



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

EA/2015/0106

MRS J HARRISON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held on 12 November 2015 at Fox Court

Before A Lowton, D Wilkinson and Judge Taylor.

Decision

The appeal is unanimously upheld for the reasons set out below. This decision is to be treated as a substituted Decision Notice.

Date of Decision: 23 December 2015

Date of Promulgation: 29 December 2015

Steps to be taken

Within twenty working days of the date of promulgation of this decision, the Royal Mint is to disclose the requested information as set out below and summarised in paragraphs 19 and 29 with any personal names redacted to the extent that these would fall within s.40(2) FOIA (*exemption for personal data*) on the basis that the Tribunal may not order disclosure of such personal data.

Reasons

Background

1. The Royal Mint is a government-owned company. It manufactures and distributes all domestic coins for the UK, and strikes collectable commemorative coins to mark significant events and subjects as well as coins for the bullion market.

The Request

2. On 2 August 2014, the Appellant requested from the Royal Mint, as a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA'):

"1. Please can you provide me with the following information relating to your UK retail trade sales.

How many UK retailers have you supplied commemorative coins to in each financial year from 2008 to 2014 and the revenue that this generated each year.

I'd also like to know how many of those accounts were over £250,000 annual spend.

Can you provide me with the number of new accounts opened in each of those years and also how many were closed in each of those years and the reason why accounts were closed.

For the current financial year from 2014, I'd like to know the number of UK retailers that you directly supply with commemorative coins and their company names.

In addition I'd like the RRP of the full UK brilliant uncirculated set of coins in each of those years from 2008 to 2014.

2. Please can you provide me with the following information relating to your overseas retail trade sales.

How many overseas retailers do/did you have in Europe for commemorative coins and how many in the rest of the world for each of the financial years from 2008 to 2014 and the revenue that this generated each year.

I'd also like to know how many of those accounts were over £250,000 annual spend.

Can you provide me with the number of new accounts opened in each of those years and also how many were closed in each of those years and the reason why accounts were closed.

For the current financial year from 2014, I'd like to know the number of overseas retailers that you directly supply with commemorative coins and their company names."

(Emphasis Added to show scope of outstanding request - see para.5 below.)

3. On 1 September 2014, the Royal Mint provided the recommended retail price for the "full UK brilliant uncirculated set from 2008 to 2014" and refused to disclose the rest of the information claiming an exemption on the basis that its disclosure would be likely to prejudice the commercial interests of the Royal Mint (s.43(2) FOIA).
4. Matters progressed with a complaint to the Information Commissioner (the 'Commissioner').

5. The Royal Mint subsequently disclosed some of the requested material with the Appellant having accepted the start date for the material provided being 2010 and not 2008. The Commissioner considered that the outstanding part of the request was for the names of companies the Royal Mail supplies; 'detailed information on the revenue generated'; and the reasons why accounts were closed. This has not been disputed such that this is the scope of the outstanding request for the purposes of this appeal.
6. The Commissioner found that the Royal Mint had correctly relied on s.43 FOIA so as to allow it to withhold the requested information. His reasons are summarised as:

s.43 FOIA engaged:

- i. **Commercial Interest:** The withheld information relates to the sale of commemorative coins, which is a commercial interest conducted in the competitive collective and gifting market, producing coins and medals to mark occasions, anniversaries and events.
 1. The Royal Mint is the only producer of official coins of the UK. However, this does not necessarily mean it has a monopoly on this market and its competitors are:
 - (a) other mints: these nationally and internationally strike coins to mark the same events and anniversaries. The Royal Mint gave details of eight of its main competitors who produce coins aimed at the UK market. It provided the Commissioner with examples of countries and their mints, which issued commemorative coins to mark the royal wedding on 29 April 2011, and photocopies of some of those coins to allow for a comparison; and
 - (b) other companies. For instance, the commemorative coins struck for the birth of HRH Prince George were competing with a wide range of other goods.
 2. The Royal Mint had explained that retailers could obtain coins to mark the same events from its competitors, but would not be able to obtain official coins of the United Kingdom as these were only supplied by the Royal Mint.
- ii. **Disclosure would cause prejudice:** There would be a causal link between disclosure and any prejudice occurring and the prejudice would be real and of substance.
 1. If the requested information were disclosed, competitors would gain detailed knowledge of to whom Royal Mint supplies coins and, more importantly, the proportion of revenue that each retailer accounted for.
 2. Competitors could target retailers with more lucrative deals and the Royal Mint would be at a significant disadvantage in their future negotiations with retailers.

