

PROTECT

To: Jo Swinson  
From: Mike Whitehead  
Date: 23 October 2012



Subject: **Freedom of information request 12/1362: proposed Section 36 exemption regarding Ministerial briefing**

**Purpose:**

1. To seek your agreement as a qualified person to withhold certain information requested under the Freedom of Information Act (FOIA). A Ministerial decision is required to determine whether the exemption in section 36 (prejudice to the effective conduct of Government affairs) should be relied on.

**Recommendation:**

2. That you:
  - a. agree that section 36 should be relied on, and that Ministerial meeting briefing papers, and certain exchanges between the Department and Post Office Ltd should not be released, signalling your consent by signing paragraph 21 (for internal audit purposes);
  - b. note that other exemptions will also be applied; and
  - c. note the proposed release of documents not covered by any exemption.

**Timing:**

3. Ideally early in week commencing 29 October. The statutory deadline for response was 22 October but the information requestor has been notified that more time is needed to consider the public interest test.

**Summary:**

4. The request covers the Department's engagement with Post Office Ltd with regards to concerns and criticism from a number of former subpostmasters who believe Post Office Ltd's accounting system (Horizon) is responsible for their contracts being terminated by Post Office Ltd. The Department has always supported Post Office Ltd's assertion that the system is robust.
5. In June, the company, with agreement from the Department, appointed an external forensic accountancy firm to conduct an independent review of a selection of cases where former subpostmasters believed the system was at fault. This review has been championed by James Arbuthnot MP on behalf of a former subpostmaster in his constituency. Post Office Ltd is confident that the independent review will support their view that the system is robust and fit for purpose. However, the review has sparked some interest, including this Fol.
6. The Department holds information within scope of the Fol request, including Ministerial briefing submissions and email correspondence with Post Office Ltd. We intend to release the majority of information held, but recommend withholding some under various exemptions of the Fol Act, including section 36 (prejudice to the effective conduct of Government affairs). Section 36 is the only FOI Act exemption

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which requires a Minister to be satisfied that release would, or would be likely to, inhibit (in this case) the free and frank provision of advice.

**Application of exemptions**

7. The Department has received the following Fol request from a journalist:

*"I would like to be provided with:*

- 1) Copies of any and all correspondence between BIS Ministers, their special advisors or BIS employees and the Post Office/Royal Mail pertaining to the integrity and performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.*
- 2) Copies of any all minutes or records of meetings between BIS Ministers, their special advisors, BIS employees and the Post Office/Royal Mail, where any part of those records relates to the integrity or performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.*
- 3) Copies of any and all internal memos or briefing documents complied by BIS Ministers, their special advisors, BIS employees or by external organisations for BIS, where any part of those documents relates to the integrity or performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present."*

8. The Department holds 38 items of information which fall within scope of this request. The majority relate to Ministerial correspondence cases relating to the Horizon accounting system, enquiries to the company regarding press interest in the story, the preparation of reactive press office lines, and briefing for Ministers meeting representatives of former subpostmasters. We do not hold any notes or formal meeting minutes.

9. We propose to release 28 items of information, and are proposing to withhold 10 items. Of these items, we recommend that you consider whether the exemption in section 36 should be relied upon in seven cases. Details of all documents within scope of the request are provided at Annex A, and copies of the documents we believe should be exempted under section 36 are attached at Annex B.

10. We consider the information we propose to withhold is exempt under:

- Section 36(2)(b) - disclosure would, or would be likely to, inhibit the free and frank provision of advice.

11. In addition, the following exemptions variously apply to other documents or part of them:

- Section 40(2) - it contains personal data.
- Section 41 - the information concerned was provided in confidence.
- Section 42 – the information attracts legal professional privilege.
- Section 43(2) – disclosure would be likely to prejudice the commercial interests of Post Office Ltd.

12. Sections 36(2)(b); 42; and 43(2) are qualified exemptions, meaning that their application is subject to a test of the public interest balance in each case. Section 40(2) and 41 are absolute exemptions and are not subject to a public interest test.

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13. The reasons for the application of these exemptions are set out in our draft letter to the respondent (attached for information at Annex C).

