

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 September 2011

**Public Authority:** Royal Mail Group PLC

**Address:** 148 Old Street  
London EC1V 9HQ

#### Decision (including any steps ordered)

---

1. The complainant has requested the total remuneration figure received by each of the top 15 executives at Royal Mail for 2007/08 and 2008/09, with a separate breakdown of amounts received by each individual in respect of their pay rates, expenses, pension contributions and sharesave holdings. The complainant did not expect to be provided with the names and job titles of the individuals linked to the remuneration payments.
2. The Commissioner's decision is that Royal Mail has incorrectly applied section 43(2) (commercial interests) of FOIA to information covered by the scope of the request. He does, however, find that some of the information constituted third party personal data and was exempt information under section 40(2) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

With the exception of the information described at paragraph 11, Royal Mail should disclose the following categories of information in the form specified for 2007/08 and 2008/09:

- The total remuneration figures received by the unnamed top 15 executives covered by the scope of the request.
  - The salary of these executives within a £5000 range.
  - The total expenses claimed by each of these executives.
  - The sharesave (ColleagueShare) holdings of these executives
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply 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.

## Request and response

---

5. On 14 November 2010 the complainant wrote to Royal Mail and requested information in the following terms:

*"Full details of the top 15 executives (by pay) their total remuneration 2007/08 and 2008/09 to include pay rates/expenses, pension contributions and sharesave holdings."*

6. Royal Mail provided its substantive response to the request on 24 January 2011.
7. It stated that it held records of the remuneration paid to its employees. Royal Mail further indicated that the remuneration figures of a number of individuals (three in 2007/08 and 2008/09) were already published in its annual Directors' Remuneration Report, copies of which were supplied to the complainant. However, it refused to disclose the remuneration information for the remaining employees on the basis that it was subject to the 'third party personal data' exemption (section 40(2)) contained in the Act.

## Scope of the case

---

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. Following discussions with the complainant, the Commissioner has confirmed that by making his request the complainant was seeking the following information for each of the financial years specified:
- (a) The total remuneration figure received by each of the "top 15" executives, which would encompass bonus payments ("top 15" defined not by seniority but by total remuneration received).

With a separate breakdown of:

- (b) The basic salary received by each of the executives.
- (c) The total expenses claimed by each of the executives.
- (d) Pension contributions.
- (e) Sharesave holdings (known as ColleagueShares by Royal Mail).

10. The complainant clarified that he did not expect to be provided with the names and job titles of the individuals linked to the remuneration payments.
11. The complainant is further satisfied that a number of individuals (three in 2007/08 and three in 2008/09) have had details of their remuneration published in Royal Mail's Annual Reports for the specified years. This publication, however, does not include information relating to the expenses claimed by these individuals.
12. In being informed of the scope of the complaint outlined above, Royal Mail decided to drop its reliance on the third party personal data exemption. This was on the basis that the complainant was seeking information in an anonymised form, a point that had not previously been made clear. However, Royal Mail claimed instead that the requested information would be exempt from disclosure by virtue of the commercial interests exemption.
13. In line with the decision of the Upper Tribunal in *DEFRA v Information Commissioner and Simon Burkett and Information Commissioner v Home Office*<sup>1</sup>, the Commissioner has accepted the late application of the exemption. In any event, the Commissioner considers that the late application was understandable in the circumstances of the case.

## Reasons for decision

---

### Section 43 – commercial interests

14. Section 43(2) of FOIA states that information is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
15. The Commissioner accepts that Royal Mail is a publicly owned company which is engaged in commercial activities and that the information requested relates to those activities. For this reason he considers that the information in question falls within the scope of the exemption.

---

<sup>1</sup> <http://www.osspsc.gov.uk/judgmentfiles/j3160/GIA%201694%202010-01.doc>

16. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of Royal Mail. In this case Royal Mail confirmed that the disclosure of the requested information "would be likely to prejudice" its commercial interests.
17. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote.
18. In its submissions, Royal Mail has argued that disclosure of the requested information would be likely to prejudice its commercial interests on two fronts. The first concerns the reputational damage to Royal Mail that could occur through disclosure. The second relates to the risk that disclosure would impede the ability of Royal Mail to operate efficiently as a result of the loss of personnel.
19. The Commissioner addresses both of these arguments in turn.

