

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2016

Public Authority: Post Office Limited
Address: Finsbury Dials
20 Finsbury Street
London
EC2Y 9AQ

Decision (including any steps ordered)

1. The complainant has requested information relating to cash deposits made by Lycamobile. Ultimately the Post Office refused to confirm or deny whether it held the requested information, relying on sections 41(2) breach of confidence and section 43(3) –prejudice to commercial interests, as its grounds for doing so.
2. The Commissioner's decision is that the Post Office is entitled to refuse to confirm whether the information is held under section 43(3).
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 9 October 2015 the complainant requested information of the following description:
"The documents requested are:
 - Minutes or any other records relating to the September 2014 meeting between two Post Office compliance officers and an investigator who attempted to supply evidence of Lycamobile's wrongdoing.
 - Copies of complaints made by Post Office managers, tellers, or any other employee about Lycamobile's huge cash deposits.

- Copies of any correspondence between Santander Bank and the Post Office discussing caps imposed on Lycamobile's cash deposits.
 - Copies of any correspondence between the Post Office and the Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs discussing Lycamobile and/or suspicious cash drop offs at the Post Office."
5. On 6 November 2015 the Post Office responded. It refused to provide the requested information citing the following exemptions as the basis for doing so:
- Section 43(2) – commercial interests
 - Section 31(1)(a) - prevention or detection of crime
 - Section 31(2)(b) – apprehension or prosecution of offenders
 - Section 31(2)(i) – securing health and safety of persons at work
 - Section 31(2)(j) – securing the health and safety of persons others than those at work
 - Section 38(1)(b) –endangerment to the safety of any individual
6. The complainant requested an internal review on 11 November 2015. The Post Office sent the complainant the outcome of its internal review on 15 February 2016. The Post Office revised its position and now refused to confirm or deny whether the Post Office held the requested information. It cited the following exemptions provided by section 41(2) – breach of confidence and section 43(3) –prejudice to commercial interests, as the basis for doing so.

Scope of the case

7. The complainant originally contacted the Commissioner on 18 January 2016 to complain about the way his request for information had been handled. However it was only after the Post Office had carried out an internal review that the Commissioner accepted the request on 17 March 2016.
8. The complainant understandably wanted the Commissioner to make a decision in respect of both the Post Office's refusal to confirm it held the information and its original refusal to provide the information. During the Commissioner's investigation he argued that the Post Office should not be allowed to rely on an exclusion from the duty to confirm or deny whether the information is held as he believed it had already acknowledged it did hold the information when applying exemptions to its duty to communicate that information (as quoted in paragraph 5).

9. The Commissioner notes that in a previous case (Richardson v the Information Commissioner and Metropolitan Police Service EA/2015/02500) the Tribunal found that having initially responded to a request by refusing to disclose information under section 40(2), on the basis that the information was personal data and its disclosure would breach the data protection principles, the Police were not entitled to later refuse to confirm or deny it held the same information under section 40(5). The Tribunal said that the initial application of the exemption from the duty to communicate the information had “altered the factual background of the request” (paragraph 22). However other Tribunals have not followed this approach (see for example Jeremy Obano v Information Commissioner EA/2016/0048). In any event the decisions of the First Tier Tribunal do not set a precedent which the Commissioner is obliged to follow. It therefore remains the Commissioner’s position that a public authority is entitled to change its response to a request at the internal review and apply new exemptions, including exemptions from the duty to confirm or deny. Upon receipt of a complaint, the Commissioner will therefore consider whether the public authority would have been entitled to rely on those exemptions at the time it originally responded to the request, having regard for the circumstances that existed at that time.
10. Therefore the matter to be decided is whether the Post Office is entitled to refuse to confirm whether it holds the requested information under either section 41(2) or 43(3).
11. The Commissioner will start by looking at the Post Office’s application of section 43(3).

Reasons for decision

Section 43(3) – prejudice to commercial interests

12. Under section 1(1)(a) any person making a request for information to a public authority is entitled to be informed whether the information is held. This is referred to as the duty to confirm or deny.
13. Section 43(3) of FOIA states that the duty to confirm or deny does not arise if, or to the extent that the confirmation or denial that would have to be given to comply with section 1(1)(a) would or would be likely to prejudice the commercial interests of any person, including the public authority holding it.
14. The exemption can be applied on the basis that either the prejudice to commercial interests ‘would’ occur or that it would be only ‘likely’ to occur. In this particular case the Post Office has argued that the

prejudice would only be likely to occur. This means that it considers there is a real and significant risk that confirming or denying the information is held would prejudice commercial interests.

