal Mail, Parcel force Worldwide, and General Logistics Systems. Post Office Limited which provides counter services is a wholly owned subsidiary of the Royal Mail Group Plc.

Analysis

Exemptions

17. A full text of all the statutory provisions referred to below can be found in the Legal Annex.

Section 43(2)

18. Information is exempt from disclosure under the above section if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
19. Therefore, for the exemption to apply, if not already apparent, it would be necessary to establish whether any person(s) has 'commercial interests', as envisaged by the exemption, which 'would or would be likely to be prejudiced' by the disclosure of the requested information.

Commercial Interests (re: Royal Mail and Department for Business, Innovation, and Skills (BIS))

20. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. However, the Commissioner is aware that whilst the essential feature of commerce is trading, information which falls within the exemption at section 43(2) may relate only indirectly to the activity of buying and selling.
21. It is important that a distinction is drawn between the commercial interests of an organisation and its financial interests. Financial interests will generally relate to the financial affairs of an organisation, and will include, but not be limited to, the revenue generated by the organisation and the management of its assets. Commercial interests on the other hand will relate more directly to trading activity undertaken by an organisation, and will include activity relating to the ongoing sale and purchase of goods and services by that organisation, frequently for the purpose of revenue generation. This distinction is not always clear cut and in most cases, there is usually an overlap between what constitutes financial and commercial interests.
22. In case FS50122723, the Commissioner accepted that Royal Mail Group plc does engage in commercial activities. In other words, although it is principally funded by tax payers, like private companies, it operates within a competitive communications market and there are therefore aspects of its operations which have to be protected from unfair competition. Its unique position does however pose some challenging questions in relation to the application of section 43(2) of the Act.
23. The public authority argued that BIS' commercial interests were also at risk of prejudice from disclosure. According to the public authority, BIS explained that the Post Office reform put in place by the Postal Services Act 2000 gave the public authority greater commercial freedom and established the government as its only shareholder. The

reform meant that the public authority could borrow money for investment and growth from the government on commercial terms.

24. It explained that responsibility for the government's shareholding in the public authority rests with the Shareholder Executive, which is part of BIS. As with any shareholder in a privately run company, part of its objectives include increasing the value of and maximising dividend return from its portfolio businesses.
25. According to BIS, to satisfy itself that the funds being provided to the public authority under the framework of the Agreement complied with the Market Economy Investor Principle (MEIP)¹, the government received advice stating that arrangements within the Agreement were consistent with what would be obtainable in a commercial loan agreement. The government therefore like any other shareholder expects to receive a return on its investment.
26. It argued that in the private sector, such commercial financing arrangements between a company and its shareholder would be entirely confidential, and it would be inappropriate for terms of such agreements to be seen by competitors. It added that the government has similar lending arrangements with a number of public owned organisations operating on a commercial basis, and disclosure in this case could prejudice the government's negotiations with such organisations.
27. In summary, BIS' argument is that it has a commercial interest to protect as a result of the government's role as an 'investor' in the public authority, based primarily on the terms of the loan Agreement. In other words, the finance advanced to aid the public authority's modernisation in order to compete effectively within the communications market is a commercial transaction rather than a grant or subsidy.
28. In the Commissioner's view, from the terms of the Agreement, it is plausible to argue that the government, in addition to having an interest in the survival and sustainability of the public authority, is investing in the public authority. By implication therefore, BIS has an interest in the commercial activities of the public authority not only in terms of it being a publicly owned company but also because public money has been invested in the public authority, for which a return is expected.
29. However, whilst there is little doubt that the Agreement is structured on commercial terms, BIS is also a public body, and the loan provided

¹ As outlined in Article 87(1) of the European Community Treaty. The granting of State aid to a commercial company is considered incompatible with the common market principles as it distorts competition.

to the public authority is to a large extent to ensure that it remains financially capable of operating within the communications market. Therefore, in relation to the public authority, BIS may be prepared to take risks which most private investors would be unlikely to consider when presented with the same investment options.

30. Furthermore, whilst the financial arrangements may have been made on commercial terms in accordance with the MEIP, the role of the government cannot be ignored. BIS is not simply involved in a trading activity, but is providing funds for a public body which engages in a commercial activity. However, to ensure a return for the tax payer as well as compliance with Article 87(1) of the European Community Treaty (EC Treaty), finance was provided on commercial terms, and to that extent it has a financial interest in the public authority's commercial transactions. It is therefore difficult to infer that BIS' investment equates to that of a private investor whose primary motive would be profit or at the very least maintaining a position that is not disadvantageous to them.
31. In the Commissioner's view, the circumstances surrounding the loan Agreement is relevant to considering whether BIS has a commercial interest to protect for the current purposes. BIS has pointed out that negotiations in similar lending arrangements between the government and other public authorities could be harmed by disclosure of the terms of the Agreement. Although it did not point out the specific harm anticipated, in the Commissioner's opinion, the fact that these 'investments' are more social or political rather than business driven significantly weakens the argument for BIS having a commercial interest in relation to the Agreement. There is, in the Commissioner's opinion, no doubt that BIS does have a financial interest in ensuring there is a return for the loan to the public authority. However, he is not persuaded that the circumstances surrounding the lending arrangement are such as to amount to BIS having a commercial interest within the meaning of section 43(2).
32. The Commissioner therefore finds that under the terms of the Agreement, BIS does not have a commercial interest within the meaning of section 43(2).

Test of Prejudice

33. The Commissioner next considered whether disclosing the remainder of the information in the Agreement would or would be likely to prejudice the commercial interests of the public authority.
34. In assessing the likelihood of prejudice to the public authority's commercial interests, the Commissioner was guided by the Information

Tribunal's (Tribunal) comments in *Hogan v the ICO and Oxford City Council* (EA/2005/0026 & EA/2005/0030) (Hogan). According to the Tribunal, the application of the prejudice test should be considered as involving a number of steps. First, the applicable interest(s) within the relevant exemption needs to be identified. Secondly, the nature of the prejudice being claimed must then be considered, and then the likelihood of the prejudice occurring needs to be determined.