### **Reputational Damage**

20. Royal Mail explained that disclosure of remuneration information would lead to unjustified negative publicity, damage customer perception and make the public less likely to use its services. These points echo those considered by the Commissioner in his decision FS50318446 (Royal Mail), albeit in connection with unrelated information. To support its position, Royal Mail has provided the Commissioner with two newspaper articles that it considers show where information had been portrayed out of context so as to generate negative media coverage.
21. As in case FS50318446, the Commissioner has not found that this argument demonstrates that a causal relationship exists between the potential disclosure of the requested information and any prejudice which is of significance. This is because Royal Mail has offered little specific argument that relates to the particular circumstances of the case presented here. For example, while the newspaper articles do show evidence of negative media coverage, they do not relate in any meaningful sense to the requested information.
22. The Commissioner acknowledges that the highlighting of poor performance by Royal Mail may, in theory, influence customers to switch provider away from the organisation. However, the Commissioner does not consider that this theoretical example will apply to remuneration information as it does not directly reflect the performance of Royal Mail in providing its services to the public.
23. On this analysis, the Commissioner considers pertinent his comments on FS50318446 where he said:

*“Royal Mail’s argument that the release of the information would be likely to generate adverse publicity which might lead to an alteration in public perception that could damage Royal Mail’s business is an argument for withholding any information of this nature. This suggests a blanket approach to the use of the exemption which is clearly not intended by the Act.” (para 34)*

24. In this vein it is the Commissioner’s opinion that the reputational damage argument is not sufficient in this case to indicate that prejudice would be likely to occur as a result of the disclosure of the requested information.

### **Ability of Royal Mail to operate in a commercial environment**

25. Royal Mail has advised the Commissioner that, as a result of the disclosure of the requested information, competitors would be more easily able to approach and potentially headhunt senior employees. This ‘brain-drain’ of personnel in a specialist business field such as mail delivery would be likely to, in the view of Royal Mail, undermine its ability to function effectively. Furthermore, the publication of remuneration figures would be in stark contrast to its competitors who are not required to disclose this information.

26. Leading on from this point, Royal Mail has claimed that disclosure could result in it:

*“...having its less preferred choices in top positions or being forced to offer increased remuneration packages, over and above what it would have to pay if the RFI information had not been disclosed in order to retain the calibre of personnel it requires to make the most effective success of its business.”*

27. The Commissioner, however, respectfully disagrees with this line of argument. In the first instance the Commissioner recognises that appointments at the executive end of the Royal Mail or one of its competitors will be highly competitive, with aggressive attempts made to attract suitable individuals to a role. This is demonstrated by the fact that at least one of the individuals covered by the scope of the request was themselves headhunted for the position.
28. In this type of competitive arena the Commissioner is satisfied that avenues already exist in which enquiries can be made to individuals with the aim of securing their appointment by a competitor. Such enquiries would inevitably revolve around the remuneration package currently awarded to the employee so that, where appropriate, a preferable offer may be made by a suitor.
29. In any event, the Commissioner does not accept that the disclosure of Royal Mail’s remuneration profile as a whole would likely result in the

identified prejudice. This is because the information would have little value to competitors where the remuneration figures were not directly linked to an identified individual who was of interest to that competitor. Given the wide differences between the remuneration packages offered to each of the executives, the Commissioner finds tenuous the argument that disclosure of the remuneration profile would likely encourage a competitor to approach an individual with the aim of headhunting that individual.

30. The Commissioner further notes that, with respect to some senior officials at Royal Mail, extensive remuneration information is already published in Royal Mail's annual Directors' Remuneration Report which forms part of its Annual Report. If, as has been argued, disclosure of the equivalent information for other individuals would be prejudicial, the Commissioner would expect to be provided with specific examples of how such information had already affected the ability of Royal Mail to operate in a commercial environment. In the absence of any examples, and for the reasons set out above, the Commissioner does not consider he has been presented with sufficient evidence to conclude that prejudice to the commercial interests of Royal Mail would be likely to occur.
31. As the Commissioner is of the view that in all the circumstances section 43(2) of FOIA is not engaged and does not provide an exemption from disclosure, he has not gone on to consider the public interest test.
32. However, the Commissioner is mindful of his responsibilities as the regulator of both FOIA and the Data Protection Act 1998 (DPA). In this case he considers that the disclosure of the requested information in an unadulterated form may lead to the release of third party personal data in breach of a data protection principle. The Commissioner has therefore gone on to assess whether the third party personal data exemption contained in FOIA would apply to any extent.

