

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 August 2010

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

Summary

The complainant made a request for information from Royal Mail for details of complaints made and the compensation paid for its Recorded and Special Delivery Services. The information was withheld under section 43(2) of the Freedom of Information Act (the "Act"). Royal Mail stated that it believed that the information was exempt from disclosure as to disclose it would be likely to prejudice its commercial interests. The Commissioner has decided that the exemption is engaged in that the disclosure would, or would be likely to prejudice Royal Mail's commercial interests. However, after considering the circumstances of the case, the Commissioner has concluded that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. Therefore the Commissioner requires that the requested information is disclosed.

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.

Background

2. The Commissioner notes that the complainant made a substantially similar FOI request in 2007 to Royal Mail and was provided with some

of the information he requested, namely the details of the largest single payment for lost or damaged mail received in the year prior to that request. Royal Mail disclosed this amount in a letter to the complainant, dated 17 September 2007 as £2,592.61 paid out due to a lost Special Delivery item. The remainder of the requested information was withheld under section 43 of the Act. Although a complaint was subsequently made to the Commissioner this was not pursued by the complainant.

The Request

3. On 1 May 2010 the complainant requested the following information:

"Please give me the figures for the last three years into the number of complaints relating to both (i) recorded mail and (ii) Special Delivery. Specifically the number of complaints that the mail had either been lost or damaged. Please also provide me with the number of compensation payments and the total amount you have paid out for each of the last three years for lost and damaged mail for both (i) recorded mail and (ii) special delivery mail. For the last year please provide summary details into the largest claim for lost/ damaged mail you made and how much that payment was for?"

4. The Royal Mail responded with a refusal notice on 2 June 2009, citing section 43(2) as the reason for its refusal and stating that disclosure would prejudice its commercial interests. Releasing such data would place Royal Mail at a commercial disadvantage as competitors are not obliged to publish similar figures. Disclosing this information would create a "misleading impression" due to the quantity of mail it handles. Royal Mail argued that the public interest lay in withholding the requested information as it would place it at a commercial disadvantage in the postal market and that there was a strong public interest in maintaining a "healthy, efficient and competitive market".
5. The complainant asked for a review of this decision on 3 June 2009 on the basis that:

"(a) I do not believe that the exemption has been engaged and (b) even if it is engaged the public have a right to know what the level of lost and damaged post is."

Additionally the complainant felt that there was no empirical evidence to show that Royal Mail would be affected in the way it described and that it had not proved that releasing the information would lead to

commercial prejudice. Finally, the complainant claimed that much of the information regarding lost and damaged post was on the Royal Mail's website and thus available to its competitors. However he noted that the proportion of lost and damaged post which related to Recorded mail and the Special Delivery Service was not differentiated. The complainant argued that this did not meet public expectation as this was a service for which a premium was paid and therefore he considered that there was a strong argument that information showing the reliability and service standards of these specific products should be disclosed.

6. The internal review, dated 6 August 2009, upheld the withholding of the information under the section 43(2) exemption. Many of the same arguments were put forward regarding commercial disadvantage if the requested information could be utilised by competitors and that the public interest lay in a "commercially viable Royal Mail". Royal Mail argued that the delivery of standard mail is regulated and that

"...express products, such as Special Delivery operate in a particularly competitive and unregulated environment, in which Royal Mail has only a small percentage of the total market share."

It suggested that a comparison of complaints made about these products was not meaningful due to the differing volumes of mail.

The Investigation

Scope of the case

7. On 21 August 2009 the complainant contacted the Commissioner to complain about the Royal Mail's application of section 43(2). He referred the Commissioner to his letter to Royal Mail, dated 3 June 2009 where his arguments were outlined more fully:
 - That Royal Mail had not provided any empirical evidence to show that commercial prejudice would occur
 - Even if the exemption was engaged he did not believe that it was in the public interest to withhold what the level of lost or damaged post is
 - That much of the information requested relating to lost or damaged mail was already in the public domain
8. In the light of further discussion between the Commissioner and Royal Mail (see paragraphs 13 and 14) the part of the request that asked

for information concerning the largest compensation payment made for lost/damaged post was provided to the complainant. For this reason the Commissioner does not propose to consider this aspect of his complaint further.

