

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 03 November 2011

Public Authority: Department for Business Innovation & Skills
(BIS)

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant requested, pursuant to his research into the provision of state aid to Post Office Ltd (POL), financial details contained within a European Commission (EC) document *State aid No N 508/2010 – United Kingdom*.
2. The Commissioner's decision is that BIS correctly withheld some of the requested information relying on the section 43 exemption, after taking the balance of the public interest into account, but also wrongly withheld some information where the public interest favoured disclosure. In one instance he decided that the section 43(2) exemption was not engaged.
3. The Commissioner requires BIS, to ensure compliance with the legislation, to disclose an amended version of document *State aid No N 508/2010* subject to the redactions set out in a confidential schedule. (This schedule has been sent only to BIS to enable it to make the necessary redactions.)
4. BIS must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Information Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 10 June 2011, the complainant wrote to BIS and requested information in the following terms:

"pursuant to my research into the provision of state aid to Post Office Ltd (POL) [please supply] the financial details that are contained within the [European Commission] document State aid No N 508/2010 – United Kingdom".

He specified some financial details of especial interest in an appendix to the request.

6. BIS responded on 23 June 2011 saying that information was being withheld under the section 43 (commercial interests) exemption of FOIA.
7. Following an internal review BIS wrote to the complainant on 6 July 2011, maintaining the exemption and saying that, for the withheld information, the public interest in withholding the information outweighed the public interest in releasing it.

Scope of the case

8. On 28 July 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled and about the continued withholding of information. He said that he needed the information to determine the likely impact of the planned withdrawal of the state aid subsidy to the post office network. During the Information Commissioner's investigation, the complainant indicated that he was not concerned to receive information about costs incurred by POL; his main interest was the number of offices required to provide SGEIs and the income derived from them. This was in relation to the provision of state aid for services of general economic interest (SGEI), in particular the obligation placed upon POL to provide a universal service (the universal postal service obligation).
9. The complainant said in correspondence with the Information Commissioner that he was a sub postmaster and needed the information requested to support the case for continuing state aid to sub post offices.
10. The Commissioner considered the application by BIS of the commercial interests (section 43(2)) exemption of FOIA to the withheld information and the balance of the public interest.

11. After discussion with BIS officials his staff prepared a schedule of information that he decided should continue to be withheld. He provided this to BIS in the form of a confidential annex to this notice. The schedule is confidential to BIS since it contains withheld information.

Reasons for decision

12. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

13. For the commercial interests exemption to apply to this information, there must be prejudice which must not be trivial or remote but real, actual or of substance to the commercial interests of a relevant body.
14. The Information Commissioner decided, for the relevant information, that prejudice would be likely to occur directly to the commercial interests of POL and indirectly to those of BIS and the taxpayers who provide any subsidies and bear any losses incurred during the provision by POL of SGEIs for which there is competition from other retail outlets. The prejudice would be likely to arise from potential competitors of POL being able to access POL information of commercial value and being enabled thereby to adapt their competitive strategies and gain maximum competitive advantage over POL to its detriment and that of BIS and the taxpayer.
15. In the case of one small section of withheld information the Information Commissioner decided that the commercial interests exemption was not engaged and therefore did not apply. BIS had argued that the commercial interests of a private body, another government department or of the government itself *may* be prejudiced and that *could* damage relations between the private body and the government in the future. The Information Commissioner did not accept that commercial prejudice to the private body or the government would be likely to occur. He saw no evidence that the private body expected anonymity or that any such expectation was induced by government or that such expectation was reasonably held.

Public interest

16. The commercial interests exemption is qualified and the Information Commissioner then addressed the balance of the public interest.

17. Public interest factors which the Information Commissioner saw favouring the **disclosure** of the withheld information included the general public interest in openness, as greater transparency with information makes government more accountable.
18. In the case of those services which attract a public subsidy to POL there is a strong public interest in enabling greater scrutiny of the level of subsidies to POL and the manner of their application.
19. Making information more widely available would foster the growth of competition and innovation in the services provided by POL and would be likely to lead to reductions in the need for BIS and the taxpayer to subsidise POL in the longer term.
20. To the extent that competition does not currently exist for some SGEIs, or exists only in a very limited form, significant immediate commercial prejudice would be unlikely to arise.
21. In addition he saw that some related information, such as the network subsidy payment, is already publicly available with no reported detriment to the commercial interests of POL, BIS or other government departments.
22. Public interest factors favouring continued **withholding** of the relevant information included that disclosure could damage the commercial position of POL.
23. It could also damage the business reputation of BIS and lead to a loss of confidence by POL and other business partners of BIS which could make them reluctant to provide commercially sensitive information to BIS in the future.
24. Disclosing information about POL's optimum commercial network would give competitors insight into the structure of POL's network and the drivers of its profitability. Full disclosure of SGEI information would, in conjunction with information already in the public domain from other sources such as reports to Parliament and POL's annual reports, provide market intelligence about POL's non-SGEI services; this would be likely to be of value to its existing or potential competitors.
25. It would not be in the public interest to disclose information that could make it more difficult, onerous or costly for POL to provide public services, especially those SGEI services for which competition is currently limited. Disclosing details of POL's costs of providing services could give actual or potential competitors commercial advantage; this related to competition coming either directly from providers of

analogous competitive services or from existing or potential future alternative channels to market.

26. In its evidence BIS said it was concerned to avoid disclosing information that could put at risk the ubiquitous provision of SGEI services, or could lead to the cost of their provision by POL being increased, leading to the risk of higher subsidies being needed.
27. BIS said that the European Commission had agreed to redaction of the withheld information and that departing from the agreed position now could lessen the government's credibility with the EC with regard to future excision requests. The Information Commissioner noted this point but also considered that a willingness on the part of BIS to correct past errors, instead of persisting in them, would be likely to improve its credibility.
28. In balancing the public interest factors for and against maintaining the exemption, the Information Commissioner was influenced by the interests of the taxpayer, the level of competition for SGEIs, the risks to POL's commercial position and the extent to which the withheld information represented factual information or was in the nature of more speculative scenarios modelled by POL or others. He decided that, in the case of business forecasts and scenarios of future activity, the modelling processes used by POL and BIS could be exposed and with them sensitive information about POL's business model and that this would be damaging to POL and, by extension, to the interests of BIS and the taxpayer. He decided that disclosing scenario information would reveal information about POL's business models and future cost trends. He decided that there was a clear public interest in disclosing the number of offices needed to support the universal [postal] service obligation placed on POL as it relates to the public subsidy needed by POL and stems directly from the relevant condition in a public document, the Royal Mail's postal licence condition 3(2)(b).
29. The Information Commissioner decided that for some information the balance of the public interest favoured maintaining the commercial interests exemption, as identified in the associated confidential schedule.
30. He decided that the remainder of the disputed information should be disclosed as the balance of the public interest did not favour maintaining the exemption.

Right of appeal

31. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Confidential Annex

Confidential schedule associated with the decision notice sent to BIS only.