3. Retailers knowing the proportion of business they generated for the Royal Mint, would be likely to press for more favourable terms, placing the Royal Mint at a significant disadvantage in future negotiations with them.
 4. The Royal Mint submitted that a sample of the Royal Mint's contracts with retailers typically contained standard confidentiality obligations prohibiting the disclosure of any confidential information concerning the affairs of the parties. Breach of these contractual obligations could damage the Royal Mint's relationships, and prejudice its commercial interests by resulting in a downturn in orders.
 5. Disclosure in breach of contractual confidentiality obligations would cause it reputational damage likely to impact on its bullion sales, where the bullion market was a market in which trust in the integrity of suppliers is a key factor.
- iii. The Royal Mint had confirmed that it did not give details of retailers on its website, but that its distribution policy did not preclude a retailer, when becoming a distributor, from advertising themselves as an official Royal Mint distributor.

Public interest:

- i. There was a strong public interest in favour of disclosure, as it promotes transparency and accountability in public authorities.
- ii. However, as a trading fund, the Royal Mint must be able to operate in a way which allows it to generate its own funding and conduct its business effectively. Whilst disclosure of the information may ultimately lead to a reduction in the Mint's pricing structure for coins, which would be in the public interest, the public interest in disclosure (and any subsequent price reduction) was far outweighed by the need to allow it to operate in a competitive commercial environment without giving any advantage to existing or new competitors.

7. The Appellant now appeals this decision.

The Task of the Tribunal

8. The Tribunal's remit is governed by section 58 FOIA. Our task is to consider whether the decision made by the Commissioner is in accordance with the law or whether any discretion it exercised should have been exercised differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
9. We have received a bundle of documents and submissions, all of which we have considered carefully even if not specifically referred to below.

The Law

10. Under s.1(1) FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless it is exempt from disclosure under the Act.
11. The requested information would be exempt if disclosure:
 - a. *'would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'*¹; and
 - b. *'in all the circumstances of the case, the public interest in maintaining this exemption outweighs the public interest in disclosing the information'*.²
12. The term 'commercial interests' is not defined in FOIA. It is often considered by that the essence of commerce is trade and a commercial activity that would generally involve the sale or purchase of goods or services for profit.

The Issues

13. The issues for us to decide are:

- A. Does the information relate to a commercial interest?**
- B. Would disclosure prejudice or be likely to prejudice those interests?**
- C. What is the balance of public interest?**

The Appellant's Submissions

14. The Appellant presented extensive arguments, which we have organised according to the issue so as to consider her best case in this appeal. She maintained that:
 - a. She was a previous customer of the Royal Mint's Retail Sales Team until they changed their retail strategy, such that she now had to import the Royal Mint UK coins because the mint no longer offered her a discount on their products.

The Mint had explained to her in a conversation that they were moving from an open market of around 200 UK distributors to a group of just five UK retailers and she said that the names of the five retailers were given to her.

A. Does the information relate to a commercial interest?

- b. The Commissioner had given one example of worldwide competition for HRH Prince George coins. Despite worldwide competition for this major event, the Royal Mint very quickly completely sold out of their commemorative products. They sold out on the basis of being the sole UK distributor such that the coins were never issued to retailers. However, this was a once in a lifetime event. It was not representative of the day-to-day

¹ See s43(2)FOIA

² See s2(2)(b) FOIA

sales of UK coins.

- c. Medals were outside of the scope of this case. The reference to other coins by the Commissioner was not relevant because the case only concerned UK coins. From the Appellant's experience of having worked in the numismatic industry for many years, she knew that UK collectors wanted UK coins and that the market for overseas coins was miniscule. The only competing mint producing coins aimed at the UK market was the Pobjoy Mint that produced the Isle of Man currency. The Royal Mint were being liberal with the truth if they were suggesting there are seven other mints producing coins for the UK market.