35. Although 'would prejudice' places a stronger evidential burden on a public authority, 'likely to prejudice' connotes a degree of probability that there is a real and significant chance of prejudice to the identified interests.
36. According to the public authority, disclosing the redacted portion of the Agreement *would be likely to* prejudice its commercial interests. It explained that withheld information could be broadly categorised into:
 - Individual clauses which were not in the public domain at the time of the request to avoid the risk of prejudice to the public authority's commercial interests. Specifically, clauses 5.3, 7.1, 7.2, and schedules 4 and 5;
 - Parts of the Agreement where although some information about the content of the clauses was in the public domain, detailed disclosures would be likely to harm its commercial interests by damaging its relationship with the trade unions, its employees and shareholder, and by giving undue advantage to its competitors.
37. According to the public authority, the commercial interests at risk in the event of disclosure relate to its '*ability to modernise*' and its '*relationship with its shareholder BERR*'
38. The public authority explained that the level of detail in these parts of the Agreement goes further than the information already in the public domain. In the public authority's view, disclosing this level of detail would have been likely to prejudice its commercial interests.
39. It explained that, to remain competitive by improving its efficiency and productivity, it had to modernise its business operations. According to the public authority, the need for modernisation was also recognised by the independent review of the UK postal services sector which was chaired by Richard Hooper CBE. Its final report (the Hooper report) was published on 16 December 2008.
40. The Commissioner notes that the Hooper report asserted that there was a broad consensus amongst the public authority's stakeholders that its status quo was untenable. The report broadly recommended

that the public authority needed to '*modernise its operations*' in order to compete with its counterparts. To facilitate the modernisation process (Part 4) it also specifically recommended that the public authority needed to have access to capital more quickly without the constraints attached to government funding, as well as a strategic partnership with one or more private sector companies.

41. According to the public authority, there were strong objections by the unions to the modernisation plan, and it provided a number of press cuttings and other documentary evidence which gave a flavour of the industrial relations climate at the time of the request.
42. The public authority therefore argued that disclosing the details of the Agreement '*then or at this time, would be likely to further fuel the industrial action, as it would provide detail into the public domain of exactly how the funding arrangements would operate.*' thereby undermining its ability to compete effectively within the market.
43. It drew the Commissioner's attention to the fact that the request was made by the Communications Workers Union ("the union"), and because it had demonstrated that the union's intention is to resist the modernisation plan, the likelihood of prejudice was significant. It based this argument on the Commissioner's Decision Notice in case FS50161274 (Leeds City Council) in which the Commissioner used the identity of the applicant to show that commercial competitors had a real interest in the withheld information.
44. In terms of the likelihood of prejudice to its relationship with BIS, the public authority explained that although it is a state owned business, it is independently managed by a Board of Directors and is designed to operate independently of the Government on a commercial basis. The Agreement, especially the finance arrangement between itself and BIS, '*was strictly on the basis of an arms length commercial shareholder providing financial investment to the company...*' in order to ensure that the financing was not considered statesubsidy of a commercial company consequently making it incompatible with the EC Treaty.
45. According to Royal Mail, although BIS is also a public authority, they both share a commercial relationship in light of BIS' position as its shareholder. It argued that it should be free to negotiate robust contractual provisions with its shareholder and that disclosure would therefore reveal the nature of its relationship with BIS and hinder its ability to agree the best commercial terms with its shareholder.
46. Furthermore, disclosing full details of the Agreement could hinder its ability to freely negotiate terms with BIS in the future. According to the

public authority, *'it would then need to take into account factors such as public opinion and perception, rather than drafting to reflect the strongest and most effective contractual provisions for it. There may even be a risk that key points of the arrangements between the parties would be omitted if the parties believed these terms would not be acceptable to the public. This would seriously weaken the effectiveness of any future agreements.'*

47. The public authority further argued that unlike a private sector company, it does not have alternative private financing options and stressed that BIS is not obliged to provide it with funding as it *'had to compete with other public bodies for funding and provide a business case to BERR to ensure a return on its investment.'*
48. The Commissioner has taken into account the public authority's unique position. He accepts that it is subject to measures which are unlikely to be imposed on private companies operating within the same market and is also under a degree of public scrutiny. Therefore, the transparency and openness of its operations has to be balanced against the need to remain competitive.
49. The Commissioner acknowledges that the public authority is concerned that disclosing the remaining information in the Agreement would impact negatively on its ability to compete effectively within the communications market.
50. Specifically in terms of the adverse effect anticipated, the public authority argued that disclosure would be likely to prejudice its *'ability to modernise'* as well as its relationship with its major shareholder, the government.
51. The Commissioner is not persuaded by the public authority's arguments regarding the likelihood of prejudice to its relationship with the government. The public authority is in a unique position as it effectively has the government as its only shareholder. Therefore, although aspects of their relationship are commercial in nature, the potential for prejudice to their relationship as may be envisaged in a commercial relationship between public authorities and private bodies is largely mitigated by the fact the public authority is effectively owned by the government.
52. As noted above, the public authority's sole source of finance is the government and in the Commissioner's view, it is irrelevant for the purpose of determining the likelihood of prejudice in this case whether the financing arrangement is regarded as investment or a direct funding initiative. It was, and still is, in the best interests of both

parties as well as in the public interest to agree effective and profitable commercial terms.