Chronology

9. On 9 October 2009 the Royal Mail provided the withheld information to the Commissioner.
10. On 22 January 2010 the Commissioner wrote to Royal Mail stating that his investigation intended to focus on whether the exemption at section 43 was engaged. He particularly sought detailed arguments as to how prejudice would, or would be likely to occur by disclosing this information.
11. Royal Mail responded on 26 February 2010 stating that disclosure of the requested information would be likely to prejudice its commercial interests for two reasons:

“(i)adverse media coverage and the effect of this on customer behaviour [and] (ii) Royal Mail’s competitors using this information in an unbalanced way when soliciting clients.”
12. Royal Mail also made certain points in answer to the Commissioner’s questions, such as establishing what information is regularly published or is in the public domain, evidence of information previously being disclosed and used against Royal Mail and whether the disclosure of any information could be put in context to counteract its arguments that disclosure of the information would be misleading or manipulated in some way.
13. The Commissioner wrote to Royal Mail on 24 March 2010 asking it to release information relating to the part of the complainant’s request that asked for information concerning the largest single payment made for lost/damaged post in the year leading to his request as the same information had been disclosed in 2007.
14. On 8 April 2010 Royal Mail wrote to both the Commissioner and the complainant accepting that an oversight had been made and confirmed it would provide the complainant with this specific part of the requested information.

Findings of Fact

15. Under the conditions of its licence granted by Postcomm Royal Mail is obliged to publish a quarterly 'Quality of Service' report posted on the Royal Mail Group website under 'How We're Performing'. The Royal Mail 'Quality of Service' reports include figures relating to Special Delivery mail. As the Recorded Delivery product is purchased as an "add on" to regular first and second class mail the figures also capture any complaints about Recorded Delivery.
16. Royal Mail also publishes annual complaints figures broken down by cause of complaint, by total number, and by postcode and the links to these documents were provided. Royal Mail only publishes figures for the most recent year.
17. Royal Mail publishes an Annual Report on its website each summer. This Report contains the annual figures relating to complaints but again on the same causal rather than service by service basis. Royal Mail only publishes the Annual Report for the most recent year.
18. Royal Mail does not routinely publish details of the largest payout it makes in any year in respect of a compensation claim for lost/damaged mail (however see paragraphs 8, 13 and 14).
19. The Royal Mail Quality of Service reports show global figures, including Special Delivery and Recorded Delivery service figures, for all relevant categories. This is to reflect the Royal Mail service as a whole, regardless of product or market. However, no information is published relating specifically to complaints made about Special Delivery or Recorded items.
20. Royal Mail argued that its Special Delivery Service is offered in a distinct market from the standard postal market. In contrast to regular first and second class delivery, Special Delivery offers guaranteed delivery before 9am or 1pm, online tracking and up to £2,500 compensation for a higher cost to the customer. Recorded Delivery (previously known as recorded delivery - signed for) is a service for first or second class post which offers up to £39 compensation and where the recipient signs to say they have received it. There is direct competition which comes from several large distribution companies plus many local carriers.
21. Special Delivery and Recorded Delivery products are purely commercial services that do not receive public subsidy and are not part of their Universal Service Obligation. Whilst these services face competition they are part of the overall Royal Mail service.

Consequently, results relating to them are included in the published annual figures.

22. Royal Mail provided the public interest arguments in favour of withholding and disclosing the requested information.

Analysis

Exemptions

Section 43

23. Royal Mail confirmed to the Commissioner that it was seeking to rely on section 43(2) regarding the withheld information:

“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).”

24. The full text of section 43 can be found in the Legal Annex at the end of this Decision Notice.
25. The Commissioner accepts that Royal Mail is a publically owned company which is engaged in commercial activities and that the requested information relates to those activities. Therefore he considers that the information in question falls within the scope of the exemption.
26. The Commissioner has then gone on to consider whether the disclosure of the information would, or would be likely to prejudice, the commercial interests of any person.
27. In reaching his decision on the question of prejudice the Commissioner has considered the comments of the Tribunal in *Hogan*¹ (at para 30) “Second the nature of the ‘prejudice’ being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thornton has stated “real, actual or of substance “ (Hansard HL (VOL. 162, April 20, 2000, col. 827) If the public authority is unable to

¹ Found at

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncil/InfoComm17Oct06.pdf>

discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

Lord Falconer clarified the strength of prejudice necessary and that prejudice must be "real, actual or of substance".

28. The Commissioner's view of this is that the choice of the term "prejudice" is important to consider in this context. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
29. Royal Mail has confirmed that it believes that the disclosure of the requested information would be likely to prejudice its commercial interests as outlined in paragraph 11 above. In the case of *John Connor Press Associates Limited v The Information Commissioner*² the Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (para 15) This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that, "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

30. In considering the question of prejudice the Commissioner has considered whether Royal Mail faced open competition in the Special Delivery and Recorded Delivery market at the time of the request.
31. In a previous case where a Decision Notice³ was issued, Royal Mail informed the Commissioner that the Special Delivery/guaranteed next day delivery market was particularly competitive and that:
 - Operators do not require licences in order to operate guaranteed delivery or courier services, and indeed there are no regulatory requirements to be met for other operators entering or leaving this market.

