

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 January 2022

**Public Authority:** Gambling Commission  
**Address:** 4th Floor Victoria Square House  
Birmingham  
B2 4BP

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the sales of £10 scratchcards and Interactive Instant Win Games (IIWG).
2. The Gambling Commission (GC) refused to disclose the requested information citing section 43(2) (commercial interests) of the FOIA.
3. The Commissioner's decision is that the exemption is engaged but the public interest lies in disclosure.
4. The Commissioner requires the GC to take the following steps:
  - Disclose the requested information.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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6. The complainant originally requested information of the following description:

*"1. In the financial years 2004/5 through to 2020/2021 inclusive, what were the yearly sales of National Lottery Interactive Instant Win Games which cost £10 per play."*

*2. In the financial years 2004/5 through to 2020/2021 inclusive, what were the yearly sales of National Lottery scratchcards which cost £10 per play."*

7. On 6 May 2021 the GC responded and refused to provide the requested information. It cited section 12 (cost of compliance exceeds appropriate limit) as its basis for doing so. The GC explained that the data in relation to part 2 of the request was readily available for 2018 onwards. The GC advised the complainant to refine their request.
8. Therefore, on 6 May 2021 the complainant refined their request so that part 2 of the request only included data from 2018 to 2020/2021 inclusive.
9. The GC responded on 18 May 2021 and confirmed that this information was exempt from disclosure under section 43(2) (commercial interests).
10. The complainant requested an internal review on 18 May 2021, noting that £10 scratchcards and £10 IIWG are no longer on sale.
11. Following an internal review the GC wrote to the complainant on 16 June 2021. It upheld its original position.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 16 June 2021 to complain about the way that their request for information had been handled.
13. During this investigation, the GC wrote to the Commissioner to clarify the information that it held that fell within the scope of the complainant's original request:  
  
*'In the Commission's response to the requestor, we inaccurately referenced parts 1 and 2 of the request, stating that "The data required to fulfil part 1 of your request is readily available. Further to this, the data to fulfil part 2 of your request is readily available from 2018 onwards". This should have read "The data required to fulfil part 1 of your request is readily available from 2018 onwards. The data relating to part 2 of the request is readily available, but starts from May 2012 (when £10 Scratchcards were launched) and ceases in September 2019 (when £10 Scratchcards were withdrawn from the market).'*
14. With the complainant's original request in mind, the Commissioner considers the scope of his investigation to be to determine whether the GC is entitled to withhold the information that it does hold in accordance with section 43(2).

## Background information

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15. The GC regulates gambling and supervises gaming law in Britain. If an individual or business wishes to operate a gambling function, which would include the selling of IIWG or scratchcards, it must first be granted a gambling license by the GC.
16. The National Lottery is operated by the Camelot Group. Through the sales of the National Lottery's products, the Camelot Group provides grants to 'Good Cause' projects.<sup>1</sup>
17. The Commissioner understands that *'with effect from 27 September 2019 all National Lottery £10 scratch card games have been removed from sale'*.<sup>2</sup> This followed concerns that £10 scratchcards were associated with problem gambling. The National Lottery is still permitted, in line with the terms of its licensing agreement, to sell scratchcards at £1, £2, £3 and £5.
18. Subsequently, in 2021 £10 IIWG were also removed due to concerns about links with problem gambling. Again, the Commissioner notes that the National Lottery is still selling IIWG at various price points up to £5.
19. The Commissioner notes that the Camelot Group is currently bidding to maintain its ownership of the National Lottery which ends in 2023. However there are concerns that the National Lottery's business model is moving towards products which are conducive to problem gambling. There are also concerns that, even though these products bring in more revenue, less money is being donated to Good Causes in comparison to more traditional National Lottery products.<sup>3</sup>

## Reasons for decision

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20. 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).'*

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<sup>1</sup> [www.camelotgroup.co.uk](http://www.camelotgroup.co.uk)

