

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 June 2010

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

Summary

The complainant made a request to Royal Mail Group PLC (the "Royal Mail") under the Freedom of Information Act 2000 (the "Act") for information regarding amounts received from surcharges, defined by the Royal Mail as a combination of administration fees and underpaid/unpaid postage. The Royal Mail confirmed that it held the requested information but stated that it believed it was exempt from disclosure by virtue of section 43(2) of the Act. The Commissioner has concluded that section 43(2) is not engaged and that the information requested should be 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 complainant made an earlier request for information to Royal Mail on 23 January 2009 (see paragraph 6 below). Royal Mail responded to this request on 6 March 2009. It provided the complainant with the information requested in point 1 of this earlier request but went on to explain that it did not hold the information he requested at points 2 to

5. This was because his request was specifically for revenue generated from the £1 administration fee. Royal Mail also explained that it did not hold information about the revenue generated from this fee in isolation but that it was effectively amalgamated with the money received for the underpaid/unpaid postage which was then recorded as revenue collected from surcharges. It then went on to provide its arguments as to why the total amounts collected from surcharges should not be disclosed as it considered this to be exempt under section 43.
3. The complainant requested a review on 9 March 2009 and Royal Mail responded on 7 May 2009 restating that it did not hold the information he required but maintaining its application of section 43 in relation to the information it did hold. The complainant then made a complaint to the Commissioner on 11 June 2009 about Royal Mail's response to his request of 23 January 2009.
4. The Commissioner pointed out to the complainant and Royal Mail that his request of 23 January 2009 was very specific - the complainant specifically only sought information about the income generated through administration fees as opposed to the total amounts collected through both fees and underpaid/unpaid postage. Royal Mail clearly indicated that the former information was not held and the complainant did not dispute this.
5. The Commissioner acknowledged that Royal Mail had endeavoured to comply with its duty to provide advice and assistance under section 16 of the Act. However, having done so, it should then have invited the complainant to revise his request rather than proceed to provide its arguments in relation to the information it does hold. The complainant was invited to make a new request for information which he did on 27 August 2009. This Decision Notice therefore focuses on the second request made on 27 August 2009.

The Request

6. The complainant made a reworded request on 27 August 2009:

*"Re: My earlier request for information on surcharges. I am told by the Office of the Information Commissioner that I have to make a formal request for the information you do hold on this subject. This is that formal request.
You have previously refused to supply this information. You should be aware that the ICO has asked you to expedite your response."*

The complainant's previous request had been made on 23 January 2009:

- "1. When did the admin fee for collecting mail with underpaid/unpaid postage go up to £1?*
- 2. How much does Royal Mail receive from the fee on an annual basis?*
- 3. What are the annual income figures from this charge for the most recent five years available?*
- 4. What is the projected income from this charge for the current financial year?*
- 5. How much did Royal Mail receive from the fees over the one month before Christmas?"*

7. Royal Mail responded on 25 September 2009 citing section 12(1) that providing this information would exceed the appropriate limit as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations). An estimate of 18 hours was calculated for one person to determine whether the information was held and to locate, retrieve and extract that information.
8. Royal Mail then went on to consider the complainant's request against the more specific points he asked. It was confirmed that relevant information was held on surcharges regarding 2004-2005 to 2008-2009, which included the £1 handling fee and the underpaid/unpaid postage, as well as Christmas 2008. The exemption at section 43(2) was cited stating that disclosure of this information would prejudice Royal Mail's commercial interests if it was published. Royal Mail explained that to publish these fee income details might encourage people to pay the incorrect postage on the basis that the surcharge was not always collected. However, income from the administration fee alone could not be identified.
9. Royal Mail pointed out that a commercial environment made a "blanket approach" to surcharging unattractive. The letter quoted the ICO in support of its contention that section 43(2) could be engaged if releasing the information might damage a company's reputation or the confidence that suppliers, customers and investors have in that business. Providing the figures might give a misleading impression and damage customer perception of the Royal Mail.
10. Royal Mail presented a number of arguments which it considered supported its decision to withhold the requested information. It explained that:
 - The public is openly informed about charges for items with insufficient postage. Those charges are not set according to the number of items

handled and are not profit making

- The charges are a revenue protection measure. Knowing the total amounts would not inform the public “as to how often, and in what circumstances, surcharges are applied”
 - Royal Mail is a publically owned company with a fair pricing system. Those customers who pay the correct price should not be disadvantaged
11. On 25 September 2009 the complainant contacted the Commissioner regarding his resubmitted request for information to complain about the way it had been handled.

