

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 December 2010

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

Summary

The complainant requested information relating to correspondence about Royal Mail's refusal to use a particular theme for an issue of stamps relating to the British soldiers killed in Iraq. Royal Mail refused to disclose the information and relied on the exemptions at section 36(2)(b)(i) and 36(2)(b)(ii). The Commissioner found that Royal Mail was correct in the application of the exemptions but that the public interest test favoured disclosure of some of the information. Therefore the Commissioner directs Royal Mail to disclose this part of the withheld information to the complainant. The Commissioner also recorded breaches of sections 1(1)(b) and 10(1) of the Act.

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. Steve McQueen is a British artist and film maker. One of his projects entitled 'Queen and Country'¹ comprised a series of photographs of soldiers who lost their lives in Iraq. He created a cabinet containing a series of facsimile postage sheets, each one dedicated to a deceased soldier. The Art Fund, a UK art charity, presented this cabinet to the Imperial War Museum in November 2007 and toured the work around the UK between 2007 and 2010. Mr McQueen made a proposal that the portraits of those who lost their lives during the conflict be issued on stamps by Royal Mail.
3. Royal Mail declined to issue the stamps as proposed by Mr McQueen and this resulted in a campaign spearheaded by the Art Fund to gain public support for the project. Between November 2007 and July 2010 26,273 people signed a petition in support of the project.

The Request

4. On 20 October 2009 the complainant made a request to the Royal Mail:

'I would like to request all internal correspondence from within Royal Mail and any external correspondence sent or received by Royal Mail that relates to the Art Fund and Steve McQueen's campaign for Royal Mail to issue stamps based on Mr McQueen's art work, Queen and Country'.
5. On 20 November 2009 Royal Mail wrote to the complainant and disclosed some of the requested information but refused to disclose the remainder. Royal Mail told the complainant that section 36(2)(b) of the Act was engaged in respect of the withheld information and that the public interest was best served by withholding the information.
6. On 16 December 2009 the complainant requested an internal review of the decision.
7. On 15 February 2010 Royal Mail completed the internal review and informed the complainant that it was upholding its decision to withhold the information, citing section 36(2)(b)(i) and (ii) of the Act.

¹ http://www.artfund.org/queenandcountry/Queen_and_Country.html

The Investigation

Scope of the case

8. On 3 March 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant told the Commissioner that she did not feel the reasons given by Royal Mail for withholding the information were justified. In the course of the Commissioner's investigation the complainant agreed not to pursue the disclosure of the names of the authors of the emails and correspondence. The Commissioner has therefore excluded this information from the scope of his investigation.

Chronology

9. The Commissioner wrote to Royal Mail to request a copy of the withheld information as well as further information about Royal Mail's handling of the request.
10. On 24 May 2010 the Commissioner received copies of the withheld information as requested together with additional information about how Royal Mail handled the request.
11. The Commissioner wrote to Royal Mail on 11 June 2010 to ask for further information about how it had applied the exemption and also to provide additional information about the qualified person's opinion as required by section 36(2) of the Act.
12. On 8 July 2010 Royal Mail wrote to the Commissioner with additional detail of the qualified person's opinion.
13. The Commissioner wrote to Royal Mail again on 12 August 2010 seeking further clarification of the information on which the qualified person's opinion was based.
14. Royal Mail provided additional information on 10 September and 23 September 2010.

Findings of Fact

15. The withheld information comprises extracts from six pieces of correspondence, including letters and emails, from various dates in 2007 and 2008. The extracts contain views and opinions of various

individuals on the issue of the proposed stamp designs, as well as Royal Mail's decision not to proceed with the project and its response to the campaign against this decision.

Analysis

Exemptions

Section 36(2)(b)(i) and (ii) – prejudice to the effective conduct of public affairs

16. In this case Royal Mail has relied upon sections 36(2)(b)(i) and (ii) in relation to the withheld information. Sections 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”.

