

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 October 2015

**Public Authority:** Department for Business Innovation & Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### **Decision (including any steps ordered)**

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1. The complainant has requested all advice received by the Shareholder Executive between 1 July 2013 and 15 October 2013 regarding the choice of a share price for the Royal Mail share offer. The Department for Business Innovation and Skills (BIS) initially applied Section 36(2)(b) of FOIA to withhold all the requested information. In subsequent correspondence with the Commissioner the Department also applied Section 43(2) to all of the withheld information and Section 41 to parts of the information.
2. The Commissioner's decision is that the Department for Business Innovation and Skills was entitled to withhold all of the information held within scope of the request on the basis of Section 36(2)(b) of FOIA. He therefore does not require it to take any further steps to ensure compliance with the legislation.

#### **Background**

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3. The Shareholder Executive is part of the Department for Business Innovation and Skills. It has the aim of being an effective shareholder of businesses owned or part-owned by the government and to manage government's interventions in the private sector in order to secure best value for the taxpayer.
4. In October 2013, the Shareholder Executive sold 60 per cent of the government's shares in Royal Mail plc to private investors at a price of 330 pence per share. The privatisation generated proceeds of £1,980 million and Royal Mail shares were admitted to the main London Stock

Exchange index (FTSE 100). On the first day of trading (11 October 2013) Royal Mail's shares closed at 455 pence, which was 38 per cent higher than the sale price. There was a 72 per cent increase in Royal Mail share price over the first five months of trading<sup>1</sup>.

## Request and response

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5. On 27 February 2014, the complainant wrote to the Department (BIS) and requested:

*'All advice received by the Shareholder Executive between 1<sup>st</sup> July 2013 – 15<sup>th</sup> October 2013 regarding the choice of a share price for the Royal Mail share offer'.*

6. The Department responded on 27 March 2014. It confirmed that it held the requested information but that it was exempt from disclosure under Section 36(2)(b) of the FOIA (would or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation).
7. The Department provided the complainant with links to information which the then Secretary of State for BIS, Vince Cable MP had provided to the Chair of the Business Innovation and Skills Select Committee in October 2013 (on the setting of the price range for the initial public offering, "IPO") and transcripts of the oral evidence given to the Committee on 27 November 2013 by Dr Cable and the then Minister of State for Business and Enterprise, Michael Fallon MP, and the Chief Executives of the Shareholder Executive and the Department's independent corporate financial adviser (Lazard).
8. Following an internal review the Department wrote to the complainant on 2 May 2014. The review upheld the application of Section 36(2)(b) and noted that the publication on 1 April 2014 of the National Audit Office report into the Royal Mail privatisation had, *'placed additional information in the public domain, on the valuation and the IPO process which has now been subject to published independent scrutiny'.*

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<sup>1</sup> Figures taken from the National Audit Office report into The Privatisation of Royal Mail

## Scope of the case

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9. The complainant contacted the Commissioner on 7 May 2014 to complain about the way her request for information had been handled.
10. In submissions to the Commissioner, the Department explained that given the wording of the request (advice **received** by the Shareholder Executive), it considered that the scope of the request was limited to the advice regarding the proposed Royal Mail share price received by the Shareholder Executive from external third parties. That is to say, it did not consider that internal documents reflecting, summarising or considering such advice were within the scope of the request.
11. The Commissioner concurs with this interpretation of the scope of the request. In submissions to the Commissioner the Department confirmed that the information which supported the decisions made by Ministers on the Royal Mail Offer Price was set out in advice provided in October 2013 by Lazard, who had been appointed as an external independent adviser (following a public procurement exercise) to provide advice to the Government on the methods and options for the sale. This was separate from financial advice which the Government procured (also following a public procurement exercise) from UBS and Goldman Sachs as joint global coordinators (JGCs) for the public offering of the shares. The primary function of the JGCs was to assess Royal Mail's suitability for listing on the stock exchange and to provide advice on determining the share price, offer size and other relevant matters.
12. The Department confirmed that the information and advice that informed the ultimate decision as to the setting of the share price was provided by Lazard and the JGCs to the Shareholder Executive in October 2013. The Commissioner has had sight of this information and he is satisfied that this is the information within scope of the request.
13. During the Commissioner's investigation, the Department advised that in addition to Section 36(2)(b)(i) and (ii), it was applying Section 43(2)(commercial interests) to all of the withheld information and Section 41 (information provided in confidence) to parts of the information. The scope of the Commissioner's investigation has been whether the requested information was correctly withheld under the exemptions applied by the Department.

