

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 02 August 2010

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

Summary

The complainant requested copies of minutes of the public authority's board meetings. The public authority provided some information but refused to disclose the remainder of the information under sections 22, 36 and 43(2) of the Act. During the course of the Commissioner's investigation the complainant reduced the scope of his complaint to one set of minutes, the headings, subheadings and any environmental information from other minutes.

The Commissioner concluded that the public authority was correct to withhold some information under sections 36 and 43(2). He determined that the remainder of the information should have been disclosed. The Commissioner also identified some procedural breaches by the public authority.

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.
2. The Environmental Information Regulations ("EIR") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement

provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. On 9 November 2008 the complainant requested "...the minutes of all meetings of the board of directors of Royal Mail Group Limited taking place on or after 1 January 2007."
4. On 19 November 2008 the public authority refused this request on the basis that to comply with it would exceed the fees limit (section 12) under the Act.
5. On 19 November 2008 the complainant narrowed the scope of his request to "all board minutes for the period from 1 August 2008 and 1 November 2008 inclusive".
6. On 18 December 2008 the public authority informed the complainant that it believed that the exemptions contained in sections 22, 36 and 43 of the Act applied to the requested information but that it needed more time to consider the public interest arguments.
7. On 6 January 2009 the public authority disclosed some information to the complainant but withheld the remaining information under sections 22, 36 and 43 of the Act.
8. On 9 February 2009 the complainant requested that the public authority carry out an internal review of its decision.
9. On 7 April 2009 the public authority informed the complainant that the result of its internal review was to uphold its original decision.

The Investigation

Scope of the case

10. On 10 April 2009 the complainant contacted the Commissioner to complain about the public authority's decision to apply sections 22, 36 and 43 to the sets of minutes covered by his request.
11. The public authority identified the minutes covered by the complainant's request as those of the meetings of the Board of Directors held on 11 September 2008 and 8 October 2008 and

meetings of the Group Executive Team held on 23 September and 21 October 2008

12. On 12 January 2010, following discussions with the Commissioner, the complainant agreed to the scope of his complaint being limited to a determination as to whether the public authority was correct to withhold:
 - (i) any headings and subheadings contained in the minutes of the meeting of the Board of Directors on 8 October 2008 and meetings of the Group Executive Team on 23 September and 21 October 2008;
 - (ii) any information contained in minutes of the meeting of the Board of Directors on 11 September 2008; and
 - (iii) any environmental information (as defined by the Environmental Information Regulations 2004) contained in the minutes of the meeting of the Board of Directors on 8 October 2008 and the meetings of the Group Executive Team on 23 September and 21 October 2008.
13. The Commissioner acknowledges that the public authority adopted a broad interpretation of the complainant's request. However, he notes that the original request was specifically for "the minutes of all meetings of the board of directors of Royal Mail Group Limited". The subsequent narrowed request, following the application of section 12 by the public authority, was for "all board minutes" for a shorter time span than the original request.
14. After considering the wording of the request, the Commissioner is not satisfied that the request that was made encompasses the information contained in the minutes of the Group Executive Team as this is clearly a different body with different members and different functions to the Board of Directors. He has therefore restricted the scope of his determination as to whether the public authority was correct to withhold:
 - (i) any headings and subheadings contained in the minutes of the meeting of the Board of Directors on 8 October 2008;
 - (ii) any information contained in the minutes of the meeting of the Board of Directors on 11 September 2008; and
 - (iii) any environmental information (as defined by the Environmental Information Regulations 2004) contained in

the minutes of the meeting of the Board of Directors on 8 October 2008.

Chronology

15. The Commissioner has outlined below the most significant communications with the public authority and the complainant.
16. On 10 August 2009 the Commissioner requested that the public authority provide him with a copy of the withheld information and detailed arguments as to why it was believed to be exempt from disclosure.
17. On 21 September 2009 the public authority's solicitors provided the Commissioner with a copy of the information that had been withheld and arguments as to why the public authority believed that the withheld information was exempt from disclosure. In addition to sections 22, 36 and 43(2), the public authority also sought to rely on sections 40(2) and 42.
18. On 3 November 2009 the complainant discussed with the Commissioner the possibility of reducing the scope of his complaint if the public authority were able to give more information concerning the content of the minutes that were the subject of his request.
19. On 4 December 2009 the public authority's solicitors informed the Commissioner that the public authority had agreed, in light of the passage of time since the request was originally made, to disclose some further information to the complainant.
20. On 12 January 2010, following discussions with the Commissioner, the complainant confirmed his agreement to narrow the scope of his complaint to that outlined in the "Scope of the case" section above.
21. On 13 January 2010 the Commissioner informed the public authority's solicitors of the narrowed scope of the complaint. He raised a number of queries with regard to the public authority's application of the exemptions to the information that now fell within the scope of the complaint.
22. In relation to the complainant's request for environmental information, the Commissioner expressed the view to the public authority that the only information falling within this definition was contained in a paragraph in the minutes of the meeting of 8 October 2008.

23. On 5 February 2010 the public authority provided the Commissioner with arguments as to why it believed that the information which now fell within the scope of the complaint was exempt from disclosure.
24. On 8 February 2010 the Commissioner wrote to the public authority seeking further information in relation to some of the public authority's arguments.
25. On 22 February 2010 the public authority provided further arguments regarding its application of exemptions.
26. On 29 March 2010 the Commissioner wrote to the public authority to obtain further clarification as to why it believed that the headings and subheadings contained in the minutes were exempt from disclosure. He also sought further clarification as to why it believed that the very limited amount of environmental information contained in the minutes was subject to exceptions.
27. On 12 April 2010 the public authority responded to the Commissioner. It informed him that it believed that the issues he had raised had been addressed in its previous correspondence.
28. On 27 May 2010 the Commissioner requested clarification from the public authority with regard to its application of section 36.
29. On 8 June 2010 provided a response to the Commissioner.
30. On 9 June 2010 the Commissioner sought further clarification from the public authority with regard to its application of section 36.
31. On 16 June 2010 the public authority provided the Commissioner with a response.

