

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 6 January 2011**

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

### Summary

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The complainant made a request to Royal Mail Group PLC (the "Royal Mail") under the Freedom of Information Act 2000 (the "Act") for information regarding how much undeliverable mail was sent for disposal by the National Returns Centre in each financial year from 2004/2005 to 2009/2010. The Royal Mail confirmed that it held part of the requested information but stated that some of this information was exempt from disclosure by virtue of section 43(2) of the Act. The Commissioner has concluded that section 43(2) is not engaged and that the information requested should be disclosed. As a consequence Royal Mail breached section 1(1)(b) and section 10(1). However, the Commissioner finds that, on the balance of probabilities, Royal Mail does not hold information relating to part of the complainant's request.

### 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.

### Background

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2. Royal Mail has a legal duty to deliver the mail. However, there are items that are undeliverable. All franked, metered and Mailsort mail, postcards, newspapers and magazines that are undeliverable are disposed of as sensitive waste at the relevant local delivery office. However, all stamped, recorded, signed for and tracked mail which is

undeliverable due to reasons such as an invalid, incomplete or illegible address, and undelivered surcharged mail is sent to the National Returns Centre in Belfast. The mail is opened and if possible sent to the intended recipient or returned to the sender. If neither of these options is possible it is disposed of as sensitive waste by a specialist contractor.

## The Request

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3. On 19 March 2010 the complainant submitted the following request for information to Royal Mail:

*"... In every year since 2004/5 please provide me with a list of (a) how much mail was sent for disposal by Royal Mail; and (b) a breakdown of the kind of post which was sent for disposal (eg junk mail, private correspondence); (c) where the post was held before it was sent for disposal; (d) how the post was disposed of eg shredded and by which company."*

4. On 21 April 2010 Royal Mail confirmed that this information was held. However, the request for information was refused under section 43(2) as prejudicial to the commercial interests of Royal Mail. The public interest arguments were also provided: Royal Mail stating that the arguments in favour of maintaining the exemption outweighed those in favour of disclosure.

5. The complainant asked for an internal review on 29 April 2010 and he challenged the withholding of the requested information. On 1 June 2010 Royal Mail reviewed the complainant's request and stated that the information requested at points (a) and (b) was not, in fact, held. Points (c) and (d) were responded to.

6. On 12 June 2010 the complainant wrote to the Commissioner outlining his complaint. A letter was sent to Royal Mail outlining the context and requesting the withheld information. On 16 August 2010 Royal Mail wrote back to the Commissioner explaining that the complainant had made a subsequent request on 11 June 2010:

*"In every year since 2004/5 please provide me with a list of*

- (a) how much mail (numbers of individual letters and parcels and weight of mail) was sent for disposal by Royal Mail's National Returns Centre;*
- (b) a breakdown of the kind of post which was sent for disposal (eg junk mail, private correspondence);*

- (c) *how the post was disposed of e.g. shredded and by which company;*
- (d) *and an estimate in numbers of individual letters and parcels, and/or weight of mail, which were sent for disposal by other parts of Royal Mail, excluding the National Returns Centre."*

7. Parts (b) and (d), it was stated, were not held by Royal Mail. Part (c) was provided to the complainant. Part (a) was withheld under section 43(2). The letter sent to the complainant by Royal Mail on 12 July 2010 stated that disclosure of the exempted information was "likely to be misconstrued" and thus be prejudicial to Royal Mail's commercial interests. Again public interest arguments were provided - Royal Mail stating that the arguments in favour of maintaining the exemption outweighed those in favour of disclosure.

## **The Investigation**

### **Scope of the case**

- 8. On 12 June 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant felt that the responses he had had were confusing and he did not understand why Royal Mail could not supply him with the figures for how much mail was disposed of by the National Returns Centre.
- 9. On 29 September 2010 the Commissioner clarified with the complainant that he was intending to investigate the 11 June 2010 request only. He explained that the focus of his investigation would be to determine whether the exemption at section 43(2) was correctly applied to the information requested at point (a) of that request and whether any of the information requested at points (b) and (d) was held at the time of the request.

### **Chronology**

- 10. On 29 September 2010 the Commissioner submitted further questions to the Royal Mail regarding points (b) and (d) in order to assist with his determination as to whether this information was held. Royal Mail was asked questions regarding what searches were made which fell within the scope of the request; what electronic searches were made; whether the information had ever been held; whether it had been destroyed; and whether there was a business or statutory need to retain such information.
- 11. On 28 October 2010 Royal Mail responded to the Commissioner's correspondence. It confirmed that there was no information held for points (b) and (d) as described in paragraph 6. There was not

considered to be any statutory requirement or business need to hold this information and, as a result, searches were not carried out. Royal Mail also asserted that the requested information in both the complainant's requests was either not held or was subject to section 43(2) in relation to point (a).