## Reasons for decision

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### Section 36(2)(b)(i) and (ii)

14. Section 36(2)(b)(i) and (ii) state 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-...*

*(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'.*

15. In order to determine whether Section 36(2)(b)(i) and (ii) have been correctly applied the Commissioner has:

(i) ascertained who the qualified person was for the public authority;

(ii) established that an opinion was given;

(iii) ascertained when the opinion was given; and

(iv) considered whether the opinion given was reasonable.

### The engagement of Section 36(2)(b)(i) and (ii)

16. The Department informed the Commissioner that a submission was provided to the then Minister of State for Business and Enterprise, Michael Fallon MP, on 17 March 2014. The Minister then gave his opinion on 19 March 2014. Having considered the submission and the arguments made by officials, he agreed to withhold the requested information. The Department informed the Commissioner that the submission was also provided to the then Secretary of State for BIS, Vince Cable MP, who signed off the same on 20 March 2014.

17. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. The Commissioner is therefore satisfied that the Minister of State for Business and Enterprise was an appropriate qualified person for this purpose.

18. In support of its application of Section 36, BIS has provided the Commissioner with a copy of the submission to the qualified person. The submission refers to the information requested and BIS confirmed

that as the Minister responsible for the privatisation of the Royal Mail, Mr Fallon (and indeed Dr Cable) was already familiar with the requested information, having had sight of the advice prior to reaching decisions on the IPO. It appears that the qualified person accepted that disclosure of the withheld information would have the effects set out in Section 36(2)(b)(i) and (ii), for the reasons contained in the submission.

19. The submission identified the following points as relevant to the engagement of Section 36(2)(b)(i) and (ii):
  - The release of such information would inhibit the provision of free and frank advice, in that it could make it more likely that external organisations would be unwilling to provide such advice in the future or could distort or restrain such advice to the detriment of the decision making process.
  - Advisers need to be confident that they can provide open and frank advice in the knowledge that it will be used by government to reach policy decisions and not be looked at in isolation.
  - Disclosure would inhibit frank discussions between Ministers and officials about the advice received and the options available. The risk of subsequent disclosure could diminish the quality of debate lying behind collective decision making, and in turn the quality of future decisions would be affected.
20. In submissions to the Commissioner the Department accepted that the information in scope of the request (i.e. the advice received from Lazard and the JGCs) did not comprise an exchange of views or deliberations with Ministers, officials and advisers but represented views which were given to inform the process of deliberation. BIS drew attention to the fact that the Section 36 exemptions concern the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. The Commissioner is satisfied that the advice provided by Lazard and the JGCs was an integral part of the process of Ministerial deliberation with regard to the Royal Mail IPO.
21. The Commissioner's guidance on Section 36 makes clear that:

'The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion'.

22. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, that is to say it is an opinion that a reasonable person could hold, then the Commissioner will regard it as a reasonable opinion for the purposes of Section 36.
23. The Commissioner notes that the qualified person's opinion was that disclosure of the withheld information (the advice) would, '*at least be likely to*' inhibit in future the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. This means that the chance of the prejudice occurring must be more than hypothetical or remote, but does not have to be more likely than not. After reviewing the voluminous withheld information, the Commissioner is satisfied that it was reasonable for the qualified person to conclude that Section 36(2)(b)(i) and (ii) applied to it.
24. As a qualified exemption, Section 36 is subject to a public interest test. The Commissioner has therefore considered whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information. As the public interest arguments are closely related, the Commissioner has considered both limbs of Section 36(2)(b) together.

## **Public Interest Test**

### **Section 36(2)(b)(i) and (ii) – Inhibiting the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation**

25. In *Guardian Newspapers & Brooke v Information Commissioner & BBC (EA/2006/0011 & EA/2006/0013)*, the Tribunal, in noting the distinction between consideration of the public interest under Section 36 and under the other qualified exemptions contained within the Act, stated:

*'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.*

26. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so, '*does not necessarily imply any particular view as to the severity or extent of*

*such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'.*

27. This means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely prejudice to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