Analysis

Freedom of Information Act 2000

Exemptions

32. The full text of the provisions of the Act which are referred to can be found in the Legal Annex at the end of this notice.

(1) Headings and subheadings contained in the minutes

33. The Commissioner initially considered whether the public authority was entitled, at the time that the request was made, to exempt from disclosure the headings and subheadings contained in the minutes of the meetings of the Board of Directors on 8 October 2008.
34. The Commissioner has identified in a confidential annex attached to this notice, Annex 1, the information which he believes constitutes the headings and subheadings contained in the above minutes which were withheld at the time that the refusal notice was issued. This annex has only been provided to the public authority.
35. In its letter of 21 September 2009, the public authority's solicitors identified which exemptions the public authority believed were applicable to specific information contained in the minutes under consideration. It applied sections 22, 36, and 43(2) to some of the headings and subheadings, as well as the content of the minutes.
36. In its letter of 22 February 2010, the public authority informed the Commissioner that it believed that exemptions had been properly relied on at the time of its original decision for the reasons set out in its correspondence with the Commissioner.
37. On 29 March 2010 the Commissioner wrote to the public authority and explained that it seemed very difficult to conceive how exemptions could apply to the headings and subheadings in the minutes. He therefore asked the public authority to clearly identify the exemptions that it believed were applicable at the time that it issued its refusal notice and explain why exemptions applied to each heading and subheading.
38. On 12 April 2010 the public authority informed the Commissioner that it regarded the headings and subheadings to be part of the minute to which they related as they identified the nature of the topic under discussion. The public authority was of the view that it had already identified the exemptions applying to each minute and that those exemptions applied both to the fact that a particular topic was being discussed at that time, and to the content of the discussion.
39. The public authority stated that with the passage of time it was of the view that the sensitivity surrounding the fact of discussion had lessened and so it was now willing to release that information. It believed however that this was in no way inconsistent with or undermined its earlier position that it should have been withheld at the time that it made its original decision.

40. The Commissioner does not accept the public authority's argument that an exemption, which might be applicable to a detailed minute recording discussions on a particular topic, would necessarily also apply to the heading or subheading which identified the topic under discussion. The content of a detailed minute on a particular topic may well contain information of a sensitive nature. It does not necessarily follow that the fact that a topic was discussed would also be sensitive.
41. In the Commissioner's view the headings and subheadings of the minutes may have considerable value independently of the information contained in the minutes under those headings or subheadings. The disclosure of this information would allow people to identify specific topics that had been discussed that may be of interest. They would then be able to make specific requests for information of interest rather than having to make more general requests for complete sets of minutes. This might also be of benefit to a public authority as it may lead to requesters being able to make narrow requests for specific pieces of information that they have identified from the headings and subheadings as opposed to requests for full sets of minutes. This would avoid the need for the public authority having to review all of the information contained in those minutes.

(i) Section 22 – Intended for future publication

42. In its initial correspondence with the Commissioner the public authority applied section 22 to a small number of paragraphs of the minutes covered by the complaint, including the headings and subheadings of those paragraphs. However, following the narrowing of the scope of the complaint by the complainant, the only information which fell to be considered by the Commissioner in relation to the application of section 22 was one subheading to minute RMH08/136 of the minutes of meeting on 8 October 2008. This subheading consists of two words.
43. Section 22 provides an exemption from disclosure for information where a public authority intends to publish that information at some future date. To be applicable, it must be reasonable in all the circumstances for the information to be withheld. The Commissioner cannot identify any circumstances which would make it reasonable to withhold this limited amount of information. In the absence of any arguments from the public authority as to why section 22 would have been applicable to this subheading, the Commissioner is unable to conclude that it had been correctly applied. He has therefore decided that this information should have been disclosed.

(ii) Section 36 – Prejudice to the effective conduct of public affairs

44. The Commissioner considered whether those headings and subheadings contained in the minutes of the meeting on 8 October 2008, withheld by the public authority under section 36(2)(b)(i) and (ii) and (c), were exempt from disclosure.

45. Section 36(2)(b)(i) and (ii) and (c) provide that: -

“36(2) - 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-

(a) ...

(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

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

Opinion of the qualified person

46. In investigating whether section 36 has been correctly applied, the Commissioner, in relation to the opinion of the qualified person:

- established who the qualified person was for the public authority;
- confirmed that an opinion was given by the qualified person;
- confirmed when the qualified person gave their opinion; and
- considered whether the qualified person's opinion was reasonable.

47. The public authority confirmed to the Commissioner that an opinion was given by its Company Secretary on 22 December 2008. Section 36(a)-(o) defines who is a qualified person for the purposes of the Act. The relevant provisions in relation to Royal Mail is section 36(5)(o)(ii) and (iii) which provides that the qualified person may be the public authority itself or any of its employees if so authorised by a Minister. The public authority provided the Commissioner with documentary evidence to show that the Company Secretary was the qualified person at the time of the request. The Commissioner is satisfied from the documents provided that the Company Secretary was designated as a qualified person for the purposes of section 36 at the time that the

opinion was given. The public authority also confirmed which information was believed to be exempt under section 36(2)(b)(i) and (ii) and (c).

