

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 30 March 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 a list of all current agreements held to deliver unaddressed mail in a certain postcode area. Royal Mail confirmed that it held the requested information but stated that it believed it was exempt from disclosure by virtue of section 43(1) and section 43(2) of the Act. The Commissioner has concluded that section 43(1) is engaged and that the public interest is in favour of maintaining the exemption. The Commissioner finds that the exemption was correctly applied and he requires no steps to be taken.

### 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 the following request for information to Royal Mail on 12 March 2010:

*"For either the town of St Neots or the PE19 postal area, whichever is most convenient, please could you provide a list of all current agreements you have to deliver unaddressed mail.*

*For each such agreement, please list the following:*

- 1) *Name of company or organisation the mail is from*
  - 2) *Schedule of delivery (e.g. once per week, once on the 30th April, etc)*
  - 3) *Expiry date of agreement*
  - 4) *Scope of delivery, if not the entire area."*
3. On 13 April 2010 Royal Mail responded to the complainant stating that the requested information was held but that it would be withheld under section 43(2) – prejudice to commercial interests. Royal Mail explained that the requested information could be used by Royal Mail's competitors to target its own business and promotional activity and thus prejudice its commercial interests. The public interest arguments were also provided.
  4. On the same day the complainant asked for an internal review. He argued that Royal Mail occupied a uniquely privileged position in the door-to-door advertising market, by virtue of being the monopoly mail provider. He went on to say that the incremental costs of delivering junk mail are much lower than for any other provider as the costs of visiting every house are already covered or mostly covered by normal mail items. The complainant also suggested that there was thus a strong public interest in opening up information about the details of the impact Royal Mail's service has on competitors who lack this subsidy. The complainant also pointed out that he wanted to be able to make an informed decision as to whether to opt-out of the delivery of junk mail and that because of this, Royal Mail's assumption that the requested information would not further inform the public was incorrect.
  5. Royal Mail provided the results of its internal review on 13 May 2010 stating that it believed the information to be exempt under section 43(1) – trade secrets. However, it made clear that section 43(2) would also apply to this information and the public interest arguments for non-disclosure were listed.

## **The Investigation**

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### **Scope of the case**

6. On 23 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the points raised in paragraph 4.
7. The Commissioner wrote to Royal Mail on 28 September 2010 stating that he was not convinced that Royal Mail had appropriately applied

section 43(1) to the requested information. He explained that he intended to look at the application of section 43(1) should Royal Mail continue to argue its appropriateness and section 43(2).

## Chronology

8. Royal Mail provided its response to the Commissioner on 20 October 2010 in which it continued to rely on section 43(1) and quoted the Commissioner's own advice in *Freedom of Information Act - Awareness Guidance No 5* in support of its position. It placed great emphasis on this guidance at the point at which it suggested that the names of customers or goods could constitute a trade secret.
9. Royal Mail went on to consider the 4 questions asked in the Commissioner's guidance:

- Is the information used for the purpose of trade?

Royal Mail explained that it offered a door-to-door service for unaddressed mail – leaflets and flyers. As this market is unregulated anybody can enter the market and Royal Mail faces direct and indirect competition. Royal Mail sells its services to those wishing to advertise their goods or services in a particular area. The requested information comprises Royal Mail's client list and gives details of the services the clients are purchasing including the time of delivery and the precise area being targeted. This list is used for the purposes of trade as it is necessary for Royal Mail's delivery of services.

- Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals?

Royal Mail stated that it was self-evident that if this information was released it would be useful to its local and national competitors as it would enable them to target its customers.

- Is the information already known?

Royal Mail stated that the requested information is not publicly available. Whilst residents know what drops through their letterboxes they will not necessarily be able to deduce its client-base. Future scheduled drops are detailed on the requested information which would not normally be known until an item had been received. Recipients of unaddressed mail will not know how widely the item they have received is distributed. Royal Mail also stressed that the collated list is not known to its competitors.

- How easy would it be for competitors to discover or reproduce the information for themselves?

It was stated that competitors would have to take possession of a residential and non-residential address in order to monitor what comes through the letter-box. This is because agreements are sometimes restricted to residential addresses only. It was also pointed out that the names on Royal Mail's list could not be easily established as many organisations go through specialist leaflet delivery companies that then contract with Royal Mail.

10. In this letter Royal Mail provided the public interest arguments in favour of disclosing the information and in favour of maintaining the exemption.
11. In conclusion Royal Mail argued that it had taken steps to make the requested information secret. Only a limited number of people have access to the information and the post people who deliver it do not know the identity of the clients or the wider picture relating to patterns of customer delivery or deliveries beyond their own sector.
12. On 4 November 2010 the Commissioner wrote again to query Royal Mail's application of section 43(1) and to request that Royal Mail ascertain from its clients what prejudice to their commercial interests they believed would occur if the requested information was released.
13. Royal Mail replied on 1 December 2010 reiterating some of its previous arguments and confirming that it intended to continue to rely on section 43(1). Royal Mail also detailed its clients' arguments regarding how the release of the requested information "would be likely to" prejudice their commercial interests.