53. In terms of the prejudice to its *ability to modernise* as a result of the likelihood of further industrial action if parts of the Agreement were disclosed at the time of the request, the Commissioner notes that between July and October 2007, the public authority had experienced a number of strikes and threats of further strikes organised by the union in relation to disputes over pay and working patterns, as well as the modernisation plans.
54. The public authority's central argument in this regard is that disclosing the withheld information would be likely to damage its already strained relationship with the union to the detriment of not only its modernisation plans but also to its ability to continue to operate effectively in the market with competitors who are not subject to the same constraints on their operations. Furthermore, in relation to some of the withheld information, disclosure would place it in a disadvantageous position compared to its private competitors.
55. The Commissioner is persuaded that the threat of industrial action by the union is relevant in terms of considering the likelihood of prejudice to the public authority's commercial interests. He is also persuaded that the likelihood of placing the public authority in a disadvantageous position to its private competitors is a relevant consideration under section 43(2).
56. However, to determine the likelihood of prejudice to the public authority's commercial interests, the Commissioner has to consider whether on the evidence provided by the public authority there was a likelihood that disclosing the specific information withheld would have led to the industrial action anticipated and/or other adverse effects which would have been likely to prejudice its commercial interests.
57. The burden was therefore on the public authority to demonstrate why it considered the broad arguments in relation to the likelihood of prejudice were applicable to the withheld information in each of the relevant clauses of the Agreement.
58. In some instances, the details of the public authority's arguments as well as the Commissioner's reasoning are available in the confidential annex. This is because to reveal them publicly would reveal information which is claimed to be exempt. In addition, his decisions in relation to the information in individual paragraphs is summarised in Annex B.

Clause 2.7

59. In terms of the information contained in clause 2.7, the public authority explained that it sets out provisions as to how the 'Top Up Amount' (which is described in the Agreement as the £850million placed in escrow) should be used.
60. The public authority argued that the disclosure of the provisions in clause 2.7 could prejudice ongoing discussions with the Pension Trustee. In its words: *'Knowledge that the detailed conclusions of the discussions between the parties may be placed in the public domain is likely to prejudice the negotiations between the parties, and therefore Royal Mail's commercial interests.'*
61. The argument above does not in the Commissioner's view specifically explain why the disclosure of the information in clause 2.7 would be likely to prejudice any discussions between the public authority and the Pension Trustee. Instead, it broadly categorises the information in clause 2.7 as detailed discussions between parties to the Agreement and seeks to argue that as a matter of principle the knowledge that such discussions could be placed in the public domain would be likely to prejudice ongoing negotiations.
62. The Commissioner notes that in terms of substance, the information in clause 2.7 does not differ materially to the information already in the public domain at the time of the request.
63. The Commissioner therefore finds that the information in clause 2.7 was incorrectly withheld under section 43(2) because the exemption was not engaged.

Clause 2.9 (Additional details in confidential annex)

64. In terms of clause 2.9, the public authority argued that if the union were aware of this information, they would, because of their general objections to the modernisation plans, *'seek to encourage Royal Mail to reverse the decisions made.'*
65. The Commissioner is however not persuaded that the withheld information would cause the union to actively seek to make the public authority reverse parts of the modernisation plans as contained in the Agreement any more than it had already done regarding the modernisation plans as a whole. The Commissioner therefore finds that the information in clause 2.9 was incorrectly withheld under section 43(2) because the exemption was not engaged.

Clause 2.11 – 2.13 (Additional details in confidential annex)

66. Due to the overlap between clauses 2.11, 2.12 and 2.13, the public authority considered these clauses together. It explained that clause 2.11 sets out what would happen if the amounts in the holdings escrow were to be released from its securities, clause 2.12 sets out the government's intention regarding the amounts, and clause 2.13 covers tax implications. It argued that disclosure could lead to further industrial action from the union and also affect its business plan.
67. The Commissioner is however of the view that clause 2.11 can be read separately from clauses 2.12 and 2.13 and this information is meaningful on its own..
68. In terms of clauses 2.12 and 2.13, the Commissioner is satisfied that in light of the prevailing situation at the time of the request, disclosure would, for the reasons outlined above and more fully referred to in the confidential annex have been likely to prejudice to the public authority's commercial interests.
69. The Commissioner is not however persuaded that the disclosure of the information in clause 2.11 would have been likely to have the same prejudicial effect and therefore finds that it was incorrectly withheld under section 43(2) because the exemption was not engaged.

Clause 3 - Pensions (Details in confidential annex)

70. Please refer to the confidential annex and annex B for details of the Commissioner's decision.

Clause 4 – Debt Facilities (Additional details in confidential annex)

71. Clauses 4.1 and 4.2 relate to a 'debt facilities' agreement between the public authority and the government in December 2002.
72. The public authority argued that in general, commercial companies do not expect the existence and terms of lending arrangements with creditors to be made publicly available. According to the public authority, '*disclosure of the existence of the debt facilities described in these clauses may cause prejudice to the commercial interests of Royal Mail.*' It did not provide any specific explanation as to the specific harm anticipated in the event of disclosure.
73. For the reasons given in the confidential annex the Commissioner finds that the information in clauses 4.1 and 4.2 was incorrectly withheld under section 43(2) because the exemption was not engaged.

74. Clause 4.3 is considered below in conjunction with clause 7 and schedule 4 as the subject matter is related.

Clause 5 – Transformation (Additional details in the confidential annex)

75. The public authority explained that disclosing the information in clauses 5.1, 5.2, and 5.4 would be likely to prejudice its commercial interests as the unions would seek to lobby for changes to its business plans as much possible.
76. In the Commissioner's opinion, the information in clauses 5.1, 5.2, and 5.4 is information that was known at the time. The public authority was working with the government to 'modernise' its business and the union objected to the modernisation plans.
77. The Commissioner therefore finds that the public authority incorrectly withheld the information in clauses 5.1, 5.2, and 5.4 by virtue of the exemption at section 43(2) because the exemption was not engaged.
78. The information in clause 5.3 is considered below in conjunction with schedule 5 as the subject matter is related.

Schedule 5 & Clause 5.3 – Property (Additional details in confidential annex)

79. The public authority applied the exemption provided by section 43(2) to all the information in the schedule and clause 5.3.
80. The Commissioner is persuaded by the public authority's reasoning, explained in the confidential annex, and finds that, at the time of the request, the disclosure of the above information would have been likely to prejudice the public authority's commercial interests.