48. In the case of *Guardian & Brooke v Information Commissioner & the BBC (EA/2006/0011 and 0013)*, the Information Tribunal stated that “in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at.” (para 64). In relation to the issue of reasonable in substance, the Tribunal indicated that “the opinion must be objectively reasonable” (para 60). In determining whether an opinion had been reasonably arrived at, it suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
49. The public authority confirmed to the Commissioner that the qualified person had concluded that disclosure would be likely to inhibit the free and frank provision of advice or free exchange of views for the purpose of deliberation and that it would be likely to prejudice the effective conduct of public affairs. It was believed that it was essential that board members were able to provide advice and exchange views in a free and frank way. Many of the matters discussed were sensitive and it was essential that robust debate on such issues could take place. The qualified person considered that, if debate were to be published, that it would be likely that this would prejudice the ability of board members to offer advice and hold such debates in this way in future. The Commissioner has assumed that these arguments relate to the application of section 36(2)(b)(i) and (ii).
50. The Commissioner was informed by the public authority that the qualified person considered that it should have space to develop its business plan and strategy without speculation from the public and competitors about what this plan might cover. This gave an opportunity to develop and change its plans before the final version was released to the public.
51. It was also believed that knowledge that the minutes could be made public would be likely to inhibit the public authority from debating strategic decisions. Factors such as public opinion and perception and how the information would be used by its competitors and affect industrial relations would militate against full discussion and planning. This would be likely to prejudice its ability to run its services effectively. The Commissioner has assumed that these arguments relate to the application of section 36(2)(c).

52. The Commissioner reviewed the information which constituted the headings and subheadings and which was withheld by the public authority at the time of the request. He was unable to identify how the disclosure of such limited information, viewed independently from the detailed contents of the minutes to which they related, would be likely to have the effects suggested. He consequently wrote to the public authority to request further explanation as to why it was believed that the relevant parts of section 36 applied to this information. The public authority did not provide him with any further explanation.
53. In light of the nature of the withheld information and the lack of any detailed explanation from the public authority as to how disclosure of the headings and subheadings would have been likely to have had the effects suggested by the qualified person, the Commissioner is not convinced that the qualified person's opinion was reasonable in substance. He has therefore found that section 36(2)(b)(i) and (ii) and (c) were not engaged in relation to the headings and subheadings contained in the minutes of the meeting of the Board of Directors on 8 October 2008 and should have been disclosed.

(iii) Section 43(2) – Prejudice to commercial interests

54. The Commissioner considered whether those headings and subheadings that had been withheld by the public authority under section 43(2) were exempt from disclosure.
55. 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).
56. The Commissioner accepts that the withheld information relates to the commercial activities of the public authority and therefore falls within the scope of the exemption contained in section 43(2). He went on to consider whether the release of the information would, or would have been likely, to have prejudiced the commercial interests of the public authority.
57. The public authority informed the Commissioner that it believed that disclosure of the withheld information would have been likely to have prejudiced its own commercial interests.
58. In dealing with the issue of whether disclosure would have been likely to prejudice commercial interests, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information 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). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.

59. The Commissioner reviewed the information which constituted the headings and subheadings and which was withheld by the public authority at the time of the request. He was unable to identify how the disclosure of such limited information, viewed independently from the detailed contents of the minutes to which they related, would have been likely to prejudice the commercial interests of the public authority.
60. In light of the nature of the withheld information and the lack of any detailed explanation from the public authority as to how the disclosure of the headings and subheadings would have been likely to have prejudiced its commercial interests, the Commissioner is not satisfied that section 43(2) was engaged and has decided that it should have been disclosed.
61. The Commissioner has identified the headings and subheadings that he believes should have been disclosed at the time of the request in a confidential annex, Annex 1, attached to this notice. This has only been provided to the public authority.

(2) Minutes of the meeting of the Board of Directors held on 11 September 2008

62. The Commissioner considered the detailed arguments contained in the public authority's letters of 5 February 2010 and 22 February 2010 regarding the application of exemptions to individual paragraphs of the minutes of the meeting of the Board of Directors on 11 September 2008. Where the public authority has not provided arguments in relation to specific paragraphs of the minutes, the Commissioner has assumed that no exemption was applicable to those paragraphs and has therefore ordered disclosure.
63. In relation to some of the minutes, in order to analyse the application of exemptions by the public authority, the Commissioner has had to discuss the content of the information that has been withheld. To avoid disclosing information that the public authority believes is exempt he has included this analysis in a confidential annex ("Annex 2") at the end of this notice. This annex has only been provided to the public authority.

(i) Section 43(2) – Prejudice to commercial interests

64. The Commissioner went on to consider the paragraphs of the minutes which had been withheld by the public authority under section 43(2).
65. 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).
66. The Commissioner accepts that the withheld information relates to the commercial activities of the public authority and therefore falls within the scope of the exemption contained in section 43(2). He went on to consider whether the release of the information would, or would have been likely, to have prejudiced the commercial interests of the public authority.
67. The public authority informed the Commissioner that it believed that disclosure of the withheld information would have been likely to have prejudiced its own commercial interests.
68. In dealing with the issue of whether disclosure would have been likely to prejudice commercial interests, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information 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). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.

Minute 08/116(b)

69. The public authority stated that this minute detailed its performance part way through the financial year against the commercial forecasts that had been set. It argued that disclosure of this information at the time of the request would have been likely to give a snapshot of its expectations for the business and its progress against those expectations. This would have been useful to its competitors.
70. The public authority explained that it operated as a commercial venture in an extremely competitive environment. The nature of the business meant that its competitors were closely interwoven with the day to day running of its operations and therefore had significant insight into the challenges facing the organisation. In this context, its competitors could use this information to help identify areas of the business which were under performing and therefore presented an opportunity to win

business from it or which were unprofitable for any business and therefore not worth pursuing.