## Analysis

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### Substantive Procedural Matters

#### Exemptions

##### Section 43(1)

14. The full text of section 43 can be found in the Legal Annex at the end of this Notice.
15. Section 43(1) provides an exemption for information which constitutes a trade secret. This is a qualified exemption, and is therefore subject to the public interest test.

16. When the FOI Bill was being considered by the Scottish Parliament, the Justice Minister at that time said:

*"Although trade secrets are often considered to be commercial interests...they are materially different from the normal interest that a business has in the confidentiality of its affairs. A trade secret can be regarded as an asset - perhaps the most valuable asset - of the business. The recipes for Drambuie and Irn Bru are examples of trade secrets that people would readily recognise as being of a different quality from commercial interests. Sometimes trade secrets attract legal protection, such as a patent or copyright, but often the only protection is in maintaining their secrecy."*<sup>1</sup>

17. The Commissioner acknowledges that the term "trade secret" is not defined in the Act. However his own published guidance (*Awareness Guidance number 5*) suggests that the term "trade secret" encompasses technical secrets such as secret formulae or recipes and business secrets such as pricing structures or unique strategies or methodologies if such information gives a company a "competitive edge". It is important to note that this guidance contains quite a broad interpretation of what may constitute a trade secret and includes the names of customers. The Commissioner has also considered the Tribunal decision *Department of Health v Information Commissioner (EA/2008/0018)*. He notes comments made by the Tribunal:

*"A trade secret implies that the information is more restricted than information that is commercially sensitive. The ordinary understanding of the phrase usually suggests something technical, unique and achieved with a degree of difficulty and investment. Few would dispute that the recipe for "Coca Cola" is (or has been) a trade secret."* (paragraph 52)

The Tribunal itself underlined some of the inherent difficulties in differentiating between section 43(1) and 43(2) by commenting that the Commissioner's tests were "*strikingly similar to those applicable to section 43(2) commercial sensitivity*".

18. The Commissioner has considered the four points referred to in his guidance as highlighted by Royal Mail in paragraph 9. He accepts that the information is used for the purpose of trade for the reasons explained by Royal Mail above.

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<sup>1</sup> Quoted in:

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2583&SID=123>

19. The Commissioner accepts that disclosure could conceivably cause harm to the commercial interests of the third parties by enabling competitors to target its customers. The information considered here does not consist of unique pricing calculations, strategies, methodologies or, in the Commissioner's view, secret details of products or services which he considers could be gleaned from knowing the identity of Royal Mail's list. However, the Commissioner's *Awareness Guidance number 5 also "...extend[s] to such matters as names of customers and the goods they buy..."*<sup>2</sup> Royal Mail's competitors could use the information to target its business development and promotional activity. He accepts that if Royal Mail's competitors had access to the client list then it is possible that they would offer their services to those clients highlighting the fact that they could deliver the same items through their own network, or through a named national network. He also agrees that release of the list could damage Royal Mail's relationship with its clients, who would be unlikely to welcome this information being disclosed about their business. Furthermore the Commissioner accepts Royal Mail's view that, as it would not have access to its competitors' client lists, release could put Royal Mail at a disadvantage in the market place and therefore be detrimental to its commercial interests.
20. In relation to the third point in the Commissioner's guidance, as to whether the information is already known, the Commissioner notes that Royal Mail considers that the information is not widely known, whilst accepting that the residents themselves who receive the drops know what comes through their letterbox. It argues that the drop is only one piece of the jigsaw and that the actual requested detail itself is only accessible by 5 people within Royal Mail and is stored on a password-protected database. The Commissioner is prepared to accept that in the form requested by the complainant the information is not widely known.
21. Finally the Commissioner has considered how difficult it would be:
- "...for a Competitor to discover elements of the information or to reproduce elements of the information..." (*Department of Health v Information Commissioner (EA2/2008/0018)* at paragraph 53).
- He considers that the easier it is for a competitor to recreate or discover that information through his own efforts, the less likely it is to

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<sup>2</sup> Found at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_v3_07_03_08.pdf)

be a trade secret. Royal Mail argues this would be impossible to do as even if competitors were able to access necessary delivery points across the district code of PE19 they would still not know who the Royal Mail's client was and whether it was the company advertising or an intermediary leafleting company. The Commissioner accepts that, whilst it may be possible through its own market research for competitors to ascertain which companies drop leaflets where, competitors will not be able to establish who the direct client of Royal Mail was without accessing the withheld information itself.