Employee Incentives – clause 6.5 and schedule 6 (paragraphs 1, 2, 5, 6 & 7)(Additional details can be found in the confidential annex)

81. In relation to all of the information withheld in schedule 6 (which contains information relating to the ColleagueShares plan), the public authority argued this information is commercially sensitive '*on the grounds that (it) sets out details that are not in the published scheme rules or in the public domain more widely.*' It further argued that disclosure could damage its relationship with the union who may argue it is not commercially independent from the government.
82. The Commissioner notes that apart from a specific figure in paragraph 1(c) (relating to potential cumulative stakeholder dividends), the information withheld in paragraph 1 of schedule 6 is not materially different from the information on page 1 of the ColleagueShares rules

disclosed to the complainant on 15 October 2007. In terms of the excluded figure in paragraph 1(c), the Commissioner also notes that it is explicitly referred to in clause 1 of the Agreement (the interpretation section – under the definition of the term 'Maximum Stakeholder Dividend') already disclosed to the complainant.

83. The Commissioner therefore finds that the public authority incorrectly withheld the information in paragraph 1 of schedule 6 under section 43(2) of the Act because the exemption was not engaged.
84. In terms of the withheld information in paragraph 2 of the schedule (relating to the return of a colleagueshare), the Commissioner is not persuaded that this information was correctly withheld under section 43(2). The public authority did not provide a specific explanation regarding its non-disclosure, and the Commissioner does not accept the argument that section 43(2) is engaged merely because information is not widely published. There has to be at least the likelihood of a prejudicial effect on the commercial interests of a public authority in the event of disclosure. In his opinion, the information in question is innocuous, probably already known to employees, and highly unlikely to prejudice the public authority's commercial interests if disclosed.
85. In the Commissioner's view, the information in paragraph 5 of schedule 6 (excluding the last sub – paragraph) is not materially different from the information in paragraphs 3.1 and 3.2 of the Colleagueshares rules. Given that the information was already available, the Commissioner is not persuaded that the disclosure of the withheld information could have adversely affected the public authority's relationship with the union. Therefore the exemption at section 43(2) was not engaged.
86. In terms of the information in clause 6.5 and the last sub- paragraph of paragraph 5 of schedule 6 (which relates to unpaid dividends from the Colleagueshares scheme), the public authority explained that disclosure would prejudice its ability to negotiate effectively with the union.
87. The Commissioner finds that the public authority incorrectly withheld the information in clause 6.5 and the last sub-paragraph of paragraph 5 of schedule 6 by virtue of the exemption at section 43(2) because the exemption was not engaged.
88. In terms of the withheld information in paragraph 6 of schedule 6, the public authority did not provide any specific arguments justifying non-disclosure other than for paragraph 6(b). It essentially relied on the broad argument that disclosure could damage its relationship with the

union without indicating why it considered the relevant information could result in commercial prejudice.

89. Based on the specific arguments it provided in relation to schedule 5 above, the Commissioner finds that the information in paragraph 6(a) was exempt under section 43(2).
90. However he finds the information in paragraphs 6, 6(b, and 6(c)) was incorrectly withheld because the exemption at section 43(2) was not engaged.
91. The information in paragraph 7 relates to the timing of the awards of the dividends from colleagueshares. The public authority did not withhold clauses 7 (a), (b), and (c) which indicate that the principal awards would be made in March of the relevant year. In light of that disclosure as well as the Commissioner's decision in relation to paragraph 5 of the schedule, he finds that the information in paragraph 7 was incorrectly withheld because the exemption at section 43(2) was not engaged.

Restructuring – Clause 7 & Schedule 4 (Additional details in confidential annex)

92. The public authority explained that due to their sensitivity, none of the provisions in clauses 7.1, 7.2, and schedule 4 of the Agreement were in the public domain. The Commissioner has not found any factual evidence to dispute the public authority's assertion that this information is not currently in the public domain.. The public authority argued that disclosure would have placed it in a disadvantageous position in terms of what it was trying to achieve and consequently likely to prejudice its commercial interests.
93. After considering the public authority's arguments and having considered the withheld information, the Commissioner is satisfied that the disclosure of clauses 7.1,7.2 & Schedule 4 under the Act would have been likely to prejudice the commercial interests of the public authority.
94. In terms of clause 7.3, the public authority explained that, the disclosure of this provision which relates to Post Office Limited would have also given its private competitors an unfair advantage and consequently likely to prejudice its commercial interests. The Commissioner is persuaded that the disclosure of the information in this clause would have been likely to prejudice the public authority's commercial interests.

95. According to the public authority, the disclosure of the information in clause 7.4 (which relates to the public authority's distributable reserves) would have led to accusations of government interference from the union and potentially to industrial action. It also argued that the information should not be disclosed for the same reasons it gave in relation to the information in clause 2.12 above.
96. For reasons other than those in relation to clause 2.12, the Commissioner is persuaded that the information in clause 7.4 was exempt under section 43(2).
97. For the same reasons, the Commissioner is also persuaded that the information clause 4.3 was exempt under section 43(2).

Clause 8 - Information and Monitoring

98. The public authority explained that information in the above clauses which describes the information sharing position between the public authority and the government could damage its relationship with its employees and the union who may argue it demonstrates the public authority is not commercially independent. This could, as already noted, consequently prejudice its commercial interests.
99. The Commissioner is not persuaded by the public authority's argument. In his view, there is or would be a general expectation that the government, as the public authority's shareholder, is entitled to the information described in these clauses as well as the process of information flow suggested. In his view, the information is not commercially sensitive, and the public authority's explanation has not persuaded him that the disclosure of this information could lead to industrial action from the union.
100. He therefore finds that the information in clause 8 was incorrectly withheld under section 43(2).

Schedule 1, Paragraph 2 – completion date payment mechanics

101. This paragraph essentially contains the public authority's bank account details. The Commissioner accepts that disclosure could leave it open to fraudulent practices and also cause damage to its commercial reputation, and to that extent is likely to prejudice its commercial interests.

Annex B – section 72 Directions

102. Annex B is divided into two sections, the recitals to the section 72 directions and the actual directions which formally document the terms

agreed in the Agreement. According to the public authority, '*...although some of the information is in the public domain, and some details are in the main body of the Agreement, the Section 72 Directions in this form (i.e. statutory form) are not publicly available.*' Specifically, in terms of section 43(2), the public authority argued that disclosure could prejudice its relationship with the government. It explained that '*although the inability to contract in confidence in this way may not prevent an agreement being reached between the parties, it would be likely to create uncertainty or ambiguity and potential loopholes in the relationship.*' It argued that this could lead to damage on either side or a drain on resources as the parties would have to resolve misunderstandings or omissions that would be likely to arise from a lack of clarity in documenting the relationship.