### **Public interest arguments in favour of disclosing the requested information**

28. In its responses to the complainant's request, BIS stated that, *'it could be argued that there is a public interest in releasing this information – given the profile of the Royal Mail share offer in general – in order to provide greater transparency around the IPO and pricing'.* In submissions to the Commissioner the Department was more definite, confirming that it recognised the level of public interest in the Royal Mail privatisation, *'and in particular in the decision-making surrounding the price at which shares were sold'.*
29. However, BIS contended that these matters had been subject to considerable public scrutiny and debate. In particular the Department cited the following:
- Ministers and senior officials from the Department have appeared before the Public Accounts Committee and Business Select Committee to answer a range of detailed questions, including about the Offer Price;
  - Senior employees of Lazard, UBS and Goldman Sachs appeared in front of the Business Select Committee, and senior employees of Lazard also appeared before the Public Accounts Committee;
  - The advice has been provided to and scrutinised by the National Audit Office (NAO) in its role of holding government to account. The NAO had access to the requested information when conducting its review of the project but chose not to release it as part of its report;
  - The advice has also now been considered in detail by the independent panel chaired by Lord Myners.

30. BIS has contended that since 2 May 2014 (the date of the internal review), several documents have been placed in the public domain which have further reduced the public interest in disclosure. The Business Committee published its report in July 2014 and the Government response to that was published in October 2014. Transcripts of the evidence session by Ministers, BIS officials and advisers to the Public Accounts Committee (30 April 2014) and the Business Committee (29 April 2014) have also been published. Finally, the report of the independent panel chaired by Lord Myners<sup>2</sup> was published in December 2014. The Department noted that, *'all of this information has been subject to considerable press and media interest and discussion'*.
31. In submissions to the Commissioner (which pre-date most of the above developments), the complainant stated her belief that the release of the information, *'will promote accountability and transparency in government decision making, especially in matters which involve the sale of a totemic public asset, and whether the government did its best to secure good value for taxpayers'*. In the complainant's view the publication of the information would help to promote public debate not just about the Royal Mail IPO but about wider issues concerning the sale of public assets and how the government can ensure good value for taxpayers through the sale of such assets.
32. The complainant noted that in her internal review request to BIS, she had asserted that the publication of the National Audit Office report on 1 April 2014<sup>3</sup> (shortly after her request), had increased the public interest in disclosing the withheld information, since it had criticised the government's handling of the sale. The Commissioner notes that in its internal review the Department stated that the NAO report, *'while publically raising the profile of the IPO, does not heighten the public interest test in itself'*. BIS asserted that the NAO report had in fact placed additional information in the public domain on the valuation and IPO process which *'has now been subject to published independent scrutiny'*.
33. In submissions to the Commissioner, the complainant highlighted several of the NAO findings. The relevant findings of the NAO report were that:

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<sup>2</sup> IPOs and Bookbuilding in Future HM Government Primary Share Disposals

<sup>3</sup> The Privatisation of Royal Mail



- *'Sixteen of the 17 priority investors bought shares, and were allocated larger proportions of their orders than other investors reflecting the Department's expectation that they would form part of a stable long-term and supportive shareholder base, but almost half of the shares allocated to them had been sold within a few weeks of the IPO'* (page 9)
  - *'The strong share price increase of 38 per cent on the first day of trading and the trading throughout the first five months indicates that Royal Mail's shares are worth much more than this process was able to extract'* (page 10)
  - *'We consider that in order to achieve its main objective, the Department took a cautious approach to a number of issues which, taken together, resulted in the shares being priced at a level which was substantially below that at which they started trading'* (page 10)
34. The complainant contended to the Commissioner that *'given the weight of authority that the National Audit Office carries, the neutral approach it takes to assessing the value for money of governmental spending decisions and the concerns it has expressed about the valuation process which led to the Shareholder Executive choosing the 330p share price, I believe this bolsters the public interest argument for releasing the information I have requested'*. The complainant accepted that since her request was made more information had come into the public domain about the process which led to the decision to set the share sale price at 330 pence per share. However, the complainant submitted that since her internal review request, further information had come to light *'which throws into question the decisions taken by the government in relation to the IPO of Royal Mail shares'*. This further information was:
- *'The fact that we now know the names of the 16 priority investors and that these investors are not, as Business Secretary Vince Cable repeatedly stated prior to the sale, long term stable investors, but instead foreign sovereign wealth funds and global and UK based hedge funds, in particular a hedge fund which is a top donor to the Conservative party'*
  - *'The fact that the investment arm of Lazard, the company which was paid to advise the government about the sale, had priority access to shares and made 8 million on behalf of their clients in the first week of trading'*