71. The public authority also considered that any information that suggested an unfavourable position in relation to its budget would have been publicised by the media and/or its competitors in a way that would have damaged business confidence in the public authority. The independent Hooper Report commissioned by the Government identified commercial confidence as key to securing its future viability.
72. It was suggested that disclosure of this information would have put the public authority at a commercial disadvantage because it had no equivalent right to obtain commercial information about the performance against target of other players in the postal services market. Furthermore, at the time of the request it was operating (and continues to operate) in a critical period of rapid and significant organisational change. It was fundamental to its survival that it remained profitable while those changes were worked through and its future was considered by Government. As such, it was particularly vulnerable to any damage to its commercial interests at this point in time.
73. The Commissioner notes that the withheld minute contains information concerning the public authority's performance for the period from April to August 2008. In October 2008 the public authority published a document entitled "Trading update for the half year ended 28 September 2008". This contained information concerning the public authority's performance for the period from April to September 2008. The nature of the information contained in this document was similar to that contained in the minute, although for a slightly longer period.
74. In addition, the public authority informed the Commissioner that it was working in "an extremely competitive environment" and was going through "a period of rapid and significant organisational change". Given such a fluid situation, any information about its performance would be likely to become outdated very quickly. The Commissioner notes that the withheld information was over four months old by the time that the public authority issued its refusal notice. At this point it would no longer necessarily reflect the position in relation to the public authority's performance in this area as it may have been subject to significant change.
75. In light of the above, the Commissioner is not satisfied that disclosure of the withheld information would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of

the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/116(c)

76. The public authority informed the Commissioner that it accepted that the release of the information in this minute would have been less damaging to business confidence than the release of the information contained in minute 08/116(b) as the minute was generally positive. However, it believed that the remaining points made on the application of section 43(2) to paragraph 08/116(b) also applied to this paragraph.
77. In addition to the specific information about the Letters business' contribution over the preceding period, the paragraph also gave information about the trends which the public authority expected over the coming months, which again could be capitalised upon by competitors.
78. The Commissioner believes that the points that he made in relation to the previous minute, 08/116(b), are equally applicable to this minute. In addition, in relation to the public authority's argument concerning the paragraph giving information about the trends that it expected over the coming months, the Commissioner notes that this appears to be a very brief, general comment.
79. In light of the above, the Commissioner is not satisfied that disclosure of the withheld information would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/116(d)

80. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
81. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/116(e)

82. The public authority argued that the points made on the application of section 43(2) to paragraph 08/116(b) also applied to this paragraph. The paragraph gave details of the Letter business' forecast revenue, overheads, pensions liabilities and regulatory decisions. This information helped to build up the picture of the public authority's commercial capabilities, in a way which would have been extremely helpful to competitors who continually sought ways to win business from and challenge the public authority.
83. The Commissioner believes that the points that he made in relation to minute 08/116(b) are equally applicable to this minute. In light of this, he is not satisfied that disclosure of the withheld information would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/116(f)

84. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
85. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/116(g)

86. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
87. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged. He went on to consider whether the information was exempt under section 36(2)(b)(i) and (ii).

Minute 08/117(a)

88. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
89. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/117(b)

90. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
91. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/119(e)

92. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
93. After analysing the application of the exemption, the Commissioner is satisfied that section 43(2) was engaged in relation to the first, second and fifth bullet points of the minute. He also decided that the public interest in withholding this information outweighed the public interest in disclosure and that the public authority was therefore entitled to withhold that information.
94. The Commissioner is not satisfied that the disclosure of the remainder of the information contained in the minute would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged in relation to that information. He went on to consider whether the information was exempt under section 36(2)(b)(ii) and (c).

Minute 08/119(f)

95. The public authority was of the view that the points made in relation to minute 08/119(e), in relation to the challenges raised by the Board, also applied to this paragraph. The Commissioner is not convinced that this minute, consisting of one sentence, provided any information which would have been likely to likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged. He went on to consider whether the information was exempt under section 36(2)(b)(ii) and (c).

Minute 08/121(b)

96. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.

97. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged. He went on to consider whether the information was exempt under section 36(2)(b)(ii) and (c).

Minute 08/121(c)

98. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.

99. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged. He went on to consider whether the information was exempt under section 36(2)(b)(ii).

Minute 08/123 (b)

100. The minute relates to suggested changes to the marketing strategy for a newly launched product being offered by the public authority. The public authority argued that this information would have been useful to its competitors, who would have been likely to use it to improve their own offering, or to enter the market or expand their reach, by targeting customers with offers based on perceived weaknesses in the public authority's product.

101. The Commissioner accepts that the disclosure of the minute would have been likely to have been of value to the public authority's competitors in this area as it provides details of possible changes to its marketing strategy for the product being discussed. He is consequently satisfied that disclosure would have been likely to be prejudicial to its commercial interests and that section 43(2) was engaged.
102. The Commissioner went on to consider whether the public interest in withholding the information outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

103. The Commissioner acknowledges the general public interest in openness and transparency in relation to a public authority and its activities. He also acknowledges that disclosure of the information might have enhanced the public's understanding of the decisions being taken by the public authority and allowed the public to debate the issues under consideration.

Public interest arguments in favour of maintaining the exemption

104. The public authority informed the Commissioner that it was undergoing a period of significant change. It was imperative to its long term survival that it remained profitable as the postal sector was liberalised and it competed with profit making companies for business. The public authority remained in a state of transition, during which it was particularly acute to any damage to its commercial interests.
105. The public authority argued that there was a public interest in ensuring that companies were allowed to compete fairly. Its competitors, as private companies, were not covered by the Act. The release of commercially sensitive information would remove the level playing field between itself and its competitors which would lead to an asymmetry in the market.

Balance of the public interest arguments

106. The Commissioner acknowledges the general public interest arguments in favour of the disclosure of the withheld information. However, he is of the view that these do not outweigh the public interest in ensuring that the public authority is not placed at a commercial disadvantage compared with its private sector competitors. To disclose details related to its marketing strategy regarding a new product would have been likely to do so. He is therefore satisfied that section 43(2) was correctly

applied and that the public authority was entitled to withhold the information.