B. Would disclosure be or be likely to prejudice commercial interests?

- d. Competitors were already aware of who the Royal Mint supplied and it was not the best kept secret who it had large accounts with and any new competitor could easily find out by using a Google.
- e. Of these retailers, at least two were already active with foreign mints. Currently, the largest retailer was the Post Office Branch network and they did not stock foreign coins. She posed the following questions: have the Post Office been approached by foreign mints? Do foreign mints not know of their counter sales of Royal Mint coins? Would the Monnaie de Paris have any interest whatsoever in knowing the proportion of business the Royal Mint do with the Post Office? Would it make any difference to them if they knew the Post Office accounted for 17.3% of sales of UK coins?
- f. She argued that retailers already had knowledge of the proportion of business that it generates for the Royal Mint and any pressure for more favourable terms in future negotiations was built into contract negotiation. To claim this would be a disadvantage was contrary to what already happened.
- g. An examination of confidentiality clauses would clearly be needed to identify if disclosure would prejudice the Mint's interest, but for her part she considered it unlikely.
- h. She was not convinced that if the Mint were to upset any of the businesses they dealt with, it would result in a downturn of orders. This is because the Mint has a complete monopoly on UK products, so there was nowhere else for them to go for the products.
- i. As regards damaging the reputation of the Royal Mint, the Commissioner's argument concerned bullion which was dealt with by a different team and so was completely irrelevant.
- j. Retailers would have a difficult job of matching up foreign coins to the UK coins. There were exceptions, such as Royal Weddings, those related to HRH Prince George etc., but these were rare exceptions. In general, the Royal Mint had 'very British' subjects on their coins (for instance Benjamin

Britten, Kew Gardens, Florence Nightingale, Britannia etc.) and foreign mints were not 'too impressed' by them.

- k. Prior to the Royal Mint moving over to a cartel based distribution network in 2013 they published retailers on their website using a clickable map of the UK which allowed open access to the public to the Royal Mints network of distributors. The Appellant had had many enquiries from the general public who had accessed her details from that site. Historically, the names of many of the retailers the Mint had dealt with had already been put into the public domain by the Mint. Currently, the Mint had a list of "stockists" on their website <http://www.royalmint.com/aboutus/stockists>.

The Commissioner's Submissions

15. The Commissioner's arguments included the following:

A. Does the information relate to a commercial interest?

- a. The Royal Mint operates in the highly competitive collectable and gifting market, producing coins and medals to mark occasions, anniversaries and events. Within this market, competitors were not just limited to other mints but also include other companies operating in the collectables and gifting market. The Royal Mint cited the recent example of its commemorative coins struck for the birth of HRH Prince George competing with a wide range of other goods.
- b. In relation to coins and medals, other mints nationally and internationally strike coins to mark the same events and anniversaries as those coins produced by The Royal Mint. The Royal Mint provided the details of eight main competitors who produce coins aimed at the UK market alone. The list extends to overseas mints and it provided the Commissioner with examples of countries and their mints, which issued commemorative coins to mark the royal wedding on 29 April 2011. It has also provided photocopies of some of those coins to allow for a limited comparison.
- c. Specifically asked if retailers could source the exact same coin elsewhere, The Royal Mint explained that retailers could obtain coins to mark the same events from its competitors but would not be able to obtain official coins of the United Kingdom as these are only supplied by The Royal Mint.

B. Would disclosure be or be likely to prejudice commercial interests?

- d. The term 'prejudice' in the context of section 43 implies not only that the disclosure of information has some effect on the applicable interest, but that the effect must be detrimental or damaging in some way. The possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
- e. The Royal Mint operates on the competitive market for collectables and gifts, which includes commemorative UK coins as well as other commemorative products such as medals and foreign coins. It is

necessary to consider the effect disclosure may have on the Royal Mint's ability to operate on this market, and not only its position with respect to the production and supply of UK coins. .

- f. Disclosure of the withheld information would significantly affect the ability of the Royal Mint to do business in the market place.
- g. In the event that the requested information was disclosed, competitors would gain a detailed knowledge not only of those to whom the Royal Mint supplies coins but they would also, more importantly, know the proportion of revenue that each retailer accounts for. With this information competitors could target retailers with more lucrative deals. In such circumstances, The Royal Mint would be at a significant disadvantage in their future negotiations with retailers.
- h. Disclosure could put the Royal Mint at a commercial disadvantage: if a retailer were to know the proportion of business that it generated for the Mint, then they would be highly likely to press for more favourable terms in future negotiations and of course.
- i. The Royal Mint's contracts with retailers include standard form agreements, and sometimes, it was required to sign up to third party terms and conditions particularly with larger retailers. During the timeframe set out in the request, it would have entered into dozens of contractual arrangements. A sample of the contracts showed that they typically contain standard confidentiality obligations on each party. These obligations prohibited disclosure of any confidential information concerning the affairs of the other party. Any breach of these contractual obligations would damage the relationship and would prejudice the commercial interests of The Royal Mint by a downturn in orders.
- j. Any prejudice that may result to the Royal Mint's ability to operate on the wider market was relevant. The Royal Mint had explained why damage to its relationships on this market may affect its ability to operate competitively on the market for bullion, by reason of reputational effects.
- k. The Royal Mint was becoming increasingly involved in the bullion market and there were many competitors around the world supplying bullion coins of the same weight and purity as those produced by the Royal Mint. There was an issue of trust surrounding the bullion market and the main reason that customers purchase one bullion coin over another was trust in the integrity of the supplier. In the event that the information were disclosed and the Royal Mint was seen to be breaking contractual confidentiality, the reputational damage was likely to have an impact on its bullion sales.
- l. The Royal Mint had confirmed that it did not provide details of retailers on its website. With regard to retailers who advertised themselves as 'official Royal Mint distributors', the Mint stated that its distribution policy neither prevents nor licences whether a retailer, at the point of becoming a distributor, may or may not advertise themselves as an official distributor.