- *'The fact that the government has stated it may sell more of its existing 30% stake in Royal Mail and plans to sell a large amount of the taxpayers stake in RBS before the next general election, as well as speculation that other state owned assets such as Eurostar may be given an IPO'.*
35. The complainant contended that, *'given the dispute over whether the government has achieved its objectives of getting good value for taxpayers and creating a long term and stable investor base, and that there may be future rounds of share sales, I believe this heightens the public interest in releasing the information I have requested about the advice the government received regarding the sale price of Royal Mail shares'*. The complainant concluded her submissions by stating her belief that BIS had not given enough weight to the strong public interest arguments which favour disclosing the information, both in terms of the Royal Mail case specifically, and the broader issue of providing appropriate transparency to the Department's work.

### **Public interest arguments in favour of maintaining Section 36(2)(b)(i) and (ii)**

36. The Department stated that the IPO had raised approximately £2bn for the taxpayer, with the 30% stake in Royal Mail that the Government retained increasing in value with the increase in the share price. The Department stated that the IPO had significantly reduced the risk to the taxpayer of having to provide support for the universal postal service. BIS contended that the critical views which had been expressed had been made *'with the benefit of hindsight and some are likely to be politically motivated'*. It pointed out that at the time of the sale in October 2013 there was much uncertainty, with a major strike threatened and economic turbulence internationally (in particular the possibility of a debt default by the United States Government)
37. The Department stated that the advice which had been provided was based on extensive market testing and a study of dividend yields on comparable stocks. It maintained that there was a significant risk that the share offer would not be successful at a higher price, and had that occurred then it would have potentially imposed very significant costs on the public purse.
38. The Department stated that the offer price of 330 pence was the highest price that the Department and its advisers were confident could successfully be achieved, *'and no subsequent investigation has found any evidence to suggest that this view was incorrect at the time'*. BIS stated that there is no evidence to suggest that the process itself or the

advice to Ministers was flawed or not backed by the evidence derived from extensive investor engagement and analysis.

39. In their submissions, BIS highlighted certain findings of the Myners report and submitted that, *'any major sale of public assets will inevitably attract criticism, including from those who are in principle against such a sale, and those who say with the benefit of hindsight that greater value should have been achieved'*. The Department contended that, *'these are properly matters for the scrutiny of Parliament and the National Audit Office (as has occurred in this case)'*. In view of the considerable scrutiny that had already taken place of the Royal Mail IPO, the Department asserted that, *'there is no prima facie compelling public interest in disclosure of the requested information in this case'*.
40. BIS advised that in a matter *'as sensitive and important as the sale of the Royal Mail'* it was crucial that the Government was able to obtain the best expert advice, and that that advice was frank and comprehensive. The Department stated that, *'as is the case with most financial or investment advice, the advice was provided to the Government in confidence. It was based in large part on extensive confidential discussions with a very wide range of institutional investors, which were designed to enable an accurate assessment to be made as to the demand for Royal Mail shares at different price points'*. The Department explained that the advice which was provided (and followed) by Ministers was based on a range of inputs and represented the considered view and expertise of two of the world's largest investment banks and one of the world's largest financial advisory firms. The Department said that any suggestion of a conflict of interest is misguided and, *'should be given no weight'*, there being well-established procedures and safeguards in place to prevent such a situation affecting the process. The Department contended that it would be impossible for the Government to obtain proper advice on stock market launches if it could not seek advice from global investment banking institutions which, by their nature, may potentially act for clients who wish to invest in the asset being sold.
41. BIS stated that the advice which was provided to the Department, *'concerned a matter of considerable importance and sensitivity, with major implications for public finances, the long term future of the Royal Mail and the success of the Government's policy towards privatisation of the Royal Mail and reducing the risk to the taxpayer of having to subsidise the universal postal service in the future'*. The advisers had to be confident when giving such advice that they could do so in an open and frank manner. That would not be the case if advisers were aware that the detail of their advice would be published.