17. Royal Mail did not indicate which information was withheld in reliance on each subsection. However, having considered in detail the withheld information the Commissioner considers it appropriate to look at Royal Mail's arguments in relation to both subsections together.
18. In order to establish whether the exemption has been applied correctly the Commissioner considers it necessary to:
- Establish that an opinion was given;
 - Ascertain that it was given by a qualified person;
 - Ascertain when the opinion was given; and,
 - Consider whether the opinion was objectively reasonable and reasonably arrived at.
19. If the Commissioner decides that the exemption is engaged he will then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

The opinion of the qualified person

20. Royal Mail confirmed that the qualified person in this case was Mr Jonathan Evans, who was the Company Secretary of Royal Mail Group at the time of the request and internal review.
21. Royal Mail told the Commissioner that the qualified person had previously considered the release of the same information on another request which the Royal Mail had received on 4 February 2009. Royal Mail told the Commissioner that Mr Evans, the qualified person, had concluded that section 36 had applied to the requested information in that previous case and so Royal Mail had relied on that opinion when making a decision on this subsequent request.
22. Royal Mail also told the Commissioner that the qualified person considered whether the exemption applied to the requested information at a panel meeting held on 26 January 2010 which constituted the internal review.
23. Royal Mail told the Commissioner that prior to making his decision to apply section 36 on 26 January 2010 the qualified person was provided with the following:
 - a copy of the request;
 - Royal Mail's response, including a copy of the information disclosed;
 - the applicant's request for an internal review;
 - the information that at the internal review stage was being withheld;
 - a review of the searches made for the requested information;
 - a summary of Royal Mail's response to a similar request of 4 February 2009;
 - an outline of the requirements of section 36(2)(b);
 - commentary on whether section 36(2)(b) was engaged; and
 - commentary on the public interest test, including consideration of factors for and against disclosure; and
 - a recommendation of how to proceed.
24. The Commissioner requested and was provided with a copy of the submissions on which the qualified person gave his opinion. Royal Mail also told the Commissioner that although the qualified person did not record his opinion in writing that it was Royal Mail's view that the opinion given did reflect the discussion at the meeting based on the submissions provided. Royal Mail told the Commissioner that this was accurately reflected in the internal review response.

25. In light of the above the Commissioner is satisfied that an opinion was given on 26 January 2010 by the time of completion of the internal review, and that the opinion was given by the Company Secretary. The Commissioner, having seen proof in a previous case, accepts that the Company Secretary of Royal Mail is a qualified person for the purposes of section 36(5)(o)(iii) of the Act.
26. Royal Mail has provided the Commissioner with details of the factors that the qualified person took into account in reaching his opinion. Those factors included sensitivity around the proposed design of the stamps, in that they would portray images of deceased service personnel, and the controversy around the Iraq war and the public debate about the conflict. The qualified person also took into account the view that the disclosure of information containing discussions or opinions expressed could result in some public debate which could make the contributors uncomfortable that their views, which had been given in the context of the performance of their roles, could be attributed to them as their personal views.
27. For this reason the qualified person was of the opinion that disclosure of the withheld information would be likely to inhibit the provision of advice and the exchange of views.
28. The Commissioner is satisfied that the qualified person only took into account relevant factors when reaching his opinion. In view of this the Commissioner is satisfied that the qualified person's opinion was reasonably arrived at.
29. The next steps for the Commissioner to consider are whether the qualified person's opinion was a reasonable one, and whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Was the opinion reasonable?

30. The basis for the qualified person's opinion under section 36(2)(b)(i) and 36(2)(b)(ii) is that the disclosure of the information would be likely to lead to individuals being less willing to express their views candidly on issues such as proposals for special stamps or the subjects that appear on them. The qualified person also considered that disclosure would be likely to inhibit expressions of staff on how to respond to external requests or campaigns concerning special stamps.
31. Royal Mail also told the Commissioner that its staff need to be able to have frank discussions about a subject or likely reaction to the adoption or rejection of any subject. This is particularly important when

discussing the subject and themes of special stamps, especially where there are sensitivities and strong emotions surrounding any proposed content. If individuals thought that their comments were liable to be disclosed, they would be likely to be inhibited in the advice and views they offer.

32. The Commissioner has examined the withheld information and is satisfied that it can be characterised as being provided in the context of a free and frank exchange.