15. In respect of whose commercial interests the Post Office is wishing to protect it has cited its own interests, its banking partner and those of Lycamobile.
16. It is important to recognise that when refusing to confirm or deny whether the information is held the Post Office is not restricted to only considering whether the actual response it would in reality be required to provide under section 1(1)(a) would be likely to prejudice the commercial interests of those parties. For example, if the Post Office did not hold the information it is not limited to only considering what would be revealed by denying the information was held, it could also take account of what would be revealed if it had to confirm it did hold the information. If it can demonstrate that either a hypothetical confirmation **or** denial would be likely to be harmful the exemption is engaged.
17. In this case the Post Office is arguing that if, hypothetically, it had to confirm the information was held, the commercial interests of itself, its banking partner and those of Lycamobile would be prejudiced. It is therefore necessary to consider what a hypothetical confirmation would reveal and compare this to what was already known at the time of the request.
18. Confirming the information sought in the first part of the request would confirm that allegations against Lycamobile had been made or reported to the Post Office and that these allegations had been provided by an 'investigator'. Confirming the information sought in the second part of the request would reveal that Lycamobile had made large cash deposits at Post Offices which had lead staff to complain to senior managers. Confirming the information requested in part three was held would in effect confirm that Santander was Lycamobile's bank and that it had imposed limits on the amount of cash deposits Lycamobile could make. Finally confirming that the information requested in part four was held would reveal that either the Post Office or the Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs had suspicions over Lycamobile making large cash deposits at Post Offices.
19. In October 2015 a media outlet reported that it had carried out an investigation into Lycamobile's business practices and identified that it regularly deposited large amounts of cash at a number of Post Offices in London. The news story reported that Post Office staff had raised concerns about this practice and that Santander, which it said was Lycamobile's bank, had imposed limits on the amounts it would accept as cash deposits through this route. In another article the same media

outlet reported that one of Lycamobile's business competitors had also investigated these business practices and reported its concerns to the National Crime Agency. In support of its stories the reports include quotes from unidentified Post Office and Santander staff. The reports refer to the cash deposits as being "unorthodox" and "suspicious". A number of national newspapers picked up on the story.

20. The Post Office directed the Commissioner to a press release that Lycamobile had issued in response to these stories. In that press release Lycamobile acknowledges that it does make cash deposits to Post Offices. However it denied any wrong doing and was taking legal advice on its options. The Post Office has also advised the Commissioner that despite quotes from an anonymous member of staff, Santander had not confirmed that Lycamobile is one of its customers. The media outlet has published a letter from a law firm named in its stories as engaging a private investigator to investigate Lycamobile on behalf of its business rival. That letter appears to acknowledge that such an investigation did take place and the results were passed to the appropriate authorities. It is assumed that this is the investigator referred to in the first part of the complainant's request.
21. Therefore although the news story was widely reported the only details that have been confirmed are that Lycamobile did make cash deposits to Post Offices albeit the size of those deposits has not been disclosed, and that a named law firm engaged a private investigator which looked into this matter. So far as is relevant to the complainant's request, the other details of the news report have not been substantiated by official confirmation from the parties involved.
22. The Post Office has argued that if the information sought in the four requests was held, confirming this would, in each case, be likely to prejudice the commercial interests of the Post Office, its banking partners and Lycamobile. The first request relates to the alleged meeting between an investigator and Post Office's compliance managers. The Post Office considers that if it confirmed the information was held it would reveal confidential information about customers of its business partners in breach of contractual arrangements. The Commissioner understands that the Post Office has contractual arrangements with banks to accept cash deposits from their customers and to then courier these to the bank. The Post Office refers to these banks as its business partners. These contracts would contain confidentiality clauses prohibiting the disclosure of any information about the agreement or information obtained as a result of entering into the agreement. If this confidentiality clause was breached this, it is argued, could lead to the bank concerned terminating its arrangements with the Post Office and this loss of custom would prejudice the Post Office's commercial interests.

