



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2010/0160

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50266509
Dated: 16 August 2010**

Appellant: ROYAL MAIL

Respondent: INFORMATION COMMISSIONER

Additional Party: MR MATTHEW DAVIS

On the papers on 12 April 2011

Date of decision 29 April 2011

Before

ROBIN CALLENDER SMITH
Judge

and

PIETER DE WAAL
ALASDAIR WARWOOD
Tribunal Members

For the Appellant: Royal Mail Legal Services

For the Respondent: Claire Nicholson on behalf of the Information Commissioner's Office

For the Additional Party: Matthew Davis in person

Subject matter:

Section 43 (2) information likely to prejudice the commercial interests

Cases:

DEFRA v Information Commissioner & Simon Burkett EA/2009/0106

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 16 August 2010.

SUBSTITUTED DECISION NOTICE

Dated 29 April 2011

Public authority: Royal Mail

Address of Public authority: Royal Mail Group Limited, 100 Victoria Embankment, London EC4Y 0HQ

Name of Complainant: Mr Matthew Davis

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 10 August 2010.

Action Required

Within 35 days the Appellant is to reveal all the textual information in the closed witness statement of Stephen Agar save that the figures used in the closed statement are to remain redacted.

The same process is to be used for the closed material in Annex 2: the figures are to remain redacted but the text is to be disclosed.

3 May 2011

Robin Callender Smith

Tribunal Judge

REASONS FOR DECISION

Background

1. On 1 May 2009 Mr Matthew Davis (the "Additional Party") wrote to Royal Mail with the following request:

"Please give me the figures for the last three years into the number of complaints relating to both (i) recorded mail and (ii) special delivery. Specifically the number of complaints that the mail had either been lost or damaged.

"Please also provide me with the number of compensation payments and the total amount you have paid out for each of the last three years for lost and damaged mail for both (i) recorded mail and (ii) special delivery mail. For the last year please provide summary details into the largest claim for lost/damaged mail you made and how much that payment was for?"

2. Royal Mail ("the Appellant") issued its response on 2 June 2009. It confirmed it held the information but refused to disclose it, citing section 43 (2) Freedom of Information Act ("FOIA").
3. In the Decision Notice ("DN") dated 16 August 2010 the Information Commissioner ("IC") concluded (Paragraph 49 of the DN):

"..... the Commissioner has considered the competing public interest arguments.... Whilst he considers the arguments finely balanced he has concluded that the arguments relating to transparency and accountability make a more compelling case in favour of disclosure. He is not persuaded that this more detailed information in relation to these two specific services is of a substantially higher commercial sensitivity than that information already in the public domain. Whilst he acknowledges Royal Mail's argument that the public interest in openness and accountability is somewhat met by the performance data it publishes in the Quarterly Reports, he believes that the withheld information increases public understanding of its performance by giving a more detailed breakdown of the volume of complaints received and compensation payments made for its Special Delivery and Recorded Delivery services."

4. The IC noted the similarity to an FOIA request made in 2007 by the Additional Party, when he had already been provided with some of the information covered by his 2009 request, namely the details of the

largest single payment for lost or damaged mail received in the year prior to the 2007 request. The Appellant had disclosed this amount in a letter to the Additional Party dated 17 September 2007 as £2592.61 paid out due to a lost Special Delivery item. The remainder of the requested information had been withheld under Section 43 FOIA. The Additional Party had originally complained to the IC but did not pursue the complaint.

5. In relation to this appeal, the Appellant filed a witness statement from Stephen Agar dated 16 December 2010. This witness statement was produced in two forms: there is an open version and a closed version (which contains details of the sensitive commercial information that the Appellant does not wish to be revealed).
6. Mr Agar explained he had joined Royal Mail in 1991 as a commercial lawyer in Royal Mail's Legal Department where he had worked until 2001. After that time he worked as Director of Marketing, Director of Regulation and Managing Director of Royal Mail Wholesale.
7. At the time he filed the two versions of his witness statement he had been appointed Director of Regulated Products in the Letters Division of Royal Mail Group Limited.
8. On receipt and in light of the closed version of the witness statement, the IC (the Respondent in this appeal) changed his position. He now concluded that the public interest in maintaining the exemption in respect of the requested information was not outweighed by the public interest in disclosing it.

The appeal to the Tribunal

9. The Tribunal had already set dates early in January for an oral hearing in respect of the appeal. The IC pointed out that, because of his change of position, the Tribunal might wish to consider the position of the Additional Party as requestor. In the event, the Additional Party was joined to these proceedings.
10. Because he was not going to be able to see the closed submissions of the Appellant, the Additional Party claimed that it was impossible for him to have a fair hearing in terms of his Article 6 ECHR "fair trial" rights.
11. He pointed out, correctly, that the IC had originally sided with him and decided "*at the 11th hour to do a 180 degree U-turn and side instead with the Royal Mail*". That change of position occurred 18 months after his initial request was lodged and the decision of the IC to reverse his decision put him in a position where he was at an unfair disadvantage.

12. Because he was not allowed to see the closed information he asked the Tribunal to provide him with a special advocate who could look at the material and make appropriate submissions on his behalf to the Tribunal. He indicated that he wished and oral hearing generally.
13. The Tribunal considered previous decisions made about such closed evidence. In particular it reminded itself of the decision in *DEFRA v Information Commissioner & Simon Burkett EA/2009/0106*. In that case the Tribunal had noted that it was "*experienced in fulfilling its inquisitorial role and, if appropriate, exploring the evidence and submissions made....in light of the arguments advanced by the party excluded*".
14. The Tribunal declined to depart from its general rule expressed above but agreed that an oral hearing was appropriate. In the event, the Additional Party decided that he did not want to attend an oral hearing and that the matter could proceed on the papers.
15. In arriving at this decision the Tribunal noted that Mr Agar's witness statement ran to 27 pages together with annexes and contained around 9600 words. Only 319 words, 5 figures and one of the annexes had been redacted from the open version of the witness statement. The thrust of the Royal Mail's argument could be deduced from the open material.

The questions for the Tribunal

16. The Tribunal had to determine whether the public interest in revealing the information requested was – or was not – outweighed by maintaining the commercial confidence in the material.

Conclusion and remedy

17. The Tribunal has had the advantage of seeing all the relevant material in this appeal in its open and close, confidential state. The Tribunal has also considered carefully whether the IC's change of position is one with which the Tribunal concurs either in part or in full.
18. The Appellant makes a reasonable point about Mr Agar's witness statement running to 27 pages plus annexes. Only 319 words, 5 figures and one of the annexes has been redacted from the open version of the witness statement and the reductions relate solely to the Appellant's financial position as this is commercially sensitive.
19. The Tribunal has decided to the required standard (the balance of probabilities) that the position of the Appellant and the revised position of

the IC are partly correct and that the redacted material is exempt under Section 43(2) FOIA and the public interest in maintaining the Section 43(2) exemption in respect of **some of** that material is not outweighed by the public interest in disclosure.

20. However, the Tribunal disagrees with the extent of non-disclosure in the redacted version of the closed material, and has reflected this in the Substituted Decision Notice.

21. The redacted text of the closed material is to be disclosed but not the redacted figures which are not required to be disclosed and are to remain redacted.

22. There is no order as to costs.

23. Our decision is unanimous.

Robin Callender Smith

Tribunal Judge

3 May 2011