33. The Commissioner has been guided by the Information Tribunal's decision in *Guardian & Brooke v ICO & the BBC* which indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

*"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."*²

34. In this case, the Commissioner accepts that, if the withheld information were to be disclosed into the public domain, it is reasonable to conclude that the individuals concerned would be likely to feel inhibited in expressing views and offering advice. The Commissioner is satisfied that on balance this possibility is real and significant and more than hypothetical or remote so the Commissioner is satisfied that the opinion of the qualified person was a reasonable one. Therefore the Commissioner concludes that the qualified person's opinion that disclosure of the withheld information would be likely to have the effect indicated is reasonable, and therefore the exemptions are engaged.

Public interest test

35. As the Commissioner is satisfied that an opinion was given by the qualified person on a specified date prior to the completion of the internal review and that it was objectively reasonable and reasonably arrived at, the exemption is engaged and so he has gone on to consider the balance of the public interest arguments.

36. As indicated above, the Commissioner considers that both section 36(2)(b)(i) and (ii) are engaged in relation to all of the withheld information. Therefore the Commissioner has also considered the public interest arguments in relation to both subsections together.

² EA/2006/0011 & EA/2006/0013, para 91

Public interest arguments in favour of disclosing the requested information

37. Royal Mail told the Commissioner that any decision to recognise a person or event through the issue of special stamps is a form of recognition on behalf of the nation even though there is no direct grant of funding from central government for special stamps. Therefore there will generally be a strong public interest in disclosing information which explains how these decisions are made.
38. However, it also pointed out that the views expressed in the withheld information are in line with the public approach taken by Royal Mail. Therefore Royal Mail was of the view that disclosure of the withheld information would not add significantly to what is already in the public domain.
39. The Commissioner is mindful that the issue of Mr McQueen's stamp proposal remained in the public domain as at the date of the request. The Commissioner notes that the Art Fund campaign as described in paragraphs 2 and 3 of this Notice received considerable public support in the form of signatures on a petition. The Commissioner believes that this adds some weight to the argument to disclose the information to aid public understanding of Royal Mail's response to the Art Fund's campaign. He also considers that even if the withheld information does not add significantly to what is already known, there is still a public interest in the public being provided with a full picture so as to avoid any suspicion of "spin"
40. Finally, Royal Mail acknowledged the legitimate public interest in the public being informed about how decisions concerning how to recognise and remember those who have died in the Iraq war are made. The Commissioner notes that there has been considerable public interest in the subject of the Iraq war and related topics. The Commissioner is mindful that what interests the public is not always what is in the public interest, but he agrees that there is a strong public interest in the public being informed about proposals to recognise and remember soldiers who lost their lives in the Iraq war.

Public interest arguments in favour of maintaining the exemption

41. Royal Mail was of the view that, the content of the information (rather than the conclusion Royal Mail reached and announced publically) is what would have an effect on the likelihood of future free discussions. Royal Mail argued that there is a strong public interest in protecting the ability of individuals to communicate with candour and frankness on

sensitive issues. Taking into account that the withheld information is several years old, Royal Mail accepted, however, that the inhibiting effect on future behaviour of individuals expressing opinions may have diminished somewhat. The Commissioner accepts that full, free and frank discussions ultimately lead to better decision making and that there is therefore a public interest in not prejudicing the free and frank exchange of views and provision of advice. He notes that as at the date of the request the campaign supporting the stamp issue proposal was ongoing and that therefore the Royal Mail could have been called upon for further comment in relation to this matter at any time. He therefore considers that, although the correspondence was over a year old as at the date of the request, to some extent this remained a “live” issue for the Royal Mail.

42. The Commissioner has inspected and considered the content of the information and, as stated above, accepts that it was reasonable for the qualified person to have concluded that the content of the withheld information in this case would be likely to cause the inhibiting effect on future discussion and decisions and that this would not be in the public interest. He has therefore given due weight to the opinion of the qualified person in considering the public interest test.
43. In considering the public interest in maintaining the exemption however, the Commissioner has also considered the severity of the prejudice that would be likely to occur. The Commissioner is mindful that the withheld information does in part contain the views of individuals, and considers that disclosure of this information, whilst the issue remained live, would be likely to have a reasonably severe inhibitory effect on individuals expressing themselves candidly in relation to this matter. He also accepts that disclosure of personal views in relation to a live issue could also have a reasonably severe inhibitory effect in relation to the discussion of other similar matters in the future.
44. However, where corporate rather than individual views are revealed, and where those views had already been expressed as the public position of the Royal Mail, then the Commissioner considers that the severity of any inhibition, even where the issue is live, would be less because the fear of exposure or scrutiny on a personal level would be less.