**Section 36 (prejudice to effective conduct of public affairs)**

14. The decision to rely on section 36 can only be taken by a qualified person who decides whether release would, or would be likely to, inhibit (in this case) the free and frank provision of advice.
15. In Government Departments, Ministers are the qualified persons. **We therefore require you to decide whether section 36 should be engaged in this instance.**
16. We consider that the release of Departmental briefing for Ministerial meetings about the Horizon system, and certain email exchanges with Post Office Ltd regarding the exchange of information about the Horizon system would prejudice the effective conduct of public affairs both in this matter but also more generally. We consider that disclosure of this information may alter the nature and substance of future advice given by Post Office Ltd if they feel that candid advice provided about the Horizon system for the purposes of briefing Ministers or developing strategy more broadly may in future be publicly disclosed. Our oversight of Post Office Ltd as shareholder relies on us being able to get access to information from that company. If the company felt that information they provided to us might be disclosed, we are concerned that they may be more reluctant to offer views or input as part of the deliberative process. This would clearly have a detrimental impact on the effective conduct of public affairs because our ability to provide advice to Ministers would be inhibited.
17. For these reasons, officials believe that disclosure would result in prejudice to the nature of information and advice provided by Post Office Ltd, which would significantly impact on the quality of advice provided to Ministers by officials.
18. Should you decide that section 36 should be relied on, we request that you signal your consent by signing the wording set out at paragraph 21 (overleaf). This will ensure a full audit trail in the event that the case is referred to the Information Commissioner.

**Copied to:** Spad MPST, Perm Sec, Helen Paul, Richard Watson, Rod Brown, Angela Balakrishnan, ShEx Post Office team

**Advice received from:**

| <b>Finance</b> | <b>SpAds</b> | <b>Press</b> | <b>Legal</b>   | <b>Analysts</b> |
|----------------|--------------|--------------|----------------|-----------------|
| N/A            | In parallel  | aware        | Richard Watson | N/A             |

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**19. Ministerial consent to the application of section 36(2)(b) in relation to the following request for information:**

*"I would like to be provided with:*

- 4) Copies of any and all correspondence between BIS Ministers, their special advisors or BIS employees and the Post Office/Royal Mail pertaining to the integrity and performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.*
- 5) Copies of any all minutes or records of meetings between BIS Ministers, their special advisors, BIS employees and the Post Office/Royal Mail, where any part of those records relates to the integrity or performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.*
- 6) Copies of any and all internal memos or briefing documents compiled by BIS Ministers, their special advisors, BIS employees or by external organisations for BIS, where any part of those documents relates to the integrity or performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present."*

Having reviewed the information held by the Department which falls within the scope of this request, I consider that the some of the information requested should be exempt from disclosure under section 36(2)(b) of the Freedom of Information Act 2000.

**Jo Swinson**  
October 2012

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**ANNEX A – DOCUMENTS HELD WITHIN SCOPE**

**APPLICATION OF EXEMPTIONS**

| No. | Document Date | Detail  | Exemption  |
|-----|---------------|---|--|
| 1   | 5 Oct 2010    | Ministerial briefing for meeting with Alan Bates: Chairman of Justice for SubPostmasters Alliance (JFSA)          | Section 36(2)(b)   |
| 2   | 9 Mar 2012    | Email update from POL on the status of claims relating to Horizon – Legal privileged and confidential information | Section 42   |
| 3   |               | Attachment to item 2  | Section 42   |
| 4   | 9 Mar 2012    | Email update from POL on the status of claims relating to Horizon – Legal privileged and confidential information | Section 42   |
| 5   | 15 Jun 2012   | Email from POL regarding the Horizon system – commercial sensitive and legally privileged information             | Section 36(2)(b)<br>Section 41<br>Section 42<br>Section 43 |
| 6   |               | Attachment to item 5  | Section 36(2)(b)<br>Section 41<br>Section 42<br>Section 43 |
| 7   | 21 Jun 2012   | Email exchange discussing response to Arbuthnot review  | Section 36(2)(b)<br>Section 43                             |
| 8   | 22 June 2012  | Email exchange regarding Shoosmiths memo to BIS Committee   | Section 36(2)(b)<br>Section 43                             |
| 9   |               | Attachment to item 8  | Section 36(2)(b)<br>Section 43                             |
| 10  | 27 Jun 2012   | Ministerial briefing for meeting with Alan Bates: Chairman of Justice for SubPostmasters Alliance (JFSA)          | Section 36(2)(b)   |