42. The Department suggested that the tone, nature and content of advice provided within the confines of a confidential financial adviser/client relationship is likely to be considerably different to the advice that would be provided where the adviser in question has an eye on the likely disclosure of that advice into the public domain, *'and the inevitable need to justify or explain the advice in connection with a high profile, public sector financial transaction'*. The Department contended that disclosure of the advice in this case, *'and particularly the confidential market information on which the advice is based'* would be likely to inhibit third party advisers from expressing themselves openly, honestly and completely, or from exploring extreme, unpalatable or risky options, when providing advice in future or giving their views as part of the process of deliberation. BIS submitted that there is a substantial risk that advisers would be far more circumspect in their advice in future, and that this risk also applied to the process of exchanging views internally in relation to such advice, for the purposes of deliberation. This would ultimately be detrimental to the decision-making process.
43. With regard to the advice provided by the JGCs, the Department explained that information was obtained from potential investors (who have not been named publicly) about the prices that they were prepared to pay for shares. This information was gathered by the JGCs in confidential conversations with those potential investors and sight of the information in its raw form enhanced the decision-making process and understanding of the market. BIS contended that, *'if there was a clear intention that such information were to be made public at some future date, it would inhibit the quality of information that investors would be prepared to disclose or, in order to preserve confidentiality, the way in which advisers would present the information to the Department'*.
44. BIS stated that without the ability to obtain clear, frank and confidential advice from financial advisers, Government Ministers would be hindered in their ability to take well-informed decisions about major decisions affecting the public finances. The Department asserted that, *'the Government is entitled to obtain financial advice that is unbiased and unrestrained by concerns about subsequent disclosure of the substance of the advice or the confidential information on which it is based'*. It noted that there was also a need for Ministers and officials to be able to express themselves openly and have a free and frank exchange of views in relation to such advice, for the purposes of deliberation and to ensure that the best decision is arrived at.
45. The Department confirmed that it had consulted Lazard, UBS and Goldman Sachs in this matter and they all advised that their clear expectation was that the advice they provided was provided on a confidential basis. They all also considered that the nature and form of

such advice would be impacted if they were to have to provide such advice in future with a view to it being disclosed shortly thereafter into the public domain. *'In particular, their ability and willingness to provide working drafts for discussion purposes, the volume and level of detail of the information provided and the ability to provide the level of transparency based on information relating to third parties would all be likely to be impaired'*.

46. For all of the reasons given above, BIS contended that the public interest balance favoured maintaining Section 36(2)(b)(i) and (ii) to the withheld information.

### **Balance of the public interest**

47. The Commissioner's guidance on Section 36, where it relates to Section 36(2)(b)(i) and (ii) states that:

*'47. Arguments under Section 36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of internal discussions would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.*

*48. On the other hand, civil servants and other public servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Nonetheless, chilling effect arguments cannot be dismissed out of hand.*

*49. Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.*

*50. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question'.*

48. The Commissioner's view is that when making a decision with regard to a public authority's application of the public interest test, he is restricted to considering the circumstances which existed at the time of the request. It is therefore important to be clear about what information concerning the Royal Mail IPO (especially that pertaining to the advice provided to Government) was already in the public domain at the time of the complainant's request, and by the time that BIS provided the complainant with its internal review.
49. The complainant's request was made on 27 February 2014, four months after the Royal Mail IPO. By that time, a panel of banks, including the managing directors of UBS and Goldman Sachs (the JGCs), had given evidence to the BIS Committee (20 November 2013).
50. BIS responded to the complainant's request on 27 March 2014 and five days later the National Audit Office (NAO) published its 54 page report on the Royal Mail privatisation. In support of her public interest arguments for disclosing the withheld information, the complainant advised the Commissioner that, *'crucially the NAO report does not include what advice was given to Ministers'* by the JGCs and Lazard. However, in fact the NAO report does provide significant and important information on what advice was provided to Ministers by these parties. For example, at paragraph 4.7 on page 41 it states that:

*'On 3 October, the Department asked the syndicate banks whether it was possible to increase the price range. The global coordinators advised that, given the orders in the book, the maximum price increase could not be more than 20 pence per share to 350 pence (potentially generating additional proceeds of £120 million), although there was no certainty that the final price would exceed 330 pence per share. The syndicate and the independent corporate adviser recommended against a higher price, highlighting a risk that the offer might not ultimately price at the top of a new range with the consequent risk of the loss of momentum that had built up during book-building, and potentially a lower share price as well as noting there had been only one such change of the price range in the last decade'.*

51. Again, at paragraph 4.10 on page 42 it is stated that, *'the Department decided to sell 60 per cent on the basis of advisers' views that this would take advantage of positive momentum around the IPO, ensure investors were allocated sufficient shares and reduce taxpayer exposure to a potentially volatile share price'*. The Commissioner of course recognises that this information contained in the NAO report as to the advice provided by the JGCs and Lazard is far less detailed or comprehensive as the actual advice comprising the withheld information. Nevertheless, he considers it significant that the NAO,

which had access to the requested information when conducting its review of the Royal Mail IPO, chose to place this information in the public domain.