- m. The Royal Mint was unique in that it was the only producer of official coins of the United Kingdom but this did not necessarily mean that it had a monopoly in the commemorative coin industry and accordingly, it needed to protect its commercial interests in order to compete in that market.

Our Findings

16. We need to consider the various parts of the exemption set out in s.43 FOIA to ascertain whether we find the Commissioner correct to have decided that the Royal Mint correctly relied on the exemption so as to withhold the remaining portion of the Appellant's request.

Commercial Interest

17. We accept that the Royal Mint conducts a commercial activity by the striking and sale of UK coins for a profit. Even if it were operating a monopoly, the sale for profit would still seem to us to be a commercial activity.

Would disclosure of the requested information be likely to prejudice those interests?

18. When approaching the next part of the exemption, we accept the Commissioner's understanding that for section 43 to 'be engaged' or bite, the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote and the effect of disclosure should be detrimental or damaging in some way on the commercial interest.
19. The outstanding request is for the years from 2008 to 2014³: for (i) the reasons why accounts had been closed; and (ii) names of companies that the Royal Mail supplies and detailed information on the revenue the annual revenue generated.

i. Request for reasons why accounts had been closed

20. The Commissioner maintains that if the requested information were disclosed, competitors would gain detailed knowledge of to whom Royal Mint supplies coins and, more importantly, the proportion of revenue that each retailer accounted for. In relation to disclosure of the reasons why accounts have been closed, this cannot be the case and we have been given no reason why disclosure of that information would cause prejudice to the Royal Mint. Even if any competitors were to find out the identity of a closed business, given that the Royal Mint no longer supplies them, it is not obvious to us why it would harm the Mint's business to any real substantive degree. We therefore find that this information should be disclosed.

ii Request for supplier names; and the annual revenue generated

Competitors targeting retailers to the Mint's detriment:

21. We are told that with the detailed knowledge from disclosure, competitors could target retailers with more lucrative deals and the Royal Mint would be at a

³ It is unclear from the submissions whether the concession referred to in paragraph 5 above applied to the material that is the subject of this appeal. If it does, then the outstanding request is for the years from 2010 to 2014.

significant disadvantage in their future negotiations with retailers. In this regard the Commissioner would seem to be referring to other mints producing coins aimed at the UK market as opposed to companies competing by producing other memorabilia or goods for special events. Additionally, this argument would seem to only apply to the retailers with larger accounts with the Mint. We accept the Appellant's arguments here, which indicate that disclosure is unlikely to make a difference to the Royal Mint's commercial interests and there would not be a likelihood of real and significant prejudice that would be detrimental or damaging to those interests. This is because:

- a. we accept that it is likely to be well known who the Royal Mint's large retailers are, and other mints are unlikely to target smaller retailers;
- b. we accept if the information were made public, it would not assist other mints because we accept the Appellant's evidence as highly plausible that 'UK collectors wanted UK coins' and that the market for overseas coins is miniscule. As the Appellant has explained, the Mint seems generally to have crafted a niche market –choosing very British subjects for their coins, and commemorating events, such as royal births, with a clear UK theme where the value of the product stems from it originating from the UK Mint.
- c. we accept that arguments in relation to commemorative events are unlikely to assist the Commissioner because buyers of UK commemorative coins are likely to want to buy from the Royal Mint rather than from other mints. the Royal Mint explained to the Commissioner, retailers could obtain coins to mark the same events from the Mint's competitors, but they would not be getting official coins of the United Kingdom as these were only supplied by the Royal Mint.