Balance of the public interest arguments

44. The Commissioner has attributed significant weight to the arguments about the public interest in understanding decisions made about how to

recognise and remember those who have died in the Iraq war. He understands the public emotions associated with the loss of soldiers' lives and how that is recognised. The Commissioner notes that this strength of feeling is reflected in the number of signatures on the petition organised by the Art Fund. However, he also notes that there is a significant amount of information in the public domain which demonstrates the reasoning behind Royal Mail's decision not to issue the stamps.

45. Where the withheld information does reveal personal views, rather than purely reflecting Royal Mail's position on the issue, the Commissioner is not convinced that the public interest in disclosure is sufficient to outweigh the public interest in protecting a free and frank decision making process in relation to a live issue.
46. In relation to the remainder of the withheld information, the Commissioner agrees that the ability of individuals to have frank discussions and offer advice is worthy of protection, but considers that this must be balanced against a realistic appraisal of the risks posed by disclosure. The Commissioner considers that, in relation to this portion of the withheld information, whilst there is a risk of inhibition the severity of that inhibition would not be sufficient to tip the balance of the public interest in favour of maintaining the exemption.
47. The Commissioner has therefore found that the balance of the public interest lies in the disclosure of some of the information but favours maintenance of the exemption in respect of the remainder. The Commissioner has specified the information to be disclosed in a confidential annex at the end of this Notice.

Procedural requirements

Section 1(1)(b): duty to provide information

48. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that some of the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that Royal Mail failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

49. Section 10 of the Act states that a public authority must comply with section 1(1) promptly, and in any event not later than twenty working days after the request has been received.
50. As the Commissioner is of the view that Royal Mail wrongly withheld some information from the complainant, it follows that Royal Mail failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that Royal Mail failed to comply with section 10(1) in relation to this information.

The Decision

51. The Commissioner's decision is that Royal Mail dealt with the following elements of the request in accordance with the requirements of the Act:
 - Royal Mail correctly withheld some information in reliance on the exemption under sections 36(2)(b)(i) and (ii) of the Act.
52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - Royal Mail wrongly withheld some information in reliance on the exemption under sections 36(2)(b)(i) and (ii) as the public interest favoured disclosing this information.
 - Royal Mail breached sections 1(1)(b) and 10(1) in failing to communicate this information to the complainant within the time for compliance.

Steps Required

53. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Disclose the information specified in the confidential annex
54. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

55. 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.

Other matters

56. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

Opinion of the qualified person

57. The Commissioner has noted with concern that Royal Mail did not seek the opinion of the qualified person at the refusal stage of the request. Instead they relied on an opinion which had previously been given on a previous unrelated request for the same information. Royal Mail corrected this at internal review stage when they did then seek the opinion of the qualified person and therefore the Commissioner has accepted this opinion as valid. However, he would expect that in future cases the Royal Mail should ensure that an opinion is sought from the qualified person, in relation to each individual request, prior to relying upon section 36.
58. The Commissioner also notes the Tribunal's decision in *Chief Constable of Surrey police v ICO [EA/2009/0081]* which commented on the evidence of the content of a qualified person's opinion. At paragraphs 54 and 55 of the judgment the Tribunal recommended that it would be best practice for a public authority to maintain a documentary record of how the qualified person's opinion was reached. The Commissioner will expect public authorities to keep a record of the opinion which details the application of section 36 to the information and will expect them to understand that failure to do so may significantly weaken their case.

Internal review

59. The complainant requested an internal review on 16 December 2009. However, the outcome of the review was not communicated to the complainant until 15 February 2010.
60. Further, Part VI of the Code of Practice issued under section 45 of the Act recommends that internal review procedures should encourage a

prompt determination of the complaint. The Commissioner has published guidance which sets out his view that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it appeared to take 38 working days for an internal review to be completed.

Right of Appeal

61. 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 21st day of December 2010

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2010

Section 1

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 10

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

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

...

- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or