52. It is important to recognise, as BIS noted in its submissions to the Commissioner, that the NAO report found that by floating Royal Mail on the Stock Exchange, *'the Department achieved its key objectives of introducing private capital and commercial disciplines'* (page 10). The NAO also noted that the Government had participated in the share price increase via its 30 per cent residual stake (page 10). However, taken as a whole, the NAO report was clearly critical of certain aspects of the IPO from the perspective of the taxpayer interest. In addition to the findings highlighted by the complainant (see paragraph 33 above), the NAO noted that Lazard's fee structure incentivised successfully completing a transaction, and paid a fee that was not dependent on the valuation or transaction type. Furthermore, in delegating a wide range of responsibilities to Lazard and aligning its incentives with the policy objective of achieving a sale, *'the taxpayer interest was not clearly prioritised within the structure of the independent adviser's role'* (page 27).
53. The NAO report noted (page 42) that the Department could have sold only 47 per cent rather than 60 per cent of the company, while still meeting its objective of selling a majority of the shares. In essence, the NAO found that the Department took a cautious approach to a number of issues which resulted in the shares being priced at a level which was substantially below that at which they started trading and that although the primary objective of the IPO had been achieved, *'it could have achieved better value for the taxpayer'* (page 10).
54. Hearings on the subject took place before the Public Accounts Committee on 28 and 30 April 2014 and before the BIS Select Committee on 29 April 2014
55. On 2 May 2014 the complainant was provided with an internal review by the Department. By then there was already in the public domain a considerable amount of significant information about the role of Lazard and the JGCs and the advice which they provided to Ministers. Being objective and independent, the Commissioner considers the findings of the NAO report to be particularly important from a public interest perspective, but the Commissioner considers the fact that there was also scrutiny by two parliamentary select committees to have an important bearing on the public interest balance in this case.
56. The Department has suggested that the critical views which have been expressed have been made, *'with the benefit of hindsight'* and relied

heavily upon the findings of the Myners report in support. However, the Commissioner would note that that report was not published until December 2014. At the time of the complainant's request such retrospective analysis was not available and there was a great deal of controversy surrounding (what the Myners report would later describe as the) '*highly unusual*' Royal Mail aftermarket. The Commissioner readily acknowledges and accepts that some of the views and opinions which have been expressed in the public domain about the Royal Mail IPO are disputed. However, this in no way reduces the clear public interest factors arising from the Royal Mail IPO.

57. The Commissioner considers that the decision to privatise what the complainant has described as a '*totemic public asset*' is one which carries clear public interest at national level. The importance of and reliance on the universal postal service to the public cannot be overstated and the decision to privatise Royal Mail is one which necessitates a high degree of transparency and accountability, particularly in view of the risks and sums of public money involved. A number of public interest issues arise from the decision. However, the public interest factors which are relevant in this case are limited to those which would be facilitated by disclosure of the withheld information – the advice provided by Lazard and the JGCs.
58. The advice in question was provided to the Department in September and October 2013, and the complainant's subsequent request for the advice was made on 27 February 2014. The Commissioner recognises that markets can be volatile and subject to frequent change. Even so, the Commissioner considers that at the time of the request the financial advice provided to BIS was relatively recent. The sensitivity of the detailed advice was correspondingly significant in terms of its content. Whilst civil servants and other public officials can be expected to be impartial and robust when giving advice in the course of their employment, and not easily deterred from expressing their views by the possibility of future disclosure, the advice in this case was provided by private sector companies operating in a highly competitive environment.
59. Private sector companies which choose to do business with (and often greatly benefit from) the public sector, must expect and accept a greater degree of transparency and accountability than might be the case within the private sector. Lazard was paid a fee of 1.5m for advising on the Royal Mail IPO, with the investment banking syndicate (which included Goldman Sachs and UBS) being paid 12.7m<sup>4</sup>. Given the

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<sup>4</sup> Figures taken from the NAO report



sizable sums of taxpayers money involved, the Commissioner would entirely concur with the complainant that the public are entitled to know whether the process maximised good value for taxpayers. It would be unsatisfactory and untenable, from a transparency and accountability perspective, for there to be no information in the public domain to assist the public in making their own assessment and judgement of the advice which was so crucial to the decisions taken by Ministers.