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## DOCUMENTS RELEASED UNDER THE FOIA

| No. | Document Date | Detail  |
|-----|---------------|---|
| 1   | 30 Sept 2011  | Email exchange regarding Private Eye article                          |
| 2   | 30 Sept 2011  | Email exchange regarding Private Eye article                          |
| 3   | 17 Sept 2011  | Email exchange regarding JFSA legal matters                           |
| 4   | 25 Nov 2011   | POL Briefing note in response to BBC programme on Horizon             |
| 5   | 25 Nov 2011   | POL Briefing note in response to BBC programme on Horizon             |
| 6   | 28 Nov 2011   | POL Briefing note in response to BBC programme on Horizon             |
| 7   |               | Attachment to items 4, 5, and 6 (same attachment to all items)        |
| 8   | 16 Jan 2012   | POL advice regarding correspondence from Arbuthnot MP                 |
| 9   |               | Attachment to item 8  |
| 10  | 14 Feb 2012   | Officials advice to Minister's office regarding meeting request       |
| 11  | 12 Mar 2012   | POL advice regarding correspondence from Hepburn MP                   |
| 12  |               | Attachment to item 11   |
| 13  | 26 Mar 2012   | POL advice regarding correspondence from Shama MP                     |
| 14  |               | Attachment to item 13   |
| 15  | 18 June 2012  | Email exchange regarding JFSA meeting                                 |
| 16  | 21 June 2012  | Email regarding Channel 4 News article                                |
| 17  |               | Attachment to item 16   |
| 18  | 22 June 2012  | Email regarding Daily Telegraph article                               |
| 19  |               | Attachment to item 18   |
| 20  | 26 June 2012  | POL advice regarding correspondence from Owen MP                      |
| 21  |               | Attachment to item 20   |
| 22  | 27 July 2012  | POL advice regarding correspondence from Withers (partially redacted) |
| 23  |               | Attachment to item 22   |

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| 24 | 31 Aug 2012  | Request for advice regarding correspondence from solicitor firm |
| 25 |              | Attachment to item 24   |
| 26 | 5 Sept 2012  | POL advice regarding correspondence from John Pugh MP           |
| 27 |              | Attachment to item 26   |
| 28 | 21 Sept 2012 | POL update on Arbuthnot review timescales                       |

*In accordance with section 40(2) of the FOIA, personal information has been redacted in these documents.*

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**ANNEX B – DOCUMENTS PROPOSED FOR SECTION 36 EXEMPTION**

**(Please see separate attachments)**



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## ANNEX C – DRAFT LETTER TO CORRESPONDENT

**BIS Ref No: 12/1362**

October 2012

Dear David Pegg,

Thank you for your email of 17 September 2012 where you requested information under the Freedom of Information Act (FOIA). You have asked for the following:

*“I would like to be provided with:*

- 7) Copies of any and all correspondence between BIS Ministers, their special advisors or BIS employees and the Post Office/Royal Mail pertaining to the integrity and performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.*
- 8) Copies of any all minutes or records of meetings between BIS Ministers, their special advisors, BIS employees and the Post Office/Royal Mail, where any part of those records relates to the integrity or performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.*
- 9) Copies of any and all internal memos or briefing documents compiled by BIS Ministers, their special advisors, BIS employees or by external organisations for BIS, where any part of those documents relates to the integrity or performance of the Horizon or Horizon OnLine systems. Please limit your search to information dating from May 2010 to the present.”*

We have now completed the search of the records for the information we hold relating to your requests.

A copy of the information, which can be disclosed, is attached. Details of this information are provided at Annex A.