### **Section 40(2) – third party personal data**

33. Section 40(2) provides an exemption to the right to access recorded information where it is the personal data of any third party. In order for the exemption to apply, the following conditions would need to be satisfied:
  - the disputed information constituted the personal data of a third party, namely the executives that form the focus of the request; and if so
  - disclosure of the disputed information would contravene a data protection principle contained in the DPA.

34. In exploring the issue of what is personal data, the Commissioner has considered separately the different categories of requested information, listed as (a) – (e) at paragraph 9 of this notice.
35. The Commissioner acknowledges that there may be cases where information is not in itself personal data but, in certain circumstances, it will become personal data where it can be linked to an individual. The Commissioner has therefore considered whether there is the possibility, on the balance of probabilities, that a member of the public could identify individuals by cross-referencing the requested data with other information that was available to them.
36. Information that the Commissioner imagines to be available to the public would include the respective seniority of an executive within Royal Mail. Similarly, as evidenced by his previous decisions, the Commissioner would expect a public authority such as Royal Mail to disclose routinely the salary bands of employees.
37. Where information is found to be a third party's personal data, the Commissioner must then go on to consider whether the disclosure of the information would breach a data protection principle. In this case the relevant principle is the first, which requires the fair and lawful processing of personal data.
38. The application of the first data protection principle involves striking a balance between competing interests, the arguments around which are now well rehearsed (see, for example, the Information Tribunal's decision on *Pycroft v Information Commissioner and Stroud District Council* (EA/2010/0165)<sup>2</sup>).
39. In summary, however, the Commissioner will bear in mind the following factors when weighing up these competing interests:
  - (i) The consequences of disclosure
  - (ii) The data subject's reasonable expectations of what would happen to their personal data.
  - (iii) The balance between the rights and freedoms of the data subject and the legitimate interests of the public.

---

<sup>2</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i483/20110211\\_Pycroft\\_v\\_IC\\_and\\_SDC\\_open\\_decision\\_EA20100165.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i483/20110211_Pycroft_v_IC_and_SDC_open_decision_EA20100165.pdf)

40. The Commissioner addresses a) – e) in turn with respect to whether he considers the information to be personal data and, if so, whether the information would be exempt under section 40(2).

**a) Total remuneration figures**

41. The Commissioner appreciates that a total remuneration figure will be made up of many constituent parts. Some parts, such as bonuses, may fluctuate from one year to the next based on the performance of an individual. Other elements, such as salary scales, may increase in a more structured fashion.
42. Significantly, the Commissioner observes that there is no consistent pattern that dictates how the total figure is made up. For example, the highest salaries do not necessarily equate to the highest remuneration package when factored in with other payments such as bonuses. The Commissioner is also mindful that the requested information covers more than 10 individuals; a large enough number that the chances of accurately identifying an individual from the information would be negligible.
43. For this reason the Commissioner considers this category of information, in the form that it was requested, to be suitably anonymised so as not to represent the executives' personal data. He does not therefore consider that section 40(2) would apply.

**b) Basic Salary**

44. As referred to at paragraph 36, the Commissioner would normally expect a public body subject to FOIA to publish information about the salaries of its staff. In his guidance on salary disclosure, the Commissioner comments that disclosure should only be to the extent necessary to fulfil a legitimate public interest, for example by providing pay bands in £5000 groupings for the majority of staff.
45. The Commissioner appreciates that Royal Mail, as a commercial organisation, does not consider that it should be constrained by this guidance. However, the Commissioner disagrees with this position and considers that, if the situation was to arise in the future, he would likely support the disclosure of the pay ranges of Royal Mail staff as a minimum requirement.
46. The Commissioner therefore considers it reasonable to expect that, notwithstanding the requirements of this Notice, salary information of the executives could be placed in the public domain in the future. A member of the public could subsequently use the pay range information to link an executive to the requested information. For example, it is feasible that by knowing that the pay band of individual x was £80,000 to £85,000, a member of the public could identify individual x from the



requested information by linking him or her to the salary figure that fell within that pay bracket.