22. The Commissioner has considered the application of section 43(1) by reference to his guidance. Whilst the Commissioner acknowledges that some of the points referred to above may suggest the withheld information is not a trade secret in the fullest sense of the phrase, on balance he has concluded that the exemption under section 43(1) is engaged in this case. He has concluded that Royal Mail's client list and delivery drops are treated as a trade secret within its own business; that the information on that list and the delivery drops are guarded from its competitors; and that the disclosure of the requested information might lead to a fundamental undermining of Royal Mail's ability to compete commercially because it would allow a competitor to be in possession of a client list and delivery drops whilst being able to guard its own client list and delivery drops. He is therefore satisfied that Royal Mail correctly applied the exemption under section 43(1) and has gone on to look at the public interest test.

### **The Public Interest Test**

23. On 20 October 2010 Royal Mail provided the Commissioner with its public interest arguments in favour of disclosing the requested information and in favour of maintaining the exemption. These arguments were used to support its application of section 43(2) but the Commissioner considers that most of these arguments are also applicable to section 43(1). He accepts that disclosure of a trade secret could be detrimental to the commercial interests of Royal Mail.

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

24. Royal Mail listed the following arguments that it considered would weigh in favour of the disclosure of the requested information:
- accountability and transparency in the spending of public money;
  - accountability and transparency in the decision-making of public authorities; and



- [the] promotion of public understanding of, and participation in the debate of issues of the day.

25. Royal Mail went on to put forward a contrary argument regarding public funding. Royal Mail operates on the basis of profit and loss and does not receive state funding. It has secured loans from the government on a commercial basis and it is not permitted to secure loans from any other source. Royal Mail argued that, as the public purse is not subsidising its door to door service, the public spending argument is unsustainable.

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

26. Royal Mail also argued that under the terms of the licence from its regulator, the Postal Services Commission ("Postcomm"), it is required to meet its "universal service" remit. This means that letters and parcels are delivered across the United Kingdom for the same price, regardless of the location of the sender and the recipient. The door to door service is not part of the universal service. The vast majority of Royal Mail's door to door clients are commercial organisations (although some local councils use the service). Royal Mail suggested that public perception that the universal service underpinned the door-to-door service is based on the false assumption that Royal Mail receives a public subsidy. The true position, it claimed, is that Royal Mail does not receive a public subsidy. It is the success of Royal Mail's commercial services such as the door-to-door service which subsidises the universal service. The universal service makes a loss. Royal Mail supported its contention with links to its public accounts and quotations from The Hooper Report which suggested that the market for letters is in decline.

27. Any public interest in furthering understanding of the operation of Royal Mail's door to door service, the promotion of accountability and transparency in the spending of public money and the promotion of understanding about Royal Mail's decision-making regarding this service is limited. Royal Mail stressed the public interest in the continued delivery of the universal service using *The Hooper Report* to underpin its arguments. In support of its views it stressed the importance to the public of:

- a national network and uniform tariff as beneficial to both society and the economy;
- strengthening social cohesion by allowing everyone to send and receive goods;
- *companies of all sizes rely[ing] on the postal service to build their business, supply goods and receive payment;*



28. It went on to argue that the universal service is reliant on the long-term viability of Royal Mail. The updated *Hooper Report*<sup>3</sup> highlighted the increasing vulnerability of the universal postal service which is bound up with the survival of Royal Mail. Any damage done to Royal Mail's commercial interests would, in turn, damage its financial health and have detrimental consequences for the delivery of the universal service. None of Royal Mail's competitors in this market is covered by the Freedom of Information Act so release of Royal Mail's client list for the PE19 area would mean that it was not competing on a level playing field.

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

29. The complainant asked the Commissioner to consider the argument that release of the requested information would enable local residents to see what mail they would miss out on if they opted out. However, in the vast majority of cases, Royal Mail's client list does not reveal the organisations promoted in the unaddressed mail because those organisations largely go through an intermediary when placing a contract with Royal Mail. Local residents will already be receiving Royal Mail unaddressed items with their regular Royal Mail post, so they already know the items typically delivered by the door to door service.
30. The Commissioner agrees with Royal Mail's contention that the universal service is likely to require increasing levels of support from its commercial activities. He notes the predicted continuing decline outlined in the updated *Hooper Report*. Royal Mail has to make profits through services such as its door to door service in order to fund modernisation and subsidise the universal service. The Commissioner accepts Royal Mail's conclusion that the greater public interest lies in the requested information being withheld.
31. As the Commissioner is satisfied that section 43(1) is engaged and that the public interest in maintaining the exemption outweighs that in disclosing the information he has not gone on to consider the application of section 43(2).

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<sup>3</sup> Found at <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/s/10-1143-saving-royal-mail-universal-postal-service.pdf>

## **The Decision**

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32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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33. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

35. 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.
36. 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 30<sup>th</sup> day of March 2011**

**Signed .....**

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

## Legal Annex

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### **1 General right of access to information held by public authorities**

(1) 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.

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

(3) 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.

(4) 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.

(5) 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).

(6) 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”.

### **43 Commercial interests**

- (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).