

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 29 June 2010**

**Public Authority:** The Royal Mail  
**Address:** 100 Victoria Embankment  
London  
EC4Y 0HQ

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Royal Mail for "Minutes of meetings discussing the employers proposed changes to the [pension] plan. Plus result of vote of trustees as per section 32 of 1995 Pension Act." During the course of the Commissioner's investigation the Royal Mail provided the information to the complainant with a number of redactions made under section 36(2)(b)(ii), section 36(2)(c), section 40(2) and section 42(1). The complainant confirmed that he wished the Commissioner to focus his investigation upon the redactions made to the requested information under section 36(2)(b)(ii), section 36(2)(c) and section 42(1) of the Act. The Commissioner has reviewed the redactions made under section 36(2)(b)(ii) and section 42(1) and considers that the Royal Mail correctly applied these exemptions.

### The Commissioner's Role

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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.

## The Request

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2. The complainant made a request to the Royal Mail on 14 August 2008 for the following information:
  1. A copy of the Trust deed and rules.
  2. Information on when the employer took a contribution holiday and duration of the holiday.
  3. A breakdown of the spread of investments at the beginning of the pension holiday. I am particularly interested to know what percentage of the plan was invested/exposed to the stock market, and what percentage of the plan was invested in index linked and fixed interest bonds.
  4. Valuation of the protected liabilities prior to 2004 pay deal.
  5. Valuation of the protected liabilities after 2004 pay deal.
  6. Any correspondence sent from the trustees to the employer relating to the impact on the plan of the 2004 pay deal. I am particularly interested in any correspondence sent prior to the 2004 pay deal.
  7. Minutes of meetings where trustees have discussed "winding up" the pension scheme.
  8. Minutes of meeting discussing the employers proposed changes to the plan. Plus result of vote of trustees as per section 32 of 1995 Pension Act.
  9. Legal advice the trustees may have taken regarding whether it is legal for the shareholder to fund the deficit.
  10. Response received from postcomm to the letters sent by the trustees on 21 July and 8 November 2005 and 3 February 2006.
3. On 12 September 2008, the Royal Mail responded to the request for information. It provided the complainant with some of the information he had requested but refused to provide him with the remainder of the information requested relying upon the exemption contained at section 42(1) of the Act which relates to Legal Professional Privilege.
4. As the complainant was dissatisfied with the response, on 9 March 2009 he wrote to the Royal Mail to ask it to conduct an internal review. In particular he asked it to readdress its responses to points 3, 8 and 10 of the request set out above.

5. On 7 May 2009 the Royal Mail wrote to the complainant with the result of the internal review. It upheld its application of the section 42(1) exemption to point 8 of the request. It also stated that the exemption contained at section 36(2) of the Act was applicable to point 8 of the request. It confirmed that it had provided the complainant with all information relevant to points 3 and 10 of the request.

## **The Investigation**

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### **Scope of the case**

6. As the complainant was dissatisfied with the result of the internal review he made a formal complaint to the Commissioner on 14 May 2009. In particular he explained that he was dissatisfied with the Royal Mail's refusal to provide him with the information he had requested at point 8 of the request set out above. The Commissioner has therefore focused his investigation on Royal Mail's response in relation to point 8 of the request set out above.
7. During the course of the Commissioner's investigation the Royal Mail provided the complainant with a redacted version of the information requested at point 8 of the request. It made the redactions under the exemptions contained at section 36(2)(b)(ii), section 36(2)(c), section 40(2) and section 42(1) of the Act. The complainant confirmed to the Commissioner that he remained dissatisfied with the disclosure and in particular wished to obtain a copy of the information redacted under section 36(2)(b)(ii), section 36(2)(c) and section 42(1) of the Act. The Commissioner therefore asked the complainant if he wished the Commissioner to focus his decision upon the redactions made under section 36(2)(b)(ii), section 36(2)(c) and section 42(1). The complainant confirmed that he did wish the Commissioner to focus his investigation in this way and therefore the redactions made under section 40(2) have not been considered within this Notice.