Minute 08/125 (d)

107. The public authority explained that the paragraph flagged up a number of weaknesses and areas for improvement identified by the Audit and Risk Committee in various parts of the business. It believed that it was very important that the Committee was able to report freely and fully on areas of concern. If the records of its concerns were made public, it was likely that the audit and risk committee itself would be inhibited from discussing matters freely.
108. In addition, the Committee would feel constrained from giving full and frank advice to the Board. If this meant that the areas of risk were not addressed, this could have a significant impact on the public authority's performance, so that its commercial interests would be likely to be prejudiced.
109. In the Commissioner's view the information in this paragraph is very general in nature and does not provide any detail about risks that are identified. Much of the comment is positive concerning the progress being made by the public authority. As a result the Commissioner is not convinced that disclosure of the particular information contained within this paragraph would have been likely to cause prejudice to the public authority's commercial interests. He is consequently not satisfied that section 43(2) was engaged. He went on to consider whether the information was exempt under section 36(2)(b)(i) and (ii) and (c).

Minute 08/126 (d)

110. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to this minute in a confidential annex ("Annex 2") at the end of this notice.
111. After analysing the application of the exemption, the Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged. He went on to consider whether the information was exempt under section 36(2)(b)(ii).

Minute 08/126 (e)

112. The public authority was of the view that information relating to industrial relations was extremely sensitive in a period of widespread change to working practices. This was noted in the independent Hooper Report (paragraph 80):

“Poor industrial relations at Royal Mail have been well documented, most notably by the review led by Lord Sawyer in 2001. They remain extremely difficult. Over the past decade, disputes between Royal Mail’s management and the Communication Workers Union have had a major impact on the company’s ability to implement change and make progress in transforming the business. In 2007, over 627,000 employee days were lost as a result of industrial action, the highest total since 1996. This represented 60% of days lost to strikes across the whole of the UK economy in 2007”.

113. Strikes continued over the course of 2009 - evidence that the relationship has remained a difficult one since the Hooper Report. If this information were to be disclosed, it would be likely to inflame the situation, making the public authority’s relationship with the trade unions even more challenging.
114. In addition, disclosure of this information could have undermined the public authority’s negotiating position in relation to staff terms and conditions, so that its commercial interests would be prejudiced.
115. The paragraph appears to provide a brief general factual description of industrial relations within the public authority. There does not appear to be any information which would not be in the public domain. There are no details of any proposed industrial relations strategies or approaches.
116. It is not apparent to the Commissioner how the disclosure of the information in the minute would have been likely to adversely affect existing industrial relations or undermine the public authority’s negotiating position in relation to staff terms and conditions. He is therefore not satisfied that disclosure would have been likely to cause prejudice to the public authority’s commercial interests. He is consequently of the view that section 43(2) was not engaged. He went on to consider whether the information was exempt under section 36(2)(b)(ii).

Minute 08/126 (f)

117. The public authority stated that this paragraph contained detailed information about GLS’ commercial performance. The points made on the application of section 43(2) to paragraph 08/116(b) also applied here.
118. The Commissioner believes that the points that he made in relation to minute 08/116(b) are equally applicable to this minute. In light of this, he is not satisfied that disclosure of the withheld information would have been likely to cause prejudice to the public authority’s commercial

interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/126 (g)

119. The public authority contended that this paragraph gave information about Post Office Limited's strategy and business rationale behind Post Office Essentials which would be useful to its competitors. Such competitors would be likely to take advantage of that information, for example by taking rapid steps to establish similar, competing stores in order to restrict Post Office Limited's ability to progress this initiative.
120. At the time that the refusal notice was issued the launch of Post Office Essentials at the site referred to in the minute had taken place and was therefore public knowledge. The minute appears to be of a general nature and does not appear to contain anything which would not have been easily ascertainable from information about the new model for delivering services which was in the public domain or that could be ascertained from visiting one of the sites used to trial Post Office Essentials.
121. The Commissioner is not satisfied that disclosure would have been likely to cause prejudice to the public authority's commercial interests. He is consequently of the view that section 43(2) was not engaged and that the information should have been disclosed.

Minute 08/126 (h)

122. The minute provides details of the number of applications and amount of money received for a specific growth bond that had been issued by the public authority and subsequently withdrawn. This had occurred a relatively short time before the issue of the refusal notice. It seems likely that such information would have been of value to its competitors in the financial services market to the detriment of the public authority. The Commissioner therefore accepts that section 43(2) was engaged.
123. The Commissioner therefore went on to consider whether the public interest in withholding the information outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

124. The Commissioner acknowledges the general public interest in openness and transparency in relation to a public authority and its activities. He also acknowledges that disclosure of the information might have enhanced the public's understanding of the decisions being

taken by the public authority and allowed the public to debate the issues under consideration.

Public interest arguments in favour of maintaining the exemption

125. The public authority informed the Commissioner that it was undergoing a period of significant change. It was imperative to its long term survival that it remained in profitability as the postal sector was liberalised and it competed with profit making companies for business. The public authority remained in a state of transition, during which it was particularly acute to any damage to its commercial interests.
126. The public authority argued that there was a public interest in ensuring that companies were allowed to compete fairly. Its competitors, as private companies, were not covered by the Act. The release of commercially sensitive information would remove the level playing field between itself and its competitors which would lead to an asymmetry in the market.

Balance of the public interest arguments

127. The Commissioner acknowledges the general public interest arguments in favour of the disclosure of the withheld information. However, he is of the view that these do not outweigh the public interest in ensuring that the public authority is not placed at a commercial disadvantage compared with its private sector competitors. To disclose details related to a specific financial investment that it had offered to the public would be likely to do so. He is therefore satisfied that section 43(2) was correctly applied and that the public authority was entitled to withhold the information.