Retailers with large accounts pressing for better terms:

22. We are told that if retailers knew the proportion of business they generated for the Royal Mint, they would be likely to press for more favourable terms than they already get, placing the Royal Mint at a significant disadvantage in future negotiations with them. Whilst it might be possible that retailers may press for more favourable terms, we do not think that there would be a significant likelihood of prejudice. It is likely that the Royal Mint already publish annual data in their accounts, relating to sales, such that it is already possible for retailers to ascertain what proportion is attributable to their business. Even if this is not the case, retailers are likely to know whether their business constitutes a significant proportion of the Mint's supply of coins, and this or their bulk purchases would be likely to already be factored into the prices. In any event, since customers buying UK coins made by the Royal Mint are likely to be wanting UK coins, and retailers would only be able to procure these from the Royal Mint, it seems highly unlikely that disclosing the requested information would give them any advantage in future price negotiations.

Downturn of Orders based on damaging the Royal Mint's relationships:

23. As to the argument that the Royal Mint's contracts with retailers typically contain standard confidentiality obligations and breach of these obligations could damage the Royal Mint's relationships, and prejudice its commercial interests by resulting in a downturn in orders, the Appellant has argued that this is unlikely and that an

examination of confidentiality clauses would clearly be needed to identify if disclosure would prejudice the Mint's interest. We have not found any contracts or a sample of such contractual terms within the bundle of documents or labelled in the index, and so we have not been able to ascertain the content of any such terms and their applicability. We cannot see how we can accept the Commissioner's arguments in the absence of such evidence. Since the Appellant has made these arguments, the onus is on the Commissioner to provide sufficient evidence for the findings he has relied on, which he has not done.

24. Further, we cannot see why the information requested would be '*confidential information concerning the affairs of the other party*' – certainly we would not anticipate the names to be so. In any event, we are not convinced that disclosing information on the basis of a Freedom of Information request, would significantly upset the retailers so as to have a detrimental effect on its retail sales.
25. We did not consider it appropriate or proportionate to delay matters by seeking evidence of terms of the contracts. This is because

- a. In view of rule 2(4) of the *Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 S.I. 2009 No. 1976 (L. 20)* ('the Rules') Rules which provides:

'(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally'; and

- b. the *Tribunal's 'Hearing Bundles – Good Practice Guide 2015'* which sets out clearly what ought to be included in the bundle,

where parties have opted for a paper hearing, we consider it an implicit duty and extremely important that they have provided the Tribunal with sufficiently complete submissions to enable the Tribunal to resolve the matter fully on the day of the hearing, particularly where the party is legally represented or very experienced. (Likewise, a public authority wishing to have its arguments before the Tribunal would need to have applied to be joined and provide such arguments prior to the hearing.)

26. Additionally, we are told that disclosure in breach of contractual confidentiality obligations would cause the Mint reputational damage likely to impact on its bullion sales. We accept trust in the integrity of suppliers is a key factor in bullion sales. However, (a) we have not been shown confidentiality clauses for either markets to be able to ascertain expectations; and (b) bullion would seem to be a wholly different type of market. We also have not been given any convincing reasons or evidence as to how and why it would affect the bullion market, and any request made for information under FOIA regarding the bullion market would need to be considered on its own facts.
27. The Commissioner additionally told us that it was necessary to consider prejudice in terms of the effect of disclosure on the wider market, for instance showing how the disclosure would cause detriment to the Mint's place within the broader market of collectible gifts. However, we have seen no convincing arguments or evidence that there would be any detrimental effect. We do not see why

recognising that the Mint operates within a broader market (which it clearly does), would lead to a decline of sales resulting from disclosing the information.

28. (We note that we have received no arguments explaining how disclosure of the requested information would prejudice parties other than the Royal Mint, even in relation to arguments concerning confidentiality clauses in the contracts. Accordingly, we have not taken this into account when reaching this decision.)
29. In conclusion, for the reasons stated above, we find that s.43 FOIA is not engaged, because we have not seen any convincing evidence or argument to consider it in any way likely that disclosure of the requested information would prejudice the commercial interests of the Royal Mint. In view of this, it has not been necessary to consider the weight of public interest. We find that the Decision Notice was not in accordance with the law because the Royal Mint was not entitled to have relied on s.43 FOIA as an applicable exemption on the basis of what has been presented to us.
30. The Royal Mint is therefore to disclose the requested information within 20 working days as summarised in paragraph 19 with any personal names (of individuals as opposed to companies) redacted to the extent that these would fall within s.40(2) FOIA (*exemption for personal data*) on the basis that the Tribunal may not order disclosure of such personal data.
31. Our decision is unanimous.

Judge Taylor

23 December 2015