### **Chronology**

8. On 20 August 2009 the Commissioner wrote to the Royal Mail in order to obtain a copy of the withheld information and the Royal

- Mail's further arguments in relation to its application of exemptions cited to the complainant.
9. On 21 September 2009 the Royal Mail provided the Commissioner with a copy of the withheld information. It explained that it was now of the view that the information requested could be disclosed but with certain redactions made under section 36(2)(b)(ii), section 36(2)(c), section 40(2) and section 42(1) of the Act. The Royal Mail provided its arguments in support of the application of these exemptions to make the redactions it had suggested.
  10. On 17 December 2009 the Commissioner wrote to the Royal Mail and asked it to provide the requested information to the complainant with the redactions it had suggested.
  11. On 29 January 2010 the Royal Mail wrote to the Commissioner to confirm that a redacted version of the requested information had now been provided to the complainant.
  12. On 3 February 2010 the Commissioner wrote to the complainant to determine if he was satisfied with the extent of the Royal Mail's disclosure.
  13. On 15 February 2010 the complainant wrote to the Commissioner to confirm that he remained dissatisfied with the Royal Mail's disclosure and in particular he wished to obtain the information redacted under section 36(2)(b)(ii) and section 36(2)(c).
  14. On 27 February 2010 the Commissioner wrote to the complainant and asked him to confirm if he now wished the Commissioner to focus his decision upon the redactions made under section 36(2)(b)(ii) and section 36(2)(c).
  15. On 1 March 2010 the complainant wrote to the Commissioner and stated that he wished the investigation to focus upon the redactions made under section 36(2)(b)(ii), section 36(2)(c) and section 42(1).
  16. On 8 April 2010 the Commissioner wrote to the Royal Mail asking it to provide him with copies of the qualified person's opinion, the information the qualified person considered when reaching

- his decision, and any briefing materials that were put before him.
17. The Royal Mail replied on 27 April 2010 detailing the information considered by the qualified person, but not providing copies of the actual submissions. It also stated that there was no written record of the qualified person's opinion but that it did have a copy of an email which recorded the result of the consideration of section 36.
  18. On 16 June 2010 the Commissioner wrote to the Royal Mail to ask again for a copy of the submissions made to the qualified person in relation to section 36. He also asked for a copy of the email referred to by the Royal Mail in its letter to the Commissioner of 27 April 2010.
  19. The Royal Mail responded on 23 June 2010. It provided a copy of the submissions that had been put before the qualified person and clarified that, although it had previously referred to an email, the record it actually held was a short written note. It provided the Commissioner with a copy of this note.

## Analysis

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

20. Sections 36(2)(b)(ii) and (c) 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 –

(ii) the free and frank exchange of views for the purposes of deliberation

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

21. A full text of section 36 is available in the Legal Annex at the end of this Notice.
22. Information may be withheld under section 36(2)(b)(ii) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. Information may be withheld under section 36(2)(c) if its disclosure, in the reasonable opinion of a qualified person, would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. In the absence of the Royal Mail specifying the level of likelihood of prejudice the Commissioner has applied the lower test of 'would be likely to prejudice'. Section 36(2)(b)(ii) and section 36(2)(c) have been applied to the same redactions, the Commissioner will firstly consider the application of section 36(2)(b)(ii).
23. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that, "On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable..." (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, "...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at..." (paragraph 64) "...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

24. In determining whether section 36(2)(b)(ii) was correctly engaged by the Royal Mail the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;

- Ascertain when the opinion was given; and
  - Consider whether the opinion was objectively reasonable and reasonably arrived at.
25. The Royal Mail has explained that the qualified person at the time was the company secretary. Sub section 5(a – o) of section 36 describes a qualified person for the purpose of applying the exemption. The provisions of section 36(5)(o)(ii & iii) are relevant in this case. A qualified person may be the public authority itself or any of its employees if so authorised by a Minister. The Royal Mail has previously 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 the designated qualified person at the time of the request.
26. The Royal Mail confirmed that the qualified person was asked to consider the application of section 36 simultaneously with the internal review and on the basis of the background information to the request. There is no written record of the qualified person's opinion nor any specific record of the information which was taken into account when the qualified person reached his opinion. There is, however, a record of the submissions that were considered at a meeting of an Internal Review Panel and these submissions include a reference to the intention to refer the proposed application of section 36 to the qualified person. In light of this, and the Royal Mail's assertion that these same submissions were in fact put to the qualified person, the Commissioner accepts that this did happen. He therefore accepts that he has effectively been provided with a copy of the submissions that were put before the qualified person.
27. The submissions put to the qualified person along with the qualified person's opinion and the rationale behind it are set out in the result of the internal review and in more detail in the Royal Mail's letters to the Commissioner dated 21 September 2009 and 27 April 2010. The Royal Mail has also provided the Commissioner with a copy of a written note recording the outcome of the Internal Review Panel which states "[applicant's name redacted] – agreed s42 and s36. CY to prepare redacted versions of minutes." The Commissioner therefore considers that the qualified person reached his opinion on or around 29 April