Minute 08/126 (i)

128. This minute provides details of a business opportunity being explored by the public authority with a named organisation. The Commissioner accepts the argument that disclosure of this information may have resulted in competitors of the public authority seeking to offer similar services to the organisation concerned which would have been likely to prejudice the commercial interests of the public authority. He is therefore satisfied that section 43(2) was engaged.
129. The Commissioner went on to consider whether the public interest in withholding the information outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

130. The Commissioner acknowledges the general public interest in openness and transparency in relation to a public authority and its activities. He also acknowledges that disclosure of the information might have enhanced the public's understanding of the decisions being taken by the public authority and allowed the public to debate the issues under consideration.

Public interest arguments in favour of maintaining the exemption

131. The public authority informed the Commissioner that it was undergoing a period of significant change. It was imperative to its long term survival that it remained in profitability as the postal sector was liberalised and it competed with profit making companies for business. The public authority remained in a state of transition, during which it was particularly acute to any damage to its commercial interests.

132. The public authority argued that there was a public interest in ensuring that companies were allowed to compete fairly. Its competitors, as private companies, were not covered by the Act. The release of commercially sensitive information would remove the level playing field between itself and its competitors which would lead to an asymmetry in the market.

Balance of the public interest arguments

133. The Commissioner acknowledges the general public interest arguments in favour of the disclosure of the withheld information. However, he is of the view that these do not outweigh the public interest in ensuring that the public authority is not placed at a commercial disadvantage compared with its private sector competitors. To disclose details of a business opportunity that it was pursuing would be likely to do so. He is therefore satisfied that section 43(2) was correctly applied and that the public authority was entitled to withhold the information.

Section 36 - Prejudice to the effective conduct of public affairs

134. The public authority informed the Commissioner that it was relying on section 36(2)(b)(i) and (ii) and (c) to exempt from disclosure some information contained in the minutes of the meeting of the Board of Directors on 11 September 2008. He therefore went on to consider whether the information identified as exempt under section 36 should have been withheld.

135. Section 36(2)(b)(i) and (ii) and (c) provide that: -

"36(2) - 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-

- (a) ...*
- (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*
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

Opinion of the qualified person

136. In investigating whether section 36 has been correctly applied, the Commissioner, in relation to the opinion of the qualified person:

- established who the qualified person was for the public authority;
- confirmed that an opinion was given by the qualified person;
- confirmed when the qualified person gave their opinion; and
- considered whether the qualified person's opinion was reasonable.

137. The public authority confirmed to the Commissioner that an opinion was given by its Company Secretary on 22 December 2008 prior to the refusal notice being issued on 6 January 2009. The Commissioner is satisfied, for the reasons stated earlier in this notice, that he was the qualified person for the purposes of section 36 at the time that the opinion was given.

138. The public authority confirmed in its letter of 5 February 2010 which information it believed to be exempt under section 36(2)(b)(i) and (ii) and (c).

139. In the case of *Guardian & Brooke v Information Commissioner & the BBC (EA/2006/0011 and 0013)*, the Information Tribunal stated that "in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at." (para 64). In relation to the issue of reasonable in substance, the Tribunal indicated that "the opinion must be objectively reasonable" (para 60). In determining

- whether an opinion had been reasonably arrived at, it suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
140. The public authority explained to the Commissioner that it did not have a record of the submissions made to the qualified person on 22 December 2008. It informed him that a member of its freedom of information team recalled the qualified person reading through the requested minutes in detail and considering, in each case, whether disclosure of each paragraph of the minute would, or would be likely to, have the effects listed in section 36. The qualified person then informed him, in respect of each of the minutes, which he considered would be likely to have the effects identified in section 36. A record of the qualified person's opinion was not made.
141. The public authority stated that the qualified person reconsidered the application of section 36 at the internal review stage. When he did this he was provided with a submission which simply set out the content of section 36(2)(b) and (c). The qualified person discussed the risk of the consequences outlined in section 36(2)(b) and (c) with a member of the public authority's freedom of information team and confirmed that his initial views were unchanged. However, there was no written record of those discussions.
142. The public authority confirmed that the details of why the qualified person believed that section 36 applied to certain specific minutes, set out in its letter of 5 February 2010, were based on staff recollections of discussions with the qualified person at the time of the request, the internal review and following the complaint being made to the Commissioner.
143. The Commissioner wishes to record his concern over the lack of any written submissions being made to the qualified person and the lack of a contemporaneous written record of the qualified person's opinion as to why section 36 was applicable to specific minutes. Without these written records, it is not possible for him to determine whether the qualified person only took into account relevant matters in reaching his opinion or have any understanding of the evidence which the qualified person viewed as supporting his opinion. He therefore cannot make a determination as to whether the qualified person's opinion was reasonably arrived at.