² Found at http://www.informationtribunal.gov.uk/Documents/decisions/connorpress_v_infocommissioner.pdf

³ Found at http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50122723.pdf

- Direct competition came from several large distribution companies plus hundreds of local/niche carriers.
- These services fell outside of the formal postal monopoly, which only applied to the delivery of items priced below £1. There had therefore been full unregulated competition in this market for many years, prior to the introduction of the Postal Services Act 2000.

Although not specifically cited in the case under analysis here, the Commissioner considers the previous comments made by Royal Mail are equally relevant in this case in helping to establish the competitive nature of the Special Delivery and Recorded Delivery market.

32. Royal Mail explained that it considered it highly likely that the disclosure of these figures would be used by Royal Mail's competitors to present it in a negative way in sales conversations and negotiations, given the competitive market in which Royal Mail markets its Special Delivery and Recorded Delivery – Signed For products. It added that the bulk of Special Delivery use is by account customers – businesses that are cold-called by its competitors who can use these complaints figures in the course of attempting to win the business away from Royal Mail.
33. It commented on the use of media reporting and provided links to articles to demonstrate the kind of negative reporting that created an adverse impression in the public mind. Royal Mail highlighted press reports which used absolute figures that had been published without contextualising those figures. It argued that it was not possible to contextualise every adverse news story.
34. It also explained that it considered there was direct correlation between adverse media coverage of Royal Mail and customer satisfaction. It argued that low customer satisfaction would not only impact on the customer's own use of Royal Mail postal services but also to the extent to which they recommend Royal Mail to others
35. Royal Mail's competitors in the Special Delivery and Recorded Services are not obliged to disclose information regarding their performance, either by regulation or in terms of the Act. It was pointed out that there was no need for a competitor to publish its own figures and that if these figures were published they would be likely to provide a partial or misleading picture which would be hard to counter by Royal Mail as it would not be in possession of any opponent's figures.

36. After considering Royal Mail's comments the Commissioner accepts that it operates in a directly competitive market with regard to the requested information at the time of the request.
37. Although it has provided little evidence to substantiate its arguments, the Commissioner is also prepared to accept that disclosure of the requested information would be likely to prejudice Royal Mail's commercial interests, taking into account the fact that it operates in this directly competitive market. Therefore the Commissioner is satisfied that the exemption is engaged.
38. As section 43 is a qualified exemption the Commissioner has gone on to consider the public interest in relation to the application of this exemption in this case. Specifically, he has considered whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Public interest arguments in favour of maintaining the exemption

39. Royal Mail provided its arguments in favour of withholding the requested information in the results of the internal review on 6 August 2009:
 - Royal Mail has stated that as it is a publicly owned company, there is a strong public interest in Royal Mail's commercial viability and financial well-being. It has referred the Commissioner to the arguments it has presented in regard to the prejudice it believes disclosure would be likely to cause (see paragraphs 31 to 36 above). The Commissioner believes Royal Mail has therefore argued that it is in the public interest to avoid this prejudice by upholding the exemption
 - It has also argued that it is in the public interest to allow fair competition in the postal market. In order to maintain a "healthy, efficient and competitive" universal service the Royal Mail needs to be on a level playing field. It should also have parity of treatment with business competitors (who are not themselves subject to the provisions of the Act), and by allowing normal market forces to take effect. Royal Mail cannot operate in a commercial manner if it has to disclose more sensitive business information than its competitors. Disclosure of the requested information would not be in the public interest as it would place it at a commercial disadvantage as argued in paragraph 6.

Public interest arguments in favour of disclosing the requested information

40. There is a presumption running through the Act that openness is, in itself, to be regarded as in the public interest. In addition to this the Commissioner has also been mindful of the strong public interest in openness, transparency, public understanding and accountability, in relation to the activities of public authorities. The Commissioner has gone on to consider these generic public interest issues by reference to the individual circumstances of this case.
41. On 26 February 2010 Royal Mail provided its public interest comments in favour of disclosing the requested information in order to:
- Promote accountability and help the public to understand, in particular, its 'prestige' services. However, Royal Mail argued that Special Delivery Services and Recorded Delivery are commercial services which lessen the public's legitimate interest. Royal Mail did not believe that disclosing complaints and compensation data for two commercial products operating with a small share of the market in the interests of transparency would inform the public debate.
 - There is a public interest in the performance and accountability of the Royal Mail because of the state support it receives. However, Royal Mail has argued that the figures it is obliged to publish as part of its public service remit serves that need.
42. The Commissioner also believes that there is a public interest in allowing the public to make an informed choice as to the services offered by a public authority. Disclosure of the requested information would assist in making that choice by gaining an understanding of the reliability and value for money of the services offered.