103. The public authority added that as the union opposed to the financing package proposed in the Agreement, disclosing the exact details as set out in the section 72 directions would be likely to prejudice its commercial interests as it would increase the risk of industrial action by the union.
104. The above arguments do not, in the Commissioner's opinion, focus on the prejudicial effect of disclosing the specific information within the directions. Therefore, in reaching a decision, he has considered the various elements of the directions individually in the same way as he has approached the individual clauses in the Agreement.
105. In terms of the ability to contract in confidence, the public authority's position as the Commissioner understands it is that disclosure could affect the ability of both parties to reach future agreements without expending resources on resolving ambiguities and misunderstandings. The Commissioner is not persuaded that disclosure would result in additional resources being expended on similar agreements in the future as it is in the interest of all parties to an agreement to ensure that the terms are unambiguous.

Recitals – Paragraphs A - J

106. The Commissioner is not persuaded that the information in the recitals to the section 72 directions was correctly withheld under section 43(2). Specifically, in terms of paragraphs B, C, and H, he is of the view that the information in these paragraphs is not materially different from the information in the press release of 8 February 2007. Paragraphs B and C essentially detail the fact, already highlighted in the press release, that an amount of money would be reserved by the public authority to assist its subsidiary, Post Office Limited (POL). Paragraph H also provide details regarding the fact that an amount of money would be

held in escrow as security in favour of the pension fund, a point already highlighted in the press release.

107. In view of the above, the Commissioner is not persuaded that disclosure of paragraphs B,C and H would have been likely to prejudice the public authority's commercial interest.
108. In terms of paragraphs D, E and G, the Commissioner is also of the view that the information in these paragraphs is not materially different from the information on page 88 ('Total Equity') of the public authority's 2006-07 annual report published on 25 March 2007. In a nutshell, paragraphs D and E state that POL is required to create and equally fund two reserves (i.e. Rural network and POL funding reserves). The details regarding the purpose of both reserves do not differ dramatically from the information on page 88 of the annual report. Paragraph G relates to the Secretary of State's subscription for a share in the public authority. Page 88 goes further to state the actual premium received from the subscription for that financial year but the substance is very much similar to the information in paragraph G.
109. In view of the above, the Commissioner is not persuaded that disclosure of paragraphs D, E and G would have been likely to prejudice the public authority's commercial interest.
110. The Commissioner does not consider paragraph A contains information which would increase the risk of industrial action by the union. It essentially contains the date of the previous section 72 directions and the relevant parties consulted before the directions were issued. Paragraph J summarizes the purpose of the directions and the Commissioner is also not persuaded that the disclosure of this information would have been likely to prejudice the public authority's commercial interest.
111. Therefore the Commissioner concludes that the exemption at section 43(2) was not engaged in respect of the Recitals.

Directions

112. There are six Directions in total. Direction 1 and the first paragraph of Direction 2 relate to the public authority's reserve distribution and the creation of the Holdings Escrow reserves. The Commissioner is not persuaded that the disclosure of the information in both paragraphs could have led to industrial action by the union and therefore likely to prejudice the public authority's commercial interest as this information was already generally known at the time of the request.

113. The second paragraph of Direction 2 relates to the purposes for which the amount in the Holding Escrow reserve may be released. The Commissioner is not persuaded by the public authority's argument that disclosure would have been likely to prejudice its commercial interest. He also notes that the information in both Directions is not materially different from that on pages 88 and 89 of the annual report.
114. Direction 3 is also not materially different from clause 2.11. The Commissioner therefore finds that Direction 3 was incorrectly withheld under section 43(2) for the same reasons he found that section 43(2) was not engaged in respect of clause 2.11.
115. Directions 4, 5, and 6 are also not materially different from the information on pages 88 and 89 of the annual report. The Commissioner is therefore not persuaded by the public authority's argument in relation to withholding the information in these Directions and finds that the exemption at section 43(2) was not engaged.
116. The Commissioner also finds that paragraphs 8 and 9 (which relate to the binding nature and legality of the current Directions) should be disclosed as he is not persuaded that disclosure would have likely prejudiced the public authority's commercial interest.
117. Therefore, the Commissioner concludes that the exemption at section 43(2) was not engaged in respect of the Directions.

Public Interest Test

118. Section 43(2) is a qualified exemption and accordingly subject to the public interest test. Therefore, the Commissioner must determine whether in all the circumstances of the case, the public interest favoured maintaining the exemption in relation to the information he considered was correctly treated as exempt.

Public interest arguments in favour of disclosing the requested information

119. The public authority acknowledged the general public interest in openness and transparency. However, it considered this had been met by the information already disclosed to the complainant. It argued that the summary of the key points in the Agreement in particular provides information about the nature of the relationship between itself and BIS, and also provides sufficient information to inform the public about the main terms of the Agreement whilst protecting its commercial interests.

120. The Tribunal commented in *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and EA/2006/0013);

'While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.'
(Paragraph 87).

121. Specifically in relation to this case, the Commissioner is of the opinion that there is also a significant public interest in ensuring the public authority's employees are fully informed regarding any changes and/or transformation in the authority as they are highly likely to be affected by those changes. For instance, as pointed out by the complainant, there is a public interest in knowing the effect the Agreement would have on the status of the authority as a publicly owned commercial enterprise, and the details of the Colleague share agreement.
122. Furthermore, in the Commissioner's opinion, there is also a significant public interest in maintaining a healthy relationship between the public authority and its employees in order to ensure the authority is able to continue to deliver the services it is required to provide.
123. In addition, there is a public interest in tax payers knowing the full details of the terms under which the government is prepared to lend money to the public authority to better understand the risks involved and the extent to which it is prepared to support the public authority.