144. Without any specific evidence, in the form of written submissions, as to the factors and evidence that the qualified person took into account in reaching his decision, the Commissioner can only review the reasonableness of the opinion by reference to the relevant withheld information and the specific arguments provided in respect of the reasons for withholding that information.
145. The Commissioner notes the comments of the Information Tribunal in *McIntyre v Information Commissioner & Ministry of Defence (EA/2007/0068)* that flaws in the process in relation to the qualified person's opinion might not invalidate that opinion if it was overridingly reasonable in substance. The Tribunal did not provide any guidance as to what makes an opinion "overridingly reasonable in substance".
146. The Commissioner's view is that this should be considered on a case by case basis. He does however regard the following factors as influential:
- whether the level of prejudice/inhibition shown is "would" rather than "would be likely to";
 - the severity and scope of the prejudicial/inhibiting effect; and
 - whether the prejudicial/inhibiting effect is to a core function of the public authority.
147. The Commissioner is consequently most likely to find an opinion to be "overridingly reasonable in substance" where he accepts that the effect "would" occur and where there is a wide ranging and severe prejudicial effect on the ability of a public authority to carry out a core (rather than a subsidiary or support) function. However, the Commissioner does not regard this as a definitive test and may still find an opinion overridingly reasonable in substance if some of these factors are not present.
148. The Commissioner notes that the qualified person was of the view that where section 36 applied, disclosure of the relevant information "would be likely to", rather than "would", have the effects set out in that section. In order to determine whether the qualified person's opinion was overridingly reasonable in substance he also took account of the severity of the prejudicial effect and whether the effect was to a core function of the public authority in relation to each piece of information withheld under section 36.
149. The Commissioner is of the view that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly

more than hypothetical or remote. It requires a lesser evidential burden than "would prejudice".

Public interest test

150. Where the Commissioner considered that the opinion of the qualified person was reasonable in substance he made a determination as to whether the public interest in withholding the information outweighed the public interest in disclosure. In doing this he took account of the Tribunal's view from the *McIntyre* case, when commenting on the application of section 36(2)(c), that where the reasonable opinion of the qualified person is based on the higher threshold,

"...this will give greater weight to the public interest inherent ... in the... exemption in favour of maintaining the exemption than if the reasonable opinion was based on the lower threshold. That in turn will affect the public interest balance." (para 43)

151. He considered this further when applying the public interest test in relation to this exemption and gave lesser weight to the public interest inherent in the exemption than if the higher threshold had been applied.

152. The Commissioner also took account of the comments of the Information Tribunal in the *Guardian & Brooke* case that due weight should be given to the reasonable opinion of the qualified person when considering the public interest test in relation to section 36. However, the Tribunal's view was that the qualified person's opinion was limited to the degree of likelihood that inhibition or prejudice would occur and that the opinion "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" (para 91).

153. The Commissioner therefore, in assessing the public interest arguments, particularly those related to withholding the information, considered the relevance of factors such as the severity, extent and frequency with which the inhibition of the free and frank exchange of views might have occurred if the information had been disclosed.

154. To avoid disclosing information that the public authority believes is exempt from disclosure the Commissioner has included the analysis related to the application of section 36 to the minutes below in a confidential annex ("Annex 2") at the end of this notice.

Minutes 08/116(g)

155. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(i) and (ii) were engaged and has decided that the information should have been disclosed.

Minute 08/116(h)

156. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) was engaged and has decided that the information should have been disclosed.

Minute 08/119(e)

157. The Commissioner has already accepted that the first, second and fifth bullet points contained in the minute were exempt under section 43(2). He therefore considered whether the remainder of the minute was exempt under section 36.

158. The Commissioner reviewed the information remaining after the first, second and fifth bullet points had been removed. He was unable to identify any information that remained which, if disclosed, would appear to have been likely to have the effects identified by the qualified person. He is therefore not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) and (c) were engaged and has decided that the information should have been disclosed.

Minute 08/119(f)

159. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) and (c) were engaged and has decided that the information should have been disclosed.

Minute 08/121(b)

160. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) and (c) were engaged and has decided that the information should have been disclosed.

Minute 08/121(c)

161. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) was engaged and has decided that the information should have been disclosed.

Minute 08/125(a)

162. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) was engaged and has decided that the information should have been disclosed.

Minute 08/125(b)

163. The Commissioner reviewed the withheld information. He is satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) was engaged and that the public interest in withholding the information outweighed the public interest in disclosure. He therefore concluded that the public authority had correctly applied section 36(2)(b)(ii) to the withheld information.

Minute 08/125(c)

164. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) was engaged and has decided that the information should have been disclosed.

Minute 08/125(d)

165. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(i) and (ii) and (c) were engaged and has decided that the information should have been disclosed.

Minutes 08/125(f), 08/126(b), 08/126(d), 08/126(e) and 08/126(j)

166. The Commissioner reviewed the withheld information. He is not satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) was engaged and has decided that the information should have been disclosed.

167. The Commissioner has summarised his decision in relation to the information withheld by the public authority from the minutes of the meeting on 11 September 2008 in Annex 3, attached to this notice.

Procedural Requirements

Sections 1 and 10 – Time for compliance with the request

168. The Commissioner has decided that headings and subheadings contained in the minutes of the meeting of the Board of Directors dated 8 October 2008 and some information from the minutes of the meeting of the Board of Directors dated 11 September 2008, identified in Annex 3 to this notice, should have been disclosed to the complainant. By not doing this within 20 working days of the request, the public authority breached section 10(1). By not providing the information to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

Environmental Information Regulations 2004

169. In his letter to the public authority of 13 January 2010, the Commissioner identified the information within the minutes of the meeting of the Board of Directors on 8 October 2008 that he believed fell within the definition of “environmental information” under the EIR. The only information that he found that fell within this definition was the heading and final sentence of paragraph (a) of minute RMH08/141. This information related to emissions into the air and fell within the definition of environmental information in regulation 2(1)(b) of the EIR.

170. In its letter of 5 February 2010 the public authority informed the Commissioner that it was now prepared to disclose the information falling within the EIR. The Commissioner pointed out that he needed to make a determination on whether the public authority correctly withheld this information when it issued its refusal notice on 6 January 2009 and invited it to make further submissions on the correctness of its decision at that time. On 22 February 2010 the public authority informed the Commissioner that it believed that exemptions had been correctly applied at the time but that the sensitivity of information had lapsed with time to the extent that it was now prepared to disclose it. It stated that it did not wish to put forward any further arguments regarding the application of exemptions to this information.