The Investigation

Scope of the case

12. The Commissioner wrote to Royal Mail on 29 September 2009 to try and establish whether it had waived its right to an internal review before directing the complainant to the ICO. Royal Mail confirmed that it had indeed waived its right to a review which the Commissioner accepted, given the background to this case and the delay that had already occurred. Royal Mail was also asked to confirm if it was invoking section 12 but that whether, irrespective of this, section 43(2) would apply. Royal Mail replied by email on 29 September 2009 and explained that if the complainant’s request related to all information held on the subject of surcharging it would exceed the fees limit. However, it had taken the second request for information to be for the same specific elements outlined in the first request of 23 January 2009 and on that basis section 12 did not apply but section 43 was applicable. The complainant was advised of this approach and did not contradict the Commissioner’s interpretation. Therefore the Commissioner’s investigation has been solely focussed on the application of section 43(2) to the same specific elements as outlined in the complainant’s first request though relating to both the administration fee and the unpaid/underpaid postage combined.

For the sake of clarification the Commissioner’s investigation only relates to points 2-5 of the complainant’s request and to the total fee. Royal Mail only holds the amalgamated fee (administration fee and unpaid/underpaid postage) and the complainant put in a reworded request after having been made aware of this fact.

Chronology

13. On 14 December 2009, having considered the correspondence between Royal Mail and the complainant, the Commissioner wrote again to Royal Mail seeking further information and arguments relating to its application of section 43.
14. The Royal Mail responded with its answers to the Commissioner's questions on 15 January 2010:
 - It confirmed that it held the requested information relating to points 2-5 of the complainant's request for information but considered disclosure of that information would be likely to prejudice its commercial interests as opposed to its previous assertion to the complainant that disclosure would prejudice its commercial interests
 - It confirmed that there was a volume of information in the public domain regarding the breakdown of mail and provided articles and links to some of that information
 - The Royal Mail declined to rely further on the argument that the public would be able to assess how much of the charge for unpaid/underpaid postage had not been surcharged because of the global nature of the requested figures
 - It argued that unjustified negative publicity damaged customer perception which would make the public less likely to use Royal Mail's services
 - It also argued that critical stories at Christmas can damage Royal Mail's reputation in a commercially competitive environment. Evidence of the type of newspaper articles considered to be damaging and that might influence the public into going to a competitor were provided

Royal Mail had been asked to explain why providing the requested figures from points 2-5 would give a misleading impression, given that the public are aware of the administration fee -

- Royal Mail argued that, as it did not hold the information on how much of the global fee was made up of underpaid/unpaid postage, it would invite speculation
15. Royal Mail also put forward a number of public interest arguments for withholding the requested information.

Analysis

Exemptions

Section 43

16. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The full text of section 43 can be found in the Legal Annex at the end of this Notice.
17. The Commissioner accepts that the Royal Mail is a publically owned company which is engaged in commercial activities and that the information requested relates to those activities. For this reason he believes that the information in question falls within the scope of the exemption.
18. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of the Royal Mail. During the investigation of this case Royal Mail has confirmed that the disclosure of the requested information would be 'likely to prejudice' its commercial interests.
19. In the case of *John Connor Press Associates Limited v The Information Commissioner* 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.

20. The Commissioner has first considered whether disclosure of the withheld information would be likely to prejudice the commercial interests of the Royal Mail.
21. In its letter to the Commissioner on 15 January 2010 the Royal Mail argued that the disclosure of the information would:

- lead to unjustified negative publicity, damage customer perception and make the public less likely to use its services
- fail to distinguish between the revenue from the surcharge and the amount of the unpaid/underpaid postage that led to the surcharge being levied. Speculation would ensue concerning what proportion is made up of surcharge and what proportion unpaid/underpaid postage

Both effects would be likely to prejudice its commercial interests.