- 2009 and prior to communicating the outcome of the internal review to the complainant on 7 May 2009.
28. Whilst the qualified person's opinion was not sought prior to the initial refusal it was sought at the time of internal review. The Commissioner considers that if a reasonable opinion has been given by the qualified person, by the time of completion of the internal review, then s36 will be taken to be engaged. The decision in *McIntyre v the Information Commissioner* confirmed this approach. At para 31 specifically in relation to flaws in the process followed by the qualified person in arriving at their opinion the IT stated that *"even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review"*.
29. The Commissioner would usually expect to be provided with a copy of the qualified person's opinion along with a copy of the submissions put to the qualified person in order to enable him or her to reach the opinion. The Commissioner notes that the evidence of the qualified person's opinion has not been provided to him in this case because this has not been recorded by the Royal Mail. However on 23 June 2010 the Royal Mail did provide the Commissioner with a copy of the submissions made to the qualified person. Whilst all this information is usually required the Commissioner is satisfied that he is able to make a decision in this case based upon the description of the qualified person's opinion and as a result of being provided with a copy of the submissions which were put to the qualified person identifying the arguments that he took into account.
30. The Royal Mail has explained that the qualified person's opinion is that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. It explained that in order to function effectively, the Trustees are required to act independently of Royal Mail as the employer, and where appropriate challenge the Royal Mail's decisions as the employer relating to pensions. It added that the Trustees consider the minutes to be strictly confidential and disclosure could be damaging to the operation of the pension plan. It explained that pension Trustees must be able to provide robust comments and to be able to challenge the Royal Mail in meetings. It stated that in turn, the Royal Mail must be able to respond to these challenges. It explained that the Trustees must be able to



consider the sometimes controversial options open to them, not only in consultation with advisers but also through debate. It also stated that given the topics discussed, the minutes often document disagreements and differences in approaches taken by the Royal Mail and the Trustees. It argued that those present and in attendance should therefore be able to discuss matters freely and frankly without feeling inhibited by the possibility of information being disclosed. It therefore concluded that in the qualified person's opinion, the Trustee's ability to function effectively in this way and to have free and frank exchange of views would be likely to be prejudiced if minutes recording these debates and discussions were made public.

31. The Royal Mail has explained that in order to enable the qualified person to reach his opinion, he was provided with the following information:

- He was provided with a description of the information caught by the request.
- He was provided with a summary of the comments received by Royal Mail from Royal Mail Pensions Trustees Limited as follows, *"Royal Mail Pensions Trustees Limited considers the minutes to be strictly confidential and do not wish the information to be disclosed. It could be damaging to the operation of the Pensions Plan. Those present and in attendance should be able to discuss matters freely and frankly without feeling inhibited by the possibility of information later being disclosed. The minutes include strictly confidential information in relation to both Royal Mail Group and the Pension Plan."*
- The qualified person was also directed to ICO guidance which deals with dealing with requests for minutes. The guidance states that *"Even if large parts of a document are exempt, this does not mean the whole document should automatically be withheld. You should release any information which does not fall within an exempt category or does not meet any relevant public interest test."..."In nearly all cases, it will be possible to give the dates and times of meetings and the names of the organisations represented. In most cases, it will be possible to give broad headings of what was discussed. In many cases, it will be fair to give the names of individuals who attended the meeting in a professional capacity."*

From his review of the submissions he has been provided with the Commissioner accepts that this was the case.