Public interest arguments in favour of maintaining the exemption

124. According to the public authority, there is a public interest in maintaining a level playing field between itself and its competitors by not disclosing information which could be prejudicial to its commercial interests. It argued that *'there is very strong public interest in a healthy, efficient and profitable Royal Mail.'*
125. The public authority explained that apart from the Branch Network subsidy received by POL, none of its other services are subsidised by public funds. The Agreement specifically excludes POL. The public authority argued that the Agreement represented an investment by the government and not state aid. Therefore, the normal public interest in

scrutiny of public expenditure did not apply particularly to the Agreement, or generally to many of its operations.

126. It also argued that there is a public interest in maintaining an operational postal service, and impact of industrial action negates the effectiveness of this service. Therefore, having demonstrated that the union was prepared to embark on industrial action regarding its modernisation plans as reflected in the Agreement, there was a significant public interest in preventing such industrial action as to do otherwise would have had a detrimental impact on its ability to provide postal services

Balance of the public interest arguments

127. For ease of reference, the Commissioner has outlined below the relevant parts of the Agreement to which he considers the public authority correctly applied the section 43(2) exemption.

- Clauses 2.12 & 2.13
- Clause 3.2 & Annex A (Title)
- Clause 3.1 & Annex A (bullet point on page 34 and paragraph 10 of page 38)
- 3.5 & Annex A (paragraph 2(B) of page 34)
- Clause 4.3
- Clauses 5 & 5.3
- Clause 7 (Restructuring) & Schedule 4
- Schedule 1 (paragraph 2) – Bank account details
- Schedule 6 (paragraph 6(a) only)
- Annex A (three bullet points on page 33 which continue to page 34)
- Annex A (both bullet points on paragraph 8, paragraphs 8(B)(i) & (ii), 8(D)(ii), and 10)

128. The Commissioner agrees with the public authority that there is a significant public interest in maintaining an operational and efficient postal service. The threat of industrial action is therefore without question a threat to its ability to deliver the services required as well as its ability to maintain its commercial competitiveness.

129. However, it is well documented that at time of the request, there was a constant threat of industrial action by the union regarding pay, working conditions, restructuring etc. Indeed, the public authority had already been subjected to a number of strike actions by its employees.
130. Therefore, although the Commissioner accepts that the threat of and indeed actual industrial action does have a significant impact on the commercial interest of the public authority, he considers the public interest would have been best served if the above information had been disclosed. A number of strike actions had already taken place, and based on the prevailing situation at the time, it was highly likely that the union would have embarked on further industrial action
131. It would seem therefore that any action necessary to prevent further damage to its ability to provide an efficiently run commercial service would be in the public interest. Whilst the public authority considers the disclosure of the withheld information would not prevent further industrial action, the Commissioner is of the view that withholding the information in the Agreement would not necessarily prevent further industrial action by the union, and since the 'modernisation' plans are at the heart of the dispute, there is a significant public interest in its disclosing information which would add to the understanding of the plans.
132. The Commissioner also disagrees with the public authority's argument that because the Agreement was made on a commercial basis, it should not be subject to public scrutiny. He accepts that the public authority's unique position sometimes leaves it open to the level of public scrutiny not imposed on its private competitors. However, privately run communication enterprises do not also have the same level of access to public money as the public authority does. Whether this is via government investment or direct funding, there remains an inherent public interest in the transparency of discussions on public expenditure, not least so that judgements may be made as to value for money.
133. However, the Commissioner also considers there is a significant public interest in not disclosing information which could disadvantage the public authority against its competitors. To that extent, he agrees with the public authority that there is a public interest in ensuring that there is a level playing field between itself and private competitors who would not be expected to disclose similar commercially sensitive information.

134. Based on the above reasoning the Commissioner finds that in all the circumstances of the case, the public interest favours the disclosure of the information in the following parts of the Agreement:

- Clauses 2.12 & 2.13, and
- Clause 3.2 & Annex A (Title)

135. However, he finds that the public interest in maintaining the exemption at section 43(2) in relation to the remainder of the information identified in paragraph 127 above outweighs the public interest in favour of disclosure.

Section 36(2)(c)

136. The Commissioner next considered whether the exemption at section 36(2)(c) applies to the information he decided was not caught by the exemption at section 43(2). For ease of reference, the relevant parts of the Agreement are outlined below.

- Clause 2.7
- Clause 2.9
- Clause 2.11
- Clauses 2.12 & 2.13
- Clause 3.2 & Annex A (Title)
- Clauses 3.3 – 3.4 & 3.6
- Clauses 4.1 – 4.2
- Clauses 5.1, 5.2, & 5.4
- Clause 6.5
- Clauses 8.1 – 8.3
- Schedule 6 – paragraphs 1, 2, 5, 6, 6(b), 6(c), & 7
- Annex A (remainder of the information)
- Annex B (Recitals & Directions) including paragraphs 8 & 9

137. Information is exempt under section 36(2)(c) if in the reasonable opinion of a qualified person, disclosure would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs.
138. The Commissioner considers this exemption may apply in cases where disclosure would or would be likely to prejudice a public authority's ability to offer an effective public service or meet its wider objectives due to disruption caused by the disclosure of the requested information and the diversion of resources in managing the impact of disruption.
139. Section 36(2)(c) is a qualified exemption and therefore subject to the public interest test.