60. However, on the facts of this case, the Commissioner considers that at the time of the complainant's request, and the provision of the internal review by BIS, there was significant and important information in the public domain pertaining to the advice which had been provided by Lazard and the JGCs. As noted previously, the NAO report referred to the advice and oral evidence had been taken by two parliamentary select committees.
61. The Commissioner accepts that disclosure of the actual detailed advice would provide some further transparency but he does not consider that such disclosure would significantly add to what has already been made public. Ministers and representatives of the companies concerned have been rigorously questioned and challenged about the advice, particularly in respect of the setting of the share price and the perceived conflicts of interest involved. Put simply, whilst the handling of the Royal Mail IPO will doubtless continue to divide opinion, the Commissioner considers that by the time the complainant came to be provided with the Department's internal review, there was sufficient and appropriate information in the public domain about the advice provided by Lazard and the JGCs for individuals to form their own views and judgements about that advice. In his view, transparency and accountability would not be greatly enhanced by disclosure of the withheld information.
62. In submissions to the Commissioner BIS has submitted that '*these are properly matters for the scrutiny of Parliament and the National Audit Office*'. To the extent that appropriate mechanisms already exist for ensuring due transparency and accountability of such high profile privatisations, the Commissioner would agree with this proposition, though he is clear that such mechanisms do not replace or mitigate the role of the FOIA.
63. The main public interest argument emphasised in the submissions provided by BIS (which runs through all the exemptions applied) is that it would be detrimental to Government and ultimately to taxpayers, if it were unable to procure specialist advice for important commercial projects because of a reluctance on the part of advisers, '*to provide advice that may be published within a short timescale, or potential unwillingness of institutional investors to engage with the process*'. The

Commissioner would agree that such inhibition of advice or investor participation would be detrimental to Government, particularly in view of the fact that at present government departments are (as the NAO report found in the case of BIS) dependent on the professional judgement of specialist advisers. BIS has explained that although the names of the priority investors have been disclosed, no information recording their specific profiles, views or attitudes is in the public domain, *'and even with some level of redaction, it may well be possible to connect certain investors with specific information in the requested information'*. Even if not, the Department has contended that, *'the mere fact of disclosure of the advice, based on the input of those third parties, is likely to lead to a reluctance on the part of those investors to be as candid or cooperative in any similar exercise in future'*.

64. With regard to institutional investors, the Commissioner has already referred to the fact that 16 of the 17 priority investors were allocated larger proportions of shares in the expectation that they would form part of a stable long-term and supportive shareholder base for Royal Mail. However, almost half of these shares had been sold within weeks of the IPO. The names of the priority investors were placed in the public domain by Dr Cable on 30 April 2014. The Commissioner notes that the then Secretary of State disclosed that although he had been advised that the investors expected confidentiality around their share acquisitions, he had decided that the publication of an accurate list was in the public interest. As the complainant has stated in her submissions, a substantial number of these priority investors were global and UK based speculative hedge funds.
65. The Myners report observed that, *'without a formal commitment to retain shares from shareholders, public companies can do very little to influence ownership and ensure a long term and stable register following listing'* (page 45). In the absence of such formal commitments, the Commissioner considers that the potential and quickly realisable financial benefits and rewards to institutional investors and their clients of investing in such high profile public sector transactions would be likely to outweigh any concerns about their input in such processes becoming publicly known.
66. However, the Commissioner considers that the position would likely be different in respect of companies providing specialist advice to Government. As the Department stated in its submissions, *'publication (of such advice) would be likely to put them at a disadvantage compared to other competing financial advisers in the market, particularly those working on transactions in the private sector or on other public sector advisory projects in the UK or internationally, where they are not required to publish such advice'*. The Department

submitted that sight of the advice would, *'also give their competitors an advantage in that they will be given access to the information that the advisers have provided, giving an insight into their methodology and know-how'*.