32. The Royal Mail has explained that the qualified person is a Trustee of the Royal Mail Pension Plan and Chairman of the Royal Mail Senior Executive Pension Plan, and therefore has in-depth knowledge and understanding of the issues, and is extremely well placed to consider whether disclosure of this information would be likely to inhibit the free and frank exchange of views and to prejudice the effective conduct of public affairs.
33. As stated above the Commissioner is aware that the minutes were subsequently disclosed with a number of redactions made under various exemptions including section 36(2)(b)(ii). The Commissioner will therefore consider the qualified person's opinion in relation to the redactions made under section 36(2)(b)(ii).
34. Taking into account the withheld information, the qualified person's opinion and the submissions which were put the qualified person to enable the opinion to be reached, the Commissioner considers that the opinion is reasonable in substance and therefore section 36(2)(b)(ii) was correctly engaged.
35. As the Commissioner has decided that the exemption is engaged, he will go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke Appeal)*,<sup>1</sup> where the Tribunal considered the law relating to the balance of the public interest in cases where the section 36 exemption applied. The Tribunal held that the application of the public interest test in section 36 cases entails a consideration of the following factors:

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EA/2006/0011 and EA/2006/0013

- (a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
  - (b) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
  - (c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.
  - (d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the free and frank exchange of views by public officials for the purposes of deliberation.
  - (e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
36. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment

required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.

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

37. The Royal Mail has acknowledged that there is a public interest in openness and transparency, in particular in matters relating to pensions where there is extensive debate both about pension provision in general, and in the public sector and at the Royal Mail in particular. However the Royal Mail has argued that it has gone some way to meet the public interest in this regard through the provision of extensive information during the consultation process.
38. The Commissioner considers that there is a strong public interest in openness and transparency, particularly in relating to issues which are the subject of significant public debate and as Royal Mail is a large employer, issues which affect a vast number of people. He considers that there is a public interest in the decision making process relating to the pension plan being open and the Royal Mail and its Trustees being accountable for the decisions made. He has noted that other information has been provided as part of the consultation process and that there is an argument that this may go some way to meeting this public interest argument. The Commissioner is also mindful that a vast majority of the requested minutes have been disclosed which again, it could be argued, goes some way to meeting this public interest argument.
39. The Commissioner also recognises however that there is a strong public interest in disclosure of information which will add to the sum of knowledge that is already in the public domain, provide as full a picture as possible to the public, and thus inform public debate. In the Commissioner's view, even though some other information has been provided as described above, this does not negate the public interest in releasing the redacted information in this case.

## **Public interest arguments in favour of maintaining the exemption**

40. Royal Mail has argued that it is in the public interest for it and the Trustees of the pension to be able to discuss issues openly and in a free and frank manner. Furthermore it has argued that it is in the public interest for the Trustees to be able to function effectively in the administration of the Royal Mail pension plan.
41. The Commissioner considers that there is a strong public interest in the Royal Mail and the Trustees being able to discuss issues relating to the pension plan in a free and frank manner. He also considers that it is in the public interest for the Trustees to be able to administer the pension plan effectively. Particularly as it directly affects a large number of people. The Commissioner considers that if the information redacted under section 36(2)(b)(ii) were disclosed there is a strong likelihood that certain issues relating to the pension plan may not be discussed as freely and frankly between the Royal Mail and the Trustees in the future. Furthermore if the Trustees did not feel able to discuss certain issues with such candour, the Trustees would not be in a position to administer the pension plan as effectively. The Commissioner has therefore given significant weight to this argument.
42. The Commissioner has given such weight to this argument as he notes that the request was made in August 2008, which was 5 months after the date of the final set of minutes relevant to the request. The final set of minutes was dated 27 March 2008. The Commissioner is aware that whilst many of the main proposed changes were due to come into force in January and April 2008 (therefore prior to the request), only a very short time period had elapsed between this and the making of the request. Furthermore one of the proposed changes was not due to take effect until April 2010. The Commissioner therefore considers that the issues discussed and in particular the information which was redacted from the requested minutes related to issues which were ongoing at the time of the request. The Commissioner considers that this adds weight to the argument that the Royal Mail and the Trustees would be likely to be inhibited from such free and frank discussion in the future if the redacted information were disclosed and furthermore disclosure would be likely to prejudice the Trustees in effectively administering the

pension plan in the future if such open discussions were no longer held.