Reasonable Opinion of a Qualified Person

140. The public authority explained that the qualified person (QP) at the time was the company secretary. It however added that although his opinion was not recorded in writing, he was present at the internal review meeting held on 24 September 2007, and his opinion is encapsulated in the letter of 15 October 2007 containing the outcome of the review. The public authority also set out the rationale for the QP's opinion in its letter to the Commissioner of 4 November 2008.
141. Sub section 5(a – o) of section 36 describes a QP for the purpose of applying the exemption. The provisions of Section 36(5)(o)(ii & iii) are relevant in this case. A qualified person may be the public authority itself or any of its employees if so authorised by a Minister. The public authority provided the Commissioner with documentary evidence to show that the company secretary was the QP at the time of the request. The Commissioner is satisfied from the documents provided that the company secretary was the designated QP at the time of the request.
142. The Commissioner would however like to record his concern regarding the lack of an audit trail in relation to how the QP reached his opinion. In both *Mcintyre v Ministry of Defence*² and *Home Office v Ministry of Justice*³, the Tribunal commented that it would recommend the Commissioner requires to see more evidence in relation to the QP's opinion as it would otherwise be difficult to consider whether the opinion was 'reasonable in substance and reasonably arrived at.'⁴ What this means in effect generally is that the rationale for the QP's opinion

² EA/2007/0068 (Paragraph 47)

³ EA/2008/0006 (Paragraph 62)

⁴ The test established by the Information Tribunal in *Guardian & Brooke v The Information Commissioner & The BBC* (EA/2006/0011 & EA/2006/0013) – Paragraph 64

should only reflect the prevailing circumstances at the time he/she considered the request.

143. The outcome of the internal review simply stated that following a review of the withheld information, the public authority considered the exemption at section 36(2)(c) was also engaged as disclosure '*would prejudicethe relationship between Royal Mail and its Shareholder and the ability of Royal Mail and DBERR to maintain necessary confidentiality.*'
144. However, in its letter of 4 November to the Commissioner, the public authority explained that in considering the applicability of the exemption, the QP took into account the authority's unique position as both a commercial organisation and a public authority. Therefore, by virtue of its public ownership, '*some elements of the way it operates relates to the conduct of its public affairs.*' It added that the QP also recognised the overlap between the application of sections 43(2) and 36(2)(c) in this case as the disclosure of the requested information would both prejudice its commercial interests and the effective conduct of public affairs.
145. Based on the above explanation, Commissioner is satisfied that the factors taken into account by the QP in reaching his opinion were relevant at the time of the request. Therefore, although there is no specific evidence by way of submissions, the Commissioner is prepared to review the reasonableness of the QP's opinion by reference to the relevant withheld information, the general explanation above, and the specific arguments provided in respect of the withheld information. In the McIntyre case, the Tribunal also commented that flaws in the process might not invalidate a QP's opinion if the opinion was overwhelmingly reasonable in substance (paragraph 31). Although the circumstances differ slightly, the Commissioner has adopted a similar approach in this case in that the flaws in the process have not led him to question the substantive reasonableness of the QP's opinion.

'Would Prejudice'

146. As noted above, the public authority relied on the higher threshold of prejudice. In other words, disclosure would otherwise prejudice the effective conduct of public affairs. The public authority argued that due to the political sensitivity of the Agreement, it would have had to expend resources explaining the meaning of each clause to its employees, the unions, and possibly the public. Resources could have also been diverted to deal with the effect of industrial action by the union.

147. The public authority further argued that disclosure *'would be revealing Royal Mail's negotiating position ahead of negotiations with the CWU – this would prejudice Royal Mail's position and ability to negotiate.'*
148. The Commissioner is prepared to accept that the likelihood of industrial action in the event of disclosure is a relevant consideration under section 36(2)(c) as this would have been disruptive to its core functions and consequently its ability to function effectively.
149. In the Commissioner's view, 'would prejudice' places a much stronger evidential burden on a public authority and must be at least more probable than not. Therefore, he has to individually consider the information in the parts of the Agreement outlined above to determine whether disclosure would have had a prejudicial impact as argued on its ability to continue to function effectively.
150. The Commissioner accepts that, broadly speaking, there were reasonable grounds for the QP's opinion regarding the withheld information. However, the process of reaching the opinion becomes even more relevant in cases like these, as not only would it reveal how much of the withheld information was considered before the opinion was given but also the factors considered in respect of the application of the exemption. However, the flaws in the process are not such as to cause the Commissioner to question the substantive reasonableness of the QP's opinion.
151. The Commissioner is therefore prepared to accept the QP's opinion was reasonable in substance and therefore finds that the exemption at section 36(2)(c) was correctly engaged. He has therefore gone on to consider whether, in all the circumstances of the case, the public interest in favour of disclosing the information in relevant parts of the Agreement listed in paragraph 136 above was outweighed by the public interest in maintaining the exemption.

Clauses 2.7, 2.9 & 2.11

152. In the Commissioner's opinion, the information in clause 2.7 does not differ materially in substance from the information that had already been made public and he therefore finds that in all the circumstances of the case, the public interest in disclosure outweighs the public interest in maintaining the exemption.
153. In terms of the information in clause 2.9, as noted in relation to the application of section 43(2), disclosure would not have resulted in the union being any more opposed to the modernisation plans than they were already. He therefore finds that in all the circumstances of the

case, the public interest in disclosure was not outweighed by the public interest in maintaining the exemption.

154. For the same reason, he finds that the information in clause 2.11 should be disclosed.
155. Furthermore, due to the nature of the information they contain as well as the fact that a material proportion of these parts of the Agreement was already in the public domain, he finds that in all the circumstances of the case, the public interest was in favour of disclosing the provisions of the remaining parts of the Agreement listed in paragraph 136 above.

Procedural Requirements

156. Section 17(1)(b) of the Act provides that a public authority relying on an exemption to withhold information should specify the exemption in question.
157. A full text of section 17 is available in the Legal Annex at the end of this Notice.
158. The Commissioner finds that the public authority in breach of section 17(1)(b) as it did not inform the complainant that it was relying on section 43(2) of the Act. In both its letters to the complainant, it referred to section 43 and provided commercial interest arguments but did not explicitly refer to section 43(2) as the relevant exemption it was relying on.
159. He additionally finds the public authority in breach of sections 1(1)(b) and 10(1) for failing to disclose at the time of the request, the information he has subsequently ordered to be disclosed.

The Decision

160. The detail of the Commissioner's decision in respect of the withheld information can be found in Annex B. Some of the information requested has been found not to be exempt. Some is exempt, but the public interest in maintaining the relevant exemption does not outweigh that in disclosing the information. The rest of the information is exempt and the public interest in maintaining the exemption outweighs that in disclosure.
161. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached section 17(1)(b) by not fully citing the relevant exemption at section 43(2).
- It breached sections 1(1)(b) and 10(1) for failing to disclose the relevant information in Annex A which the Commissioner has ordered to be disclosed.