Balance of the public interest arguments

43. The Commissioner has noted Royal Mail's argument (as set out in paragraph 39) that as a publicly owned company there is a strong public interest in its commercial viability and well being, that it has a strong reliance on its brand reputation and quality of service and that therefore it is in the public interest to protect this reputation from prejudice. Whilst the Commissioner recognises this public interest argument, in balancing the public interest arguments he has to take into consideration whether he believes that the disclosure of the withheld information in this case would cause any significant damage to Royal Mail's commercial viability and financial wellbeing.

44. The Commissioner is not persuaded by this argument, and does not believe that it should lead him to conclude that it is in the public interest for the information to be withheld. Indeed, he believes that in the cause of openness, accountability and transparency, allowing the public to have an informed debate about the reputation and quality of service of Royal Mail is in the public interest, and he feels that disclosure of the withheld information would help inform that debate.
45. Royal Mail has argued that its competitors would use the withheld information regarding complaints made about its Special Delivery and Recorded services to present a negative or adverse image. The Commissioner is not persuaded by Royal Mail's contention that negative or adverse comments would be an inevitable result if the requested information was disclosed. Whilst acknowledging Royal Mail's arguments about the possibility of media distortion if the requested information was disclosed, the Commissioner believes that steps could be taken by Royal Mail to provide a context to the information when it publishes its figures. The Commissioner, however, recognises that it is open to the media to produce negative publicity in relation to published figures regardless of context. Nonetheless he does not accept the view that inaccuracy or surmise is less damaging than the disclosure of the requested information. A counter argument would be that the publication of the requested information might decrease speculation.
46. Royal Mail has presented the case that all services are amalgamated into 'complaints received' by arguing that comparisons between services (commercial or public service) are not meaningful due to differing markets and volumes of post. At the same time Royal Mail put forward the argument that the Special Delivery Service, for example, is a discrete commercial service that is separate from Royal Mail's public service remit. If it is possible to publish complaints about this service undifferentiated from the universal service figures it is not really possible to claim that this is a completely commercial service that should be viewed as distinct from Royal Mail's public service remit. The Commissioner believes that there is a public interest in disclosing complaints figures for services that offer certain guarantees, otherwise the value of those guarantees is not measurable.
47. The Commissioner acknowledges the arguments presented by Royal Mail regarding the commercial nature of these services, particularly the Special Delivery Service. However, both this service and the Recorded Service are underpinned by the universal service. The public expects that the Special Delivery Service and the Recorded Service provide extra guarantees of delivery and the Commissioner agrees that

transparency and accountability are the inevitable corollaries, as the complainant has argued. There is a public interest in knowing how reliable these more expensive services are.

48. Finally, the Commissioner recognises that Royal Mail is operating in a commercial environment and that the argument for disclosing or withholding the requested information is finely balanced. The Special Delivery Service, for example, is not part of its public function but Royal Mail is nonetheless, supported by the government in certain respects such as loan facilities. The idea that the commercial services Royal Mail offers should not be subject to public scrutiny is weakened by the public support it receives. Its status as a public authority under the Act is not qualified by reference to specific purposes or types of information, unlike some public authorities under the Act.
49. In conclusion the Commissioner has considered the competing public interest arguments set out above. Whilst he considers the arguments finely balanced he has concluded that the arguments relating to transparency and accountability make a more compelling case in favour of disclosure. He is also not persuaded that this more detailed information in relation to these two specific services is of a substantially higher commercial sensitivity than that information already in the public domain. Whilst he acknowledges Royal Mail's argument that the public interest in openness and accountability is somewhat met by the performance data it publishes in the Quarterly Reports, he believes that the withheld information increases public understanding of its performance by giving a more detailed breakdown of the volume of complaints received and compensation payments made for its Special Delivery and Recorded Delivery services
50. After considering these points, and bearing in mind the Act's presumption of disclosure, the Commissioner has decided that the public interest in maintaining this exemption is not outweighed by the public interest in disclosing the exemption. Therefore the withheld information should be disclosed.

Procedural Requirements

51. Section 1(1) of the Act states 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.”

52. Section 10(1) of the Act states 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.”

53. As the Commissioner has decided that the public interest requires the disclosure of the withheld information, it should have been provided to the complainant in line with the duty at section 1(1)(b). Royal Mail's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request Royal Mail also breached section 10(1).

54. The full texts of sections 1 and 10 can be found in the Legal Annex at the end of this Notice.

The Decision

55. The Commissioner's decision is that Royal Mail did not deal with the request for information in accordance with the Act in that:

- It did not deal with the request for information in accordance with section 1(1)(b) of the Act as 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 20 working days it also breached section 10(1).

Steps Required

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

To disclose the requested information to the complainant.

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

Failure to comply

58. 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

59. 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 sent.

Dated the 16th day of August 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

1 General right of access to information held by public authorities

(1) 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.

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

(3) 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.

(4) 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.

(5) 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).

(6) 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”.

10 Time for compliance with request

(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid 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.

(3) 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.

(4) 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.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

43 Commercial interests

(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).