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

43. The Commissioner has considered the information which has been redacted from the minutes under section 36(2)(b)(ii), he has also taken into account the information which has been disclosed relating to the request, the issues surrounding the request and the timing of the request and has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.
44. As the Commissioner has found that section 36(2)(b)(ii) was correctly engaged in this case he has not gone on to consider the application of section 36(2)(c) any further.

### **Section 42**

45. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
46. There are two categories of legal professional privilege, those categories are advice privilege and litigation privilege.
47. The Royal Mail explained to the Commissioner that during the meetings to which the minutes requested relate, the Trustees were advised by the Plan Lawyer. The Plan lawyer's clients were the Trustees of the Plan with the power to make amendments. Although the advice was given in the presence of others, for example representatives of Royal Mail Ltd, this was in a meeting with limited attendees who would have understood that the discussions were all to be treated as confidential and, therefore, the communications remain confidential and privileged.
48. Within the meeting and therefore recorded within the requested minutes, the Plan Lawyer has either reported on advice that he has prepared in written form, or has advised on legal issues as they arose during the course of the meeting. The Royal Mail stated that information in both of these categories is information in respect of which legal professional privilege would be applicable.

49. After considering the information in question the Commissioner believes that in this case the category of privilege the Royal Mail is relying upon is advice privilege.
50. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
51. After considering the requested information in this case which was withheld under the section 42(1) exemption, the Commissioner is satisfied that it falls within the scope of this exemption.
52. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
53. The Commissioner is mindful of the Tribunal's decision in *Bellamy v ICO (EA/2005/0023)* in which it was stated:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

*"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*

54. The Commissioner has therefore considered these comments in the context of this case, and considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional.



## Factors favouring maintaining the exemption

55. The Royal Mail has argued that there is an extremely strong public interest in maintaining the exemption, this is because in order for the Trustees to be able to act in the best interest of employees and for the pension plan to be well managed, they must be able to obtain legal advice in confidence. It suggested that this was particularly important due to the sensitive and significant nature of the changes discussed in the meetings relevant to the request. It summarised that the proposed changes to the plan were, closure of the plan to new members at the end of January 2008, an increase in the normal retirement age from 60-65 from 1 April 2010 and a move from a final salary scheme to a career salary plan for future service accrual from 1 April 2008.
56. Furthermore the Royal Mail suggested that if this information were released, Trustees may be inhibited from obtaining legal advice in the future due to concern that advice may be disclosed into the public domain.
57. Commissioner considers that it is in the public interest that the Trustees are able to seek legal advice to ensure that they are acting in the best interests of the employees of Royal Mail who are members of the pension scheme and that the pension plan is managed well. The Commissioner believes that to be able to do this, the Trustees must be able to seek legal advice relating to the pension plan in a free and frank manner.
58. The Commissioner also considers that if the information were released into the public domain it may have some detrimental effect on the free and frank exchange of advice between the Trustees and its legal advisers in the future which may inhibit their ability to manage the pension plan well.
59. The Commissioner has also considered whether or not the legal advice was recent. In the Tribunal case of Kessler/Ministry of Defence (EA/2007/0043) advice which was weeks old was described as "relatively recent", in Kitchner & Derby County Council (EA/2006/0044) advice which was 6 years old was described as "still relatively recent" whereas in Mersey Tunnel Users Association / Merseytravel [EA/2007/0052] advice which was over 10 years old was considered "not recent". The requested minutes date from 29 March 2007 to 27 March 2008.

The request was made on 14 August 2008. Upon considering this and the contents of the information withheld under section 42, the Commissioner considers that the legal advice was recent. Furthermore the Commissioner is aware that at the time of the request the issues surrounding a deficit in the Royal Mail pension plan and measures to tackle this deficit were very much live issues.

60. The Commissioner is also mindful of the Tribunal decision of *Foreign & Commonwealth Office v ICO* [EA/2007/0092] in which it was stated:

*"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."*

The Tribunal went on to state that such arguments of misrepresentation should be supported by, "*cogent evidence*".