22. The Commissioner does not accept the rather generic argument that the Royal Mail has presented in relation to the prejudice it might suffer to its commercial interests as a result of disclosing the requested information. The argument presented - that the release of this 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 this exemption which is clearly not what is intended by the Act. It has however presented little specific argument to support its view other than the press articles provided to the Commissioner. These articles do display adverse publicity but they are speculative and it could be argued that this supports the view that releasing the requested information would provide accurate figures for the press. There is no causal link shown which demonstrates that the release of the specific figures may very well prejudice Royal Mail any more than the adverse articles containing speculative arguments on the subject of surcharges for unpaid/underpaid postage.
23. Section 43 is a prejudice based exemption, not a class based exemption, and, as such, the correct interpretation of the application of this exemption is whether the disclosure of the actual withheld information (as specified in the request) would have the potential to cause the prejudice as described in the exemption. The question to be asked in any assessment of prejudice in relation to this case is: 'what would happen if this particular information were to be disclosed?'
24. The Tribunal in *Hogan* commented as follows (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 discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

A fuller extract of the quote from Lord Falconer of Thornton is "
Finally, on the subject of exemptions, I want to emphasise the strength

of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The Commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is “real, actual or of substance”.

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. If a “trivial or insignificant” prejudice is claimed then it is questionable whether any detriment or actual prejudice to the interest being protected has truly been identified.

25. In reaching a view on the Royal Mail's arguments and whether the disclosure of the withheld information would be likely to cause the prejudicial effects described, the Commissioner has firstly considered the nature of the withheld information.
26. The Commissioner is not convinced that the withheld information is as commercially sensitive as the Royal Mail has argued, given the uncontroversial nature of the information. By ‘uncontroversial’ the Commissioner means that the fact the Royal Mail charges for unpaid or underpaid postage and an administration fee is in the public domain and the publication of the amalgamated fees merely puts a figure to that.
27. In this case the withheld information is a figure for unpaid or underpaid postage and administration fees. As previously explained Royal Mail does not hold separate figures. The argument that this would lead to a ‘misleading impression’ and speculation does not explain how the correct figures, albeit not broken down, can be more misleading than the release of no figures. At worst the release of these figures might lead to speculative arguments regarding how many times the surcharge for unpaid/underpaid postage is not levied but the Commissioner is not convinced that this situation would be exacerbated by the use of the correct overall figures as opposed to the speculative figures. As Royal Mail has been at pains to point out, the public knows about the surcharge for unpaid or underpaid mail and so the converse argument might be put forward that any failure to collect this surcharge, coupled with the potential impact on paying customers, might also cause adverse publicity. The fact that the global figure alone is held, militates against the idea that there would be adverse publicity regarding any lack of imposition of the surcharge as this is always going to be an unknown quantity whilst that information remains

unrecorded. If the recorded figure is released it is open to Royal Mail to put that disclosure into context.

28. After considering the Royal Mail's arguments, the nature of the withheld information, and the test of likelihood of prejudice (as described in paragraphs 18-19) the Commissioner is not persuaded that the disclosure of the withheld information in this case would be likely to cause the prejudice as argued by the Royal Mail.
29. As the Commissioner is of the view that section 43(2) of the Act is not engaged and does not provide an exemption from disclosure he has not gone on to consider the public interest test.

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 1(1)(b) of the Act, in that it inappropriately relied on section 43(2) to withhold the requested information. In failing to comply with the requirements of section 1(1)(b) within twenty working days it also breached section 10(1).

Steps Required

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

The withheld information should be disclosed to the complainant. The information that should be disclosed is as follows:

- The combined annual income figures for the unpaid/underpaid postage and administration fees over the most recent 5 years
 - The projected income from this charge for 2008/2009
 - The combined amount collected in the month before Christmas 2008/2009
32. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

33. 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

34. 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 10th day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

General Right of Access

Section 1(1) provides that –

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that –

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

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

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

Section 1(5) provides that –

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

Section 1(6) provides that –

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

Time for Compliance

Section 10(1) provides that –

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

Section 10(2) provides that –

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

Section 10(3) provides that –

“If, and to the extent that –

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

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

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

Section 10(4) provides that –

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

Section 10(5) provides that –

“Regulations under subsection (4) may –

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

(b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

the date of receipt” means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

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

Commercial interests

Section 43 provides that -

- (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).