23. The Commissioner has carefully considered this argument. The news stories report that Lycamobile's bank is Santander and that the bank imposed limits on the amount of cash deposits that it would accept through the Post Office. Whilst it can be argued that confirming any element of the news report was accurate would give credence to the story as a whole, it is not clear to the Commissioner that confirming the alleged meeting took place would reveal anything about who Lycamobile's bank was or any details of the business relationship between the bank and Lycamobile.
24. Nevertheless if confirmation would, in effect, feed future news stories it may make a bank more cautious of entering into similar contacts with the Post Office. The Post Office has argued that it has to compete with other financial service organisations which are not subject to the FOIA. Therefore a bank may be reluctant to do business with the Post Office if this raised the possibility of information about its customers being disclosed which may result in adverse news coverage about the bank or its customers. The Commissioner finds this argument does support the refusal to confirm or deny. This is so even if the Post Office with its many branches may be able to provide services that some of its competitors cannot. Regard has to be had for the high level of confidentiality any bank would expect in relation to any aspect of its business arrangements and those of its customers.
25. The Post Office has also argued that confirming the information was held would damage the reputation of Lycamobile. The request infers potential wrongdoing by Lycamobile. The allegations in the news report may be unfounded and are certainly unproven at the time of the request. Therefore to confirm such allegations were put to the Post Office could create the impression of wrongdoing on the basis that there is "no smoke without fire". The Commissioner accepts that this is a rational argument. However at the time of the request Lycamobile was the subject of very negative publicity and it could be argued that simply confirming the information was held would cause little, if any, additional detriment. After careful consideration though the Commissioner has concluded that confirming the information was held could be used to support further news coverage and so accepts it would have damaging impact on Lycamobile's reputation which in turn would be likely to prejudice its commercial interests. The exemption from the duty to confirm or deny the information is held is engaged in respect of the first element of the request.
26. Confirming the information sought in the second part of the request would confirm Post Office staff had raised concerns about the amounts of cash being deposited by Lycamobile. Again the Post Office has argued that confirming the information was held would undermine the confidentiality of the arrangements between the Post Office and one of

the banks which was a business partner. As before the Commissioner accepts there is some merit in this argument.

27. The Post Office has also argued that confirming the existence of complaints would cause harm to Lycamobile's commercial interests by inferring wrongdoing or impropriety on its part which may ultimately be unfounded. This would be damaging to its reputation and so prejudice its commercial interest. Again any reputational damage has to be considered in light of the circumstances that existed at the time of the request. The Commissioner has also had regard for the actual concerns which the original news reports claimed were raised. Those reportedly raised by Post Office staff relate more to the practicalities of handling large quantities of cash in terms of the time taken to count the deposits and the security risks of handling such amounts. Nevertheless the Commissioner accepts that the arguments raised support the reliance on section 43(3) to refuse to confirm or deny the information is held.
28. If the information sought at part three of the request was held, confirming this was the case would reveal that Santander was Lycamobile's bank and that Santander had imposed caps, or at least considered the imposition of caps on Lycamobile's cash deposits. This would clearly be information about one of the Post Office's banking partners and their customers. The Commissioner does not necessarily accept that the identify of a company's bank is in itself confidential information as this would become apparent to anyone who does business with that company, the issue of limits imposed on cash deposits would be confidential. Such information is likely to be covered by the type of confidentiality discussed in paragraph 22. Revealing the existence of such limits in breach of that agreement is likely to damage the bank's relationship with its customer, prejudicing the banks commercial interests. As a consequence the bank may reconsider its arrangements with the Post Office so prejudicing the Post Office's interests. On top of this is the potential damage to Lycamobile's reputation. The Commissioner finds the Post Offices arguments support the application of the neither confirm nor deny provision.
29. Confirming the information sought in the final part of the request was held would reveal that the Post Office had correspondence with senior politicians over concerns about the cash deposits being made by Lycamobile. Such confirmation could be interpreted as indicating the seriousness with which the reported allegations against Lycamobile were being taken. This could both damage the reputation of Lyccamobile and deter the Post Office's business partners from continuing to do business with it. Therefore the Commissioner finds that the arguments put forward by the Post Office support its refusal to confirm or deny whether the information is held.

30. The Commissioner is satisfied that the exemption from the duty to confirm whether any of the requested information is held provided by section 43(3) is engaged. This is on the basis that if it did hold the information, the confirmation required would be likely to prejudice the commercial interests of the parties involved. Primarily this would be those of Lycamobile, through the damage to its reputation, and those of the Post Office as confirmation would damage its relationships with business partners and deter them continuing to contract with the Post Office.

Public interest test

31. Section 43(3) is subject to the public interest test as set out in section 2 of FOIA. This means the Post Office can only continue to refuse to confirm whether the information is held if in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether it holds the information.

32. The Post Office has put forward a number of public interest arguments in favour of maintaining the exclusion from the duty to confirm or deny. Firstly it has argued that although there are news reports suggesting Lycamobile's business activities are suspicious these are not themselves evidence of wrongdoing. It highlights the fact that allegations from unnamed and unconfirmed sources are not evidence that the claims are correct and that such allegations can have a significant impact on an organisation's reputation even if subsequently they turn out to be unfounded.