The remainder of the information that you requested is exempt under **section 36(2)(b)**, in that it would, or would be likely to, inhibit the free and frank provision of advice; **section 40(2)**, in that it relates to personal data; **section 41**, in that the information concerned was provided in confidence; **section 42**, in that the information attracts legal professional privilege; and **section 43(2)**, in that disclosure would be likely to prejudice the commercial interests of Post Office Ltd.

Sections 36(2)(b), 42, and 43(2) are qualified exemptions, meaning that their application is subject to a test of the public interest balance in each case. Section 40(2) and 41 are absolute exemptions and not subject to a public interest test.

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**Section 36(2)(b)**

Section 36(2)(b) exempts information if it would, or would be likely to, inhibit the free and frank provision of advice. There is a public interest in favour of disclosure of this information in order to provide greater transparency around the subjects discussed in the context of the meetings, correspondence and other documentation in question.

However, we consider that it is necessary that officials are able to provide advice to Ministers about the operation of the Horizon system without feeling inhibited by the possibility of its future disclosure. It is vital that Ministers have access to this advice to support them in carrying out their duties. Disclosure of such information may alter the nature and substance of future advice given by Post Office Ltd or other parties. They may be more reluctant to offer views or input as part of the deliberative process. This would clearly have a detrimental impact on the effective conduct of public affairs which would not be in the public interest.

The application of section 36(2)(b) requires a determination by a qualified person. In response to your request for information, the qualified person (the Minister for Employment Relations and Consumer Affairs) is of the view that the balance of public interest lies in withholding.

**Section 40(2)**

The information we hold contains some personal information which we are withholding in accordance with section 40(2). Section 40(2) provides an absolute exemption for personal data which then falls to be dealt with under the Data Protection Act. Personal data of third parties can only be disclosed in accordance with the data protection principles. In particular, the first data protection principle requires that disclosure must be fair and lawful and must comply with one of the conditions in Schedule 2 of the Data Protection Act.

We do not think that it is fair to release the names of junior members of Departmental and Post Office Ltd staff, or constituents and information that could be used to identify them, and do not think that any of the relevant conditions apply. We also consider that there was a legitimate expectation by these individuals that this information would remain confidential.

**Section 41**

Section 41 of the Act is an absolute exemption and applies to information that we have obtained from any other person, and where disclosing it would constitute an actionable breach of confidence by that or any other person. Some information covered by your request was provided to Departmental officials in the strictest confidence. It covers matters that are highly commercially sensitive, and are confidential. As a duty of confidence exists, there is a strong public interest in protecting that confidence and there are no public interest considerations in relation to this information requiring us to set the duty of confidentiality aside. The Department's decision is therefore to withhold the release of some of the requested information.

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## Section 42

It is essential to ensure that ministers and officials can take full and frank legal advice. We consider the possibility of disclosing legal advice risks full and frank advice being given in the future, which would be contrary to the public interest. For this reason, when considering the balance of public interest in disclosure of the information covered by section 42, as against the public interest in maintaining that exemption and withholding the information, it is our view that it is not in the public interest for such privileged information to be released.

## Section 43

Given the important social and economic role that Post Office Ltd plays in communities across the country, the Department does accept that there is a general public interest in the disclosure of information in relation to Post Office Ltd.

However, some of the information which your request covers is commercially sensitive and we consider that disclosure of this information would make it less likely that Post Office Ltd would, in the future, provide the Department with similar information, undermining our ability to provide the best outcome for Post Office Ltd, its agents, and the UK taxpayer. Furthermore, disclosure would, or would be likely to, prejudice the commercial interests of Post Office Ltd, particularly as its network operates within a highly competitive sector.

If you are unhappy with the result of your request for information, you may request an internal review within two calendar months of the date of this letter. If you wish to request an internal review, please contact the Information Rights Unit:

[foi.requests@](mailto:foi.requests@gro.gov.uk) **GRO**

Please remember to use the reference 12/1362 in any future communications relating to your request.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF

Yours sincerely,

Mike Whitehead

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**ANNEX A: DOCUMENTS RELEASED UNDER THE FOIA**

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| 19  |               | Attachment to item 18  |
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| 21  |               | Attachment to item 20  |
| 22  | 27 July 2012  | POL advice regarding correspondence from Mr Withers (partially redacted) |

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