171. In his letter of 29 March 2010 the Commissioner asked for detailed arguments from the public authority as to why it believed that any exception applied to the limited amount of environmental information he had identified at the time that it issued its refusal notice. The public authority did not identify, or provide any arguments, as to the applicability of any exceptions under the EIR. In the absence of any arguments from the public authority, the Commissioner has decided

that this information should have been disclosed at the time that the refusal notice was issued.

Procedural requirements

172. By not disclosing the environmental information in the minutes, the public authority breached regulation 5(1). By not doing so within 20 working days of receipt of the request, it breached regulation 5(2).

The Decision

173. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it correctly applied sections 36 and 43(2) to information identified in the main body of this notice and in Annex 3.

174. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it incorrectly applied sections 36 and 43(2) to the headings and subheadings contained in the minutes of the meeting of the Board of Directors on 8 October 2008;
- it incorrectly applied sections 36 and 43(2) to some information contained in the minutes of the meeting of the Board of Directors on 11 September 2008 identified in the main body of this notice and in Annex 3;
- it incorrectly withheld environmental information contained in paragraph (a) of minute RMH08/141 of the minutes of the Board of Directors' meeting on 8 October 2008;
- it breached section 1(1)(b) by not providing the complainant with the information that he determined should have been disclosed under the Act by the time of the completion of the internal review;
- it breached section 10(1) by not providing the complainant with the information that he determined should have been disclosed under the Act within 20 working days of the request;

- it breached regulation 5(1) of the EIR by not disclosing environmental information contained in paragraph (a) of minute RMH08/141 of the minutes of the Board of Directors' meeting on 8 October 2008; and
- it breached regulation 5(2) of the EIR by not disclosing environmental information contained in paragraph (a) of minute RMH08/141 of the minutes of the Board of Directors' meeting on 8 October 2008 within 20 working days of receipt of the request.

Steps Required

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

- to disclose to the complainant:
 - (i) the headings and subheadings contained in the minutes of the meeting of the Board of Directors on 8 October 2008;
 - (ii) the information contained in the minutes of the meeting of the Board of Directors on 11 September 2008 identified in the main body of this notice and Annex 3 to this notice as information that should have been disclosed; and
 - (iii) the environmental information contained in paragraph (a) of minute RMH08/141 of the minutes of the Board of Directors' meeting on 8 October 2008.

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

Failure to comply

177. 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

178. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Commissioner notes that no record was kept of the opinion of the qualified person in relation to the applicability of section 36 to the information that was withheld. He regards it as a matter of good practice that a proper record should be kept of the opinion.

Right of Appeal

179. 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 served.

Dated the 2nd day of August 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Information intended for future publication

Section 22(1) provides that –

“Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

Section 22(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the executive committee of the National Assembly for Wales,
- (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
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“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).”

Annex 3

Summary of the Commissioner's decision regarding the application of exemptions to the minutes of the Board of Directors held on 11 September 2008

Minute number	Exemption applied by PA	The Commissioner's decision
08/116(b)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/116(c)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/116(d)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/116(e)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/116(f)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/116(g)	s36(2)(b)(i) and (ii) s43(2)	The information was not exempt under sections 36(2)(b)(i) and (ii) and 43(2) and should have been disclosed.
08/116(h)	s36(2)(b)(ii)	The information was not exempt under sections 36(2)(b)(ii) and should have been disclosed.
08/117(a)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/117(b)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/119(e)	s36(2)(b)(ii) and (c) s43(2)	The first, second and fifth bullet points in the minute were correctly withheld under section 43(2). The remainder of the information in the minute was not exempt under sections section 36(2)(b)(ii) and (c) and 43(2) and should have been disclosed.
08/119(f)	s36(2)(b)(ii) and (c) s43(2)	The information was not exempt under sections 36(2)(b)(ii) and (c) and 43(2) and should have been disclosed.

08/121(b)	s36(2)(b)(ii) and (c) s43(2)	The information was not exempt under sections 36(2)(b)(ii) and (c) and 43(2) and should have been disclosed.
08/121(c)	s36(2)(b)(ii) s43(2)	The information was not exempt under sections 36(2)(b)(ii) and 43(2) and should have been disclosed.
08/123(b)	s43(2)	The information was correctly withheld under section 43(2).
08/125(a)	s36(2)(b)(ii)	The information was not exempt under section 36(2)(b)(ii) and should have been disclosed.
08/125(b)	s36(2)(b)(ii)	The information was correctly withheld under section 36(2)(b)(ii).
08/125(c)	s36(2)(b)(ii)	The information was not exempt under section 36(2)(b)(ii) and should have been disclosed.
08/125(d)	s36(2)(b)(i) and (ii) and (c) s43(2)	The information was not exempt under sections s36(2)(b)(i) and (ii) and (c) and 43(2) and should have been disclosed.
08/125(f)	s36(2)(b)(ii)	The information was not exempt under section 36(2)(b)(ii) and should have been disclosed.
08/126(b)	s36(2)(b)(ii)	The information was not exempt under section 36(2)(b)(ii) and should have been disclosed.
08/126(d)	s36(2)(b)(ii) s43(2)	The information was not exempt under sections 36(2)(b)(ii) and 43(2) and should have been disclosed.
08/126(e)	s36(2)(b)(ii) s43(2)	The information was not exempt under sections 36(2)(b)(ii) and 43(2) and should have been disclosed.
08/126(f)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/126(g)	s43(2)	The information was not exempt under section 43(2) and should have been disclosed.
08/126(h)	s43(2)	The information was correctly withheld under section 43(2).
08/126(i)	s43(2)	The information was correctly withheld under section 43(2).
08/126(j)	s36(2)(b)(ii)	The information was not exempt under section 36(2)(b)(ii) and should have been disclosed.