61. Upon viewing the legal advice contained within the requested minutes, the Commissioner is not aware of any 'cogent evidence' which would suggest the above.
62. However the above factors must be balanced against the public interest factors in favour of disclosing the legal advice which the complainant has requested.

### **Factors in favour of disclosing the information**

63. The Royal Mail recognised that there was a public interest in transparency and that members of the public may have an interest in ensuring that the right factors had been considered by the Trustees when tackling the issues discussed in the requested minutes. An argument that public authorities should be transparent in the decisions they make in order to ensure accountability and help increase public understanding of why the decisions taken by such authorities have been made.

64. The Commissioner considers that Parliament did not intend this exemption to be used as an absolute exemption. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel* (EA/2007/0052) the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel, the Tribunal placed particular weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to issues which affected a substantial number of people.
65. In this case the Commissioner considers that the legal advice referred to within the requested minutes affects all members of the Royal Mail pension plan. As the Royal Mail is a large national employer the Commissioner considers that decisions relating to its employee's pension plan does effect a significant number of people.
66. The Commissioner also considers that there is a strong public interest in public authorities being transparent in their decision making and in people understanding the reasons behind decisions made. In this case disclosure of the legal advice may assist the public in understanding the decisions made surrounding the Royal Mail pension plan.
67. In balancing the public interest considerations the Commissioner considers that because the legal advice in question affects a substantial number of people this is a significant factor in favour of disclosure. However, in favour of maintaining the exemption, the Commissioner is particularly mindful that disclosure could have a detrimental effect on the Royal Mail's Trustees free and frank exchanges with its legal advisers in the future. The Commissioner is also minded that the advice was recent at the time of the request and related to live and ongoing issues. After considering all of the above arguments, the information itself the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
68. The full text of section 42 can be found in the Legal Annex at the end of this notice.

## **Procedural Requirements**

### **Section 1(1)(b)**

69. As the Royal Mail originally withheld the requested minutes in their entirety and then subsequently disclosed a redacted version of the minutes it breached section 1(1)(b) of the Act. This is because it failed to provide the complainant with information which it held, which was not exempt, by the time of the outcome of the internal review.

### **Section 10(1)**

70. Section 10(1) of the Act 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.”

71. The Commissioner has considered whether or not the Trust complied with section 10(1) of the Act.
72. As the Royal Mail failed to provide the complainant with all information it held relevant to the scope of the request and which was not exempt within the statutory time for compliance, it breached section 10(1) of the Act in its handling of the request.

### **Section 17(1)**

73. Section 17(1) states that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

74. As the refusal notice being relied upon at the completion of the internal review, was not issued within 20 working days (the statutory time for compliance), the Royal Mail breached section 17(1) in its handling of the request.

## **The Decision**

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75. The Commissioner considers that the Royal Mail correctly applied section 36(2)(b)(ii) the redactions made under this exemption.
76. The Commissioner considers that the Royal Mail correctly applied section 42(1) to the redactions made under this exemption.
77. The Commissioner considers that the Royal Mail breached section 1(1)(b), section 10(1) and section 17(1) in its handling of this request.

## **Steps Required**

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78. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://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 29<sup>th</sup> day of June 2010**

**Signed .....**

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

## Legal Annex

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### General Right of Access

**Section 1(1)** provides that -

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

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

**Section 1(2)** provides that -

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

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time



when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

**Section 1(5)** provides that –

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

**Section 1(6)** provides that –

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

### **Time for Compliance**

**Section 10(1)** provides that –

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

**Section 10(2)** provides that –

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

**Section 10(3)** provides that –

"If, and to the extent that –

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

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

**Section 10(4)** provides that –

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

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

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

### **Refusal of Request**

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

**Section 17(4)** provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6)** provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7)** provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

## **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.

**Section 36(3)** provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

**Section 36(4)** provides that –  
“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

**Section 36(5)** provides that –  
“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

**Section 36(6)** provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

**Section 36(7)** provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

### **Legal Professional Privilege**

**Section 42(1)** provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."



**Section 42(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) in respect of which such a claim could be maintained in legal proceedings.”