Steps Required

162. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Comply with the decision as detailed in Annex B, disclosing the information which is not exempt or which is exempt but in respect of which the public interest requires disclosure.

163. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

164. 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

165. 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
Arnhem House
31, Waterloo Way,
Leicester
LE1 8DJ

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

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.

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 25th day of March 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that -

"Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that -

"The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that -

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Section 10(4) provides that –

"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

Section 10(5) provides that –

"Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

Section 10(6) provides that –

"In this section –

"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Refusal of Request

Section 17(1) provides that -

"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."

Section 17(2) states –

"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."

Section 17(3) provides that -

"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."

Section 17(4) provides that -

"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.

Section 17(5) provides that –

"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."

Section 17(6) provides that –

"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."

Section 17(7) provides that –

"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."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

"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) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

Section 36(5) provides that –

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,

- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Commercial interests.

Section 43(1) provides that –

"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –

"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)."

Section 43(3) provides that –

"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)."

Annex BDetails of the Decision.

Withheld Information	Section 43(2)	Section 36(2)(c)	Public Interest (s.43(2))	Public Interest (s.36(2)(c))	Disclose	Withhold
Table of Contents (schedules 4 & 5, & Annex A)	Yes	N/A	No – schedule 4 & 5 Yes – Annex A	N/A	Annex A (reference in Table of Contents only)	Schedule 4 & 5 (reference in Table of Contents only)
Pages 1 – 4 (Interpretation) Annex A (reference on pages 1(E) & 4) Schedule 5 (reference on page 4)	Yes	N/A	No – schedule 5 Yes – Annex A	N/A	Annex A (references on pages 1(E) & 4 only)	Schedule 5 (reference on page 4 only)
Clause 2.7 (including 2.7.1 – 2.7.6)	No	No	N/A	N/A	All of the information in clause 2.7 (including 2.7.1 – 2.7.6)	N/A
Clause 2.9 (including 2.9.1 – 2.9.4)	No	No	N/A	N/A	All of the information in clause 2.9 (including 2.9.1-2.9.4)	N/A
Clause 2.11	No	No	N/A	N/A	All of the information in clause 2.11	N/A
Clause 2.12	Yes	N/A	No	N/A	N/A	All of the information in clause 2.12
Clause 2.13	Yes	N/A	No	N/A	N/A	All of the information in clause 2.13
Clauses 3.1 & 3.2	Yes	Yes – 3.2	No – 3.1 Yes – 3.2	Yes – 3.2	All of the information in clause 3.2	All of the information in clause 3.1
Clauses 3.3 & 3.4(including 3.4.1 & 3.4.2)	No	Yes	N/A	Yes	All of the information in clauses 3.3 – 3.4(including	N/A

					3.4.1 & 3.4.2)	
Clause 3.5	Yes	N/A	No	N/A	N/A	All of the information in clause 3.5
Clause 3.6	No	Yes	N/A	Yes	All of the information in clause 3.6	N/A
Clause 4.1 – 4.3	No – 4.1 – 4.2 Yes – 4.3	Yes – 4.1 – 4.2	No – 4.3	Yes – 4.1 – 4.2	All of the information in clauses 4.1 – 4.2	All of the information in clause 4.3
Clause 5.1, 5.2, & 5.4	No	Yes	N/A	Yes	All of the information in clauses 5.1, 5.2, & 5.4	N/A
Clause 5.3	Yes	N/A	No	N/A	N/A	All of the information in clause 5.3
Clause 6.5	No	Yes	N/A	Yes	All of the information in clause 6.5	N/A
Clause 7.1 (including 7.1.1, 7.1.2 & 7.1.3)	Yes	N/A	No	N/A	N/A	All of the information in clause 7.1 (including 7.1.1, 7.1.2, & 7.1.3)
Clause 7.2	Yes	N/A	No	N/A	N/A	All of the information in clause 7.2
Clause 7.3 & 7.4	Yes	N/A	No	N/A	N/A	All of the information in clauses 7.3 & 7.4
Clause 8.1 – 8.3	No	Yes	N/A	Yes	All of the information in clauses 8.1 – 8.3	N/A
Paragraph 2 of Schedule 1 (payment mechanics)	Yes	N/A	No	N/A	N/A	All of the information in paragraph 2 of schedule 1
Schedule 4	Yes	N/A	No	N/A	N/A	All of the information in schedule 4

Schedule 5	Yes	N/A	No	N/A	N/A	All of the information in schedule 5
Schedule 6 (Colleagueshares Plan) Paragraph 1 Redacted information in paragraphs 2, 5, & 7	No	Yes	N/A	Yes	All of the information in paragraph 1 and the redacted information in paragraphs 2, 5, & 7	N/A
Schedule 6 (Colleagueshares Plan) Paragraphs 6, 6(a), 6(b), & 6(c)	Yes – 6(a), No – 6, 6(b) & 6(c)	Yes –6, 6(b) & 6(c)	No	Yes	All of the information in paragraphs 6, 6(b) & 6(c)	All of the information in paragraph 6(a)
Annex A Paragraph 2(B) Paragraph 8 (both bullet points only) Paragraphs 8(B)(i) &(ii), 8(D)(ii), & 10	Yes	N/A	No	N/A	N/A	All of the information in paragraphs 2(B), 8(both bullet points), 8(B)(i) & (ii), 8(D)(ii), & 10
Annex A Pages 33 & 34 (all 4 bullet points)	Yes	N/A	No	N/A	N/A	All of the information in the 4 bullet points on pages 33 & 34
Annex A Remainder of the information	No	Yes	N/A	Yes	All of the remaining information in Annex A	N/A
Annex B (section 72 Directions) including paragraphs 8 & 9	No	Yes	N/A	Yes	All of the information in Annex B including paragraphs 8 & 9	N/A

Key

Yes: Exemption engaged / public interest in favour of disclosure

Reference: FS50183692

No: Exemption not engaged / public interest in favour of maintaining the exemption

N/A: Not Applicable