47. As a consequence, the Commissioner has concluded that this information would represent personal data. To find otherwise, he considers, would be to potentially undermine the protection afforded by section 40(2) of FOIA.
48. As indicated, the Commissioner has taken the view in a number of decisions that employees of a public authority should expect their salaries to be published to at least the nearest £5000. This was on the basis that there was a legitimate interest in knowing how public funds are being spent, while acknowledging that an employee would have a reasonable expectation that their exact salary would not be released. The Commissioner therefore found that the release of a pay range would be fair because it struck an appropriate balance between these interests.
49. He would similarly expect an equivalent level of disclosure to apply here, irrespective of Royal Mail's status as a commercial organisation.

### **c) Expenses**

50. The Commissioner has clarified with the complainant that he is only seeking the total expenses figure claimed by each executive and does not require any description of what the expenses were claimed for.
51. In the absence of descriptive information that would lead to the identification of an executive, for example by showing travel arrangements that could be attributed to an individual, the Commissioner finds that the requested information is not personal data.

### **d) Pension contributions**

52. Pension contributions can be defined as the payments made by an employee, or as in this case the employer, into a pension scheme. The pension contribution made by either party will typically be a percentage of the employee's pensionable pay, that is the salary received by that employee.
53. Mirroring his considerations in relation to b) above, the Commissioner finds, on the balance of probabilities, that a member of the public could identify an individual from the requested information by tracing it back to salary information. He is therefore satisfied that the information would constitute personal data.
54. The Commissioner has previously decided that pension information relates to an individual's personal finances and, as such, that it would be unfair to release information of this nature.

55. This position was supported by the Tribunal in *Pycroft*, finding that information about pensions goes beyond information directly concerning the individual's public role or decision making process and instead relates to personal finances. In accordance with this decision, the Commissioner considers that it would not be fair to disclose the information and has determined that section 40(2) applies.

**e) Sharesave holdings**

56. Royal Mail has informed the Commissioner that it has interpreted the complainant's request for sharesave information as relating to its ColleagueShare scheme, the name for its phantom share plan.
57. A phantom share option plan is a cash bonus plan under which the amount of the bonus is determined by reference to the increase of value of the shares subject to the option. No shares are actually issued or transferred to the option-holder on the exercise of the phantom share option<sup>3</sup>.
58. According to Royal Mail's introductory pamphlet on its ColleagueShare Plan<sup>4</sup>, to be eligible for ColleagueShares an employee would have to be permanent, have been employed in the UK by a specified date and not be on a career break or an extended period of unpaid absence. Everyone that worked full-time at Royal Mail received the same allocation, with part-time employees being allocated a pro-rata number based on contract hours plus any regular overtime.
59. The Commissioner considers that the uniform way in which the shares were allocated means it is unlikely that the information would allow the identification of an individual. Even if the Commissioner were to allow that the information was personal data, however, he does not consider that disclosure of the information would be unfair for the purposes of the first data protection principle.
60. This is because the ColleagueShare scheme represents Royal Mail's attempt to incentivise generally its employees, with any payments made not being linked in to the performance of an employee. The standardised way in which shares are allocated therefore means that the information does not reflect in any way on the work of an employee, unlike a bonus say, and simply demonstrates that an employee has received a specific

---

<sup>3</sup> <http://www.employeeshareschemes.co.uk/plans-phantom.aspx>

<sup>4</sup> <http://www2.royalmailgroup.com/sites/default/files/pdfs/ColleagueSharesBrochure.pdf>

benefit from Royal Mail. The Commissioner further notes that the conditions of the ColleagueShare scheme are publicly available.

61. The Commissioner is of the view that in all the circumstances an employee could not have a reasonable expectation that this information would not be disclosed. On the other hand, the Commissioner considers that the public would have a legitimate interest in knowing how Royal Mail incentivises its staff and therefore takes the view that it would be fair to release the information.

### **Other matters**

---

62. Although the complainant has not specifically asked the Commissioner to address this point as part of a Decision Notice, the Commissioner notes that Royal Mail failed to respond to his request within the 20 working day timeframe stipulated by section 10(1) of FOIA.

## Right of appeal

---

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

64. 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.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**