33. It also argued that breaching the duty of confidence it owes its business partners is not in the public interest and this would be likely to harm the commercial interests of both Lycamobile and its bank.

34. Thirdly the Post Office has explained that if its own commercial interests were prejudiced in the way described above, the loss of business and revenue would impact on its ability to reduce the level of public subsidy it received. This would not be in the public interest.

35. The Post Office also explained that it provides a cash deposit service on behalf of a number of banking partners so that they in turn can offer a valuable service to their customers. It is therefore possible that allegations about other banks and their customers may be raised in the future. The Post Office considers that in order to compete in this market it must be able to protect the confidential business affairs of those banks and its customers. To do so it needs to be able to adopt a consistent approach to the way it deals with requests such as this. For example, if the Post Office only complied with section 1(1)(a) when it did

not hold any information this would lead the public to believe that any refusal to confirm or deny was tantamount to an admission that information was held and that it was considering allegations of wrongdoing. The Commissioner accepts that in order for an exclusion from the duty to confirm or deny to be effective it must be applied in a consistent manner.

36. The Post Office also raised other factors. One being that if it, or any other agency, were investigating allegations of wrongdoing, which could in certain circumstances amount to the commission of a criminal offence, it would not be in the public interest to confirm the requested information was held as this would alert those under investigation. The other factor raised by the Post Office was that confirming that it regularly accepted large cash deposits would create a security risk for both its own staff and those of Lycamobile. The Commissioner has not taken these factors into account as they are not relevant to the actual exemption claimed. Section 43(3) serves to protect commercial interests and only commercial interests. Therefore arguments about the integrity of any criminal investigation or staff safety do not support its use.
37. However the Commissioner does give some weight to the factors discussed in paragraphs 33 to 36 which relate to the severity of the commercial impact that would be suffered by Lycamobile, its bank and the Post Office itself and the need to apply the neither confirm nor deny provision on a consistent basis. These factors have to be weighed against those in favour of disclosure. The Post Office has acknowledged that there is a general public interest in transparency and in promoting an understanding of matters which are in the interests of the public. This includes bringing to light suspected wrong doing where there is proper evidence that wrongdoing has occurred.
38. Although the Post Office accepts the value in transparency where it would expose wrongdoing, it also provides a counter argument, ie that there are already appropriate mechanisms to deal with such suspicions through its own internal money laundering reporting procedures. These allow staff to raise suspicions and can ultimately result in those suspicions being reported to the appropriate law enforcement agencies in accordance with the requirements of the relevant anti-money laundering legislation.
39. The complainant has himself made a related point, stating that the request is clearly aimed at shedding light on the Post Office's handling of allegations of suspicious activity. In effect the Post Office argues that although there is a clear public interest in exposing wrong doing, this can be better achieved through its own internal procedures without it becoming necessary to disclose information to the general public. The

complainant is arguing that there is a value in understanding whether those internal procedures are working effectively.

40. The Commissioner accepts there is some value in disclosing information on how the Post Office dealt with the allegations made in the press. If complaints had been raised by its own staff and it had considered them credible, there would be a value in understanding how the Post Office took the matter forward. Disclosing such information would serve to reassure the public that the Post Office was acting responsibly and that anti-money laundering legislation was being adhered to and was effective.
41. However it is important to keep sight of the fact that to date, and certainly at the time of the request, the allegations of wrongdoing were unsubstantiated. In light of this and having taken account of the damage to the reputation of Lycamobile and more importantly the damage confirming the information was held would have on the confidence of the Post Office's business partners in its ability to handle their customers' affairs appropriately, the Commissioner finds that, at the time of the request, the public interest in maintaining the exclusion outweighs the public interest in disclosing whether the information was held.

The Commissioner finds that the Post Office is entitled to rely on section 43(3). This being so she has not gone on to consider the application of section 41(2). The Post Office is not required to take any further action in this matter.

Other matters

42. Although not forming part of the formal decision notice the Commissioner uses 'Other matters' to address other matters that have been raised by the complaint but which do not constitute breaches of the FOIA.
43. The complainant requested an internal review on 11 November 2015. The Post Office did not provide the outcome of that review until 15 February 2016, which is nearly three months later. Although there is no statutory time limit for conducting internal reviews, the Commissioner has published guidance in the form of 'A guide to freedom of information', available on the ICO website. This makes it clear that in most cases she would expect reviews to be completed within twenty working days and that only in exceptional cases should one take forty working days. Clearly the time taken by the Post Office to conduct the review in this case was outside these limits.

Right of appeal

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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

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