12. As regards section 43(2) Royal Mail confirmed in response to the Commissioner's 29 September 2010 letter that it was relying on the lower prejudice test and that disclosure of the requested information "would be likely to" prejudice its commercial interests.
13. In its response Royal Mail stated:
  - That its customers had chosen Royal Mail over its competitors and that these competitors often operated on a national, regional and local level.
  - That it operated in a commercial environment where its competitors were not required to publish the figures for the disposal of undeliverable mail. It further argued that the publication of such figures would place it at a disadvantage because its competitors could portray the quantity of disposed mail derogatively whilst not being required to publish any figures themselves.
  - Royal Mail provided a link to adverse publicity on a competitor's website which detailed missing post and postal workers convicted of stealing postal items.
  - An article in the press was provided which was also related to postal workers convicted of theft. Royal Mail stated that if the disposal figures for the National Returns Centre were disclosed it would be likely to result in negative publicity which would not be placed in context.
  - Royal Mail acknowledged that the 'evidence' it had used to support its contention that disclosure would result in commercial detriment was largely based on illegal acts whereas the disposal of undeliverable mail was a legitimate process.
14. Royal Mail also put forward a number of public interest arguments for withholding the requested information.
15. Royal Mail confirmed to the Commissioner on 22 November 2010 that in relation to point (a) it does hold the numbers of mail items sent for disposal by the National Returns Centre but not the weight. The Commissioner's analysis has therefore also considered whether Royal Mail was correct in stating it did not hold this weight information

## Analysis

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### Substantive Procedural Matters

#### Section 1

16. Section 1(1) of the Act states 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.”

17. In approaching cases such as this the Commissioner is guided by the views of the Information Tribunal in *Bromley & others v ICO & Environment Agency* [EA/2006/0072], which stated that in cases such as this,

“The standard of proof to be applied in that process is the normal civil standard, namely the balance of probabilities...”<sup>1</sup>

18. Further to this, the Tribunal also went on to state that,

“...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere with a public authority...”<sup>2</sup>

19. In reaching a view on the balance of probabilities the Commissioner should take into account a number of factors, including evidence of the scope and quality of the public authority's searches. The Commissioner has also noted the views of the Tribunal in *Fowler v ICO & Brighton and Hove City Council* [EA/2006/0071] which suggested that such evidence may include:

“...evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place.”<sup>3</sup>

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<sup>1</sup> EA/2006/0072, para 10

<sup>2</sup> EA/2006/0072, para 13

<sup>3</sup> EA/2006/0071, para 24

20. During the course of the investigation the Commissioner asked Royal Mail to provide him with evidence of searches that it had carried out in order to ascertain whether the requested information in relation to points (b) and (d) of the request of 11 June 2010 was held together with a number of other questions as outlined in paragraph 10 above. Royal Mail reiterated that this information was not held and that no searches were carried out. It confirmed that this information was not recorded and that there was no statutory or business need to hold the information. Although Royal Mail can provide general categories of post and an overall figure for the mail sent for disposal it does not hold a "breakdown". In relation to point (d) of the 11 June 2010 request for information Royal Mail described estimating how much mail is disposed of at local level as "impossible". As this information is not held the Commissioner would not expect an estimate to be made.
21. Although Royal Mail provided the Commissioner with little in the way of detail he accepts that, on the balance of probabilities, people in senior positions knew that the requested information was not recorded and had confirmed this with its Facilities Management Contracts team. In view of this, any search for this information would have been futile. The complainant has provided no evidence to show that the information is held.
22. Having considered Royal Mail's arguments the Commissioner accepts that they are reasonable. Given this, and as he has been provided with no evidence to the contrary, the Commissioner is satisfied that, on a balance of probabilities, Royal Mail does not hold the requested information in this case in relation to points (b) and (d) of the request. Based on Royal Mail's responses to points (b) and (d) above and the contents of its email of 22 November 2010 the Commissioner is also satisfied that it does not hold the weight information requested under point (a) of the 11 June 2010 request.

## **Exemptions**

### **Section 43**

23. Section 43(2) provides an exemption from disclosure for information that would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The full text of section 43 can be found in the Legal Annex at the end of this Notice.
24. The Commissioner accepts that Royal Mail is a publicly owned company which is engaged in commercial activities and that the information requested relates to those activities. For this reason he believes that the information in question falls within the scope of the exemption.

25. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of Royal Mail. During the investigation of this case Royal Mail confirmed that the disclosure of the requested information “would be likely to prejudice” its commercial interests.
26. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15)
27. This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that: “Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”  
In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
28. In reaching a view on Royal Mail’s arguments and whether the disclosure of the withheld information would be likely to cause the prejudicial effects described, the Commissioner has firstly considered the nature of the withheld information.
29. Section 43 is a prejudice based exemption, not a class based exemption. As such the correct interpretation of the application of this exemption is whether the disclosure of the actual withheld information (as specified in the request) would have the potential to cause the prejudice as described in the exemption. The question to be asked in any assessment of prejudice in relation to this case is: ‘what would happen if this particular information were to be disclosed?’
30. The Tribunal in *Hogan* commented as follows (at para 30): “Second the nature of the ‘prejudice’ being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated “real, actual or of substance ” (Hansard HL (VOL. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on ‘prejudice’ should be rejected.”
31. A fuller extract of the quote from Lord Falconer of Thoroton is: “Finally, on the subject of exemptions, I want to emphasise the strength of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The

Commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is 'real, actual or of substance'."

32. The Commissioner's view of this is that the choice of the term "prejudice" is important to consider in this context. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way. If a "trivial or insignificant" prejudice is claimed then it is questionable whether any detriment or actual prejudice to the interest being protected has truly been identified.
33. In its letter to the Commissioner of 28 October 2010 Royal Mail argued that disclosure of this information would lead to unjustified negative publicity, damage customer perception and make the public less likely to use its services. The information could also be used by its competitors to leverage business by creating a negative impression of Royal Mail amongst those browsing the web, and picking up on the resulting disaffected consumers. These effects would be likely to prejudice Royal Mail's commercial interests.
34. The Commissioner is not persuaded by the generic arguments presented by Royal Mail in relation to the prejudice it might suffer to its commercial interests as a result of disclosing the requested information. Royal Mail's argument that the release of this information would be likely to generate adverse publicity which might lead to an alteration in public perception that could damage Royal Mail's business is an argument for withholding any information of this nature. This suggests a blanket approach to the use of this exemption which is clearly not what is intended by the Act. Royal Mail has presented little specific argument to support its view that the release of this information would be likely to be commercially prejudicial other than a link to adverse comments on a competitor's website and a press article. Although these articles do display negative publicity they do not directly relate to the requested information. There is no causal link shown which demonstrates that the release of the numbers of undeliverable mail items sent for disposal by Royal Mail would be likely to prejudice its commercial interests and the Commissioner finds the suggestion of prejudice to Royal Mail's commercial interests to be tenuous.
35. It is the Commissioner's opinion that the disclosure of the requested information is unlikely to be prejudicial to the Royal Mail's commercial interests. The disposal of mail is not a competitive matter but rather an inevitable consequence of offering a postal service. As Royal Mail operates a universal service it is equally inevitable that there will be large volumes of undeliverable mail. Just because Royal Mail's competitors do not have to provide any figures does not make the

- disclosure of these figures necessarily detrimental. It could be argued that no meaningful comparison can be made due to the lack of figures regarding the disposal of undeliverable mail by commercial rivals.
36. The Commissioner is not persuaded by Royal Mail's contention that customers who have chosen them above its commercial rivals might desert Royal Mail if the disposal figures for undeliverable mail were released. The Commissioner accepts that there may be some negative publicity attached to the release of these figures but, as Royal Mail is the main player in the market, the public are likely to assume that it will deal with large quantities of undeliverable mail – a percentage of which will have to be sent for disposal. The Commissioner notes that Royal Mail receives positive publicity for the manner in which it has delivered or returned post with minimal, inaccurate or illegible address details. He is satisfied that it is possible to contextualise the figures as one aspect of the work of the National Returns Centre which aims to reunite post with its intended recipient.
  37. After considering Royal Mail's arguments, the nature of the withheld information, and the test of likelihood of prejudice (as described in paragraphs 27-29) the Commissioner is not persuaded that the disclosure of the withheld information in this case would be likely to cause the prejudice as argued by Royal Mail.
  38. As the Commissioner is of the view that section 43(2) of the Act is not engaged and does not provide an exemption from disclosure he has not gone on to consider the public interest test.

## **Procedural Requirements**

### **Section 10**

39. Section 10(1) states 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."*

40. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under the exemptions cited by the public authority, he believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The public authority's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the public authority also breached section 10(1).

## The Decision

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41. The Commissioner's decision is that the public authority did not deal with point (a) of the request for information of 11 June 2010 in accordance with section 1(1)(b) of the Act, in that it inappropriately relied on section 43(2) to withhold the requested information. As a consequence:

- In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).
- However, the Commissioner has decided, on the balance of probability, that the public authority did not hold the requested information in relation to points (b) and (d) of the 11 June 2010 request nor the weight information in relation to point (a) of this request and so complied with section 1(1) in this respect.

## Steps Required

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

Disclose the information it holds as requested at point (a) of the 11 June 2010 request:

*"In every year since 2004/5 please provide me with a list of*

*(a) how much mail (numbers of individual letters and parcels and weight of mail) was sent for disposal by Royal Mail's National Returns Centre."*

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

## Failure to comply

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43. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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44. 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 6<sup>th</sup> day of January 2010**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution  
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.”

## **Commercial interests**

**Section 43** provides that -

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).