67. Lazard, UBS and Goldman Sachs have all confirmed that the nature and form of their advice would be impacted if they were to provide such advice in future with a view to it being disclosed *'shortly thereafter'* into the public domain. The Commissioner considers that disclosure of the withheld information would be unlikely to result in such specialist companies declining to provide such advice to Government in respect of future projects (given the significant financial incentive of them doing so). However, he does consider there is a real possibility that the detail and frankness of such advice, and therefore its value to Government and ultimately the taxpayer could be constrained or restricted by adviser concerns that *proximate* disclosure might provide competitors with sensitive and advantageous information. This would not be in the public interest.
68. That is to say, the Commissioner considers that whilst information remains market or operationally sensitive to the companies providing expert advice, then such companies, knowing that disclosure was soon to follow, would be less likely to be as detailed or frank in their advice provided and would be likely to take a risk-averse or protectionist approach (to their corporate interests) which would not be in the best interests of the taxpayer and thus the public at large.
69. One particularly important point made by the Department in its submissions to the Commissioner was that the choice of Offer Price was decided by Ministers, *'and it is right that they have to be accountable and must publicly defend that decision, as they have done'*. However, BIS contended that it is not for independent advisers to have to defend that decision, their role being to provide the best independent and impartial advice they could in fulfilment of their professional obligations.
70. Given the sizable fees paid to Lazard and the JGCs and what some have perceived as a conflict of interest between the adviser and investor roles, the Commissioner considers that the public interest in this case dictates a high level of transparency (if only to rebut such perceptions) with regard to the advice provided by the companies involved.
71. However, the Commissioner does not consider that such transparency necessarily requires the disclosure of the actual detailed advice provided by Lazard and the JGCs. Given the reasonable and legitimate concerns which the Department (and the companies concerned) have expressed about the adverse effect and inhibition to the future advice provision

and deliberation processes which disclosure of the advice could cause, the Commissioner believes that an appropriate and careful balance must be made when reaching a conclusion on where the greater public interest lies.

72. In this case, the Commissioner considers, upon consideration of the available evidence, that the appropriate transparency and accountability balance had been met by the time that the complainant was provided with the Department's internal review on 2 May 2014.
73. Although the Commissioner's determination as to the public interest balance has been restricted to the circumstances at the time of the request and the responses received by BIS, he considers it important, from a contextual standpoint, to note that significant further information was published as to the handling of the Royal Mail IPO in the months post-dating the internal review. On 11 July 2014 the BIS Committee published its two volume report on the Royal Mail privatisation.
74. The Government published its response to the BIS Committee's report on 23 October 2014. As previously noted, and as referenced by BIS in its submissions to the Commissioner, the independent review chaired by Lord Myners<sup>5</sup> published its report on 16 December 2014.
75. The Commissioner fully acknowledges the considerable public debate which took place following the Royal Mail IPO and recognises the public interest case for due transparency and accountability which the complainant makes in support of her request for the advice provided to the Shareholder Executive. However, he also recognises that the advice in question was provided in the context and understanding of confidentiality and contained financially sensitive information affecting the investors, the advising companies themselves and ultimately the public since they retained a significant shareholding of the company. At the time of the request the advice (and the information contained within it) was relatively recent<sup>6</sup>.

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<sup>5</sup> The Commissioner notes that the review panel had access to a number of documents relating to the floatation, including the information within scope of the complainant's request, and the panel had detailed discussions with Lazard, Goldman Sachs and UBS

<sup>6</sup> The Commissioner notes that on 10 June 2015, the newly elected Conservative Government sold half of the Government's remaining 30% shareholding in Royal Mail. The sale raised £750m which the Government announced would be used to help pay down the national debt.

76. On balance the Commissioner is satisfied that limited additional public interest would be served by the disclosure of the detailed advice in this case, given the significant level of transparency and accountability of that advice which had already taken place at the time of the request. Such limited additional public interest is outweighed by the public interest in ensuring that government departments have access to the most candid and comprehensive advice from specialist advisers, to help ensure that major decisions affecting the public finances are taken on a well-informed and deliberative basis. The Commissioner considers that this can only be ensured if such advice (in its detailed form at least) is treated as confidential, particularly in the immediate or short-term period after decisions are taken.
77. The Commissioner would emphasise that given the high-profile nature and importance of the Royal Mail IPO, and the significant sums of public money involved, had there been no or insufficient information in the public domain about the advice provided by Lazard and the JGCs, then his determination of the public interest balance might well have been different. As it is, given the factual circumstances and position described, the Commissioner is satisfied that BIS correctly applied Section 36(2)(b)(i) and (ii) to the withheld information and that the public interest favours maintaining the exemption.
78. Having found that the withheld information is exempt under Section 36(2)(b)(i) and (ii), the Commissioner has not gone on to consider the additional application of Section 43(2) and Section 41 relied upon by BIS.

## Right of appeal

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

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

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

80. 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.

81. 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 .....**

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