<sup>2</sup> [Scratchcards - Gambling Commission](#)

<sup>3</sup> [MPs criticise lottery operator Camelot over problem gambling | National Lottery | The Guardian](#)

21. The Commissioner's guidance '*Section 43 - Commercial interests*<sup>4</sup> states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity', for example the purchase and sale of equipment, goods or services.
22. In order for a public authority to properly engage a prejudice based exemption such as section 43(2), there must be a likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to avoid. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure '*would be likely*' to result in prejudice or disclosure '*would*' result in prejudice.
23. Consideration of the section 43 exemption is a two-stage process. Firstly the exemption must be properly engaged and meet the three criteria listed above. Even if this is the case the information should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### *The applicable interests*

24. To reiterate, the withheld information is the annual sales for £10 scratchcards for 2012 – 2020 and £10 IIWG for 2018 – 2021.
25. Disclosure does not need to prejudice the commercial interest of the public authority that is holding that information for the exemption to be engaged. In this instance, the GC has explained that disclosure could allow '*an alternative provider of scratchcards or digital equivalents to inform its own product offering, potentially in direct competition to the National Lottery.*'

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<sup>4</sup> [Section 43 - Commercial interests | ICO](#)

26. The Commissioner is satisfied that the arguments presented by the GC outline how disclosure would prejudice the applicable interests within the relevant exemption.

*The nature of the prejudice*

27. The GC believes *'the disclosure of this information 'would be likely to prejudice' the commercial interests of Camelot (the National Lottery operator), the Commission and the National Lottery itself.'*
28. The Commissioner must therefore now consider if the GC has successfully demonstrated a causal relationship between disclosure and the prejudice which the exemption is designed to protect.
29. The Commissioner accepts that it will not be possible for the GC to provide concrete proof that the prejudice would be likely to occur as a result of disclosure. In order to do so disclosure would be required which would undermine the point of the exemption and the FOIA. However, the Commissioner must be satisfied that this causal relationship is based on more than mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.
30. To justify its position, the GC has explained *'The information requested relates to £10 scratchcards and IIWG which have always been very limited in volume. A very limited number of products would have been on sale at the £10 price-point in each category throughout the period and, in some cases, only one product would have been on sale.'*
31. The GC has also elaborated *'on that basis, a competitor to the National Lottery would be able to infer the distribution, design and features of one specific game'* and disclosure would provide the revenue for that product. The GC is concerned that this would allow *'an alternative provider of scratchcards or digital equivalents to inform its own product offering, potentially in direct competition to the National Lottery.'*
32. During the GC's initial handling of the request, it contacted the Camelot Group and asked for its input as to whether disclosure was appropriate. The Camelot Group acknowledged that the products in question are no longer on sale. However, it explained *'Sharing this data at price point level, when considered alongside category level sales information that is already available from previous years, or will become available when the FY20/21 results are announced, will allow for more detailed analysis at category level to be done which would reveal more sensitive information about the IWG and Scratchcard portfolio and our strategies in these categories.'*
33. The complainant has stated *'Camelot is currently the only operator of the National Lottery, and in this it has no competitors who are also*

*running the same games in the UK. As such there is not commercial sensitivity with other gambling companies, as Camelot and the National Lottery are not (sic) gambling product.'*

34. It is not the role of the Commissioner to comment on whether the National Lottery's products represent gambling or leisure, though he notes the decision to withdraw £10 scratchcards was made as *'the association of problem gambling was such that it was not consistent with it being a legitimate leisure activity.'*<sup>5</sup>
35. According to the Gambling Act there can only be one National Lottery provider. However, there are multiple scratchcard and IIWG providers in the UK, all operating at similar price points and the Commissioner accepts that the National Lottery is ultimately a business which must be allowed to compete in a competitive market.
36. The Commissioner accepts that disclosure would allow a competitor to draw conclusions about the £10 products including the design and how successful they were whilst on the market, in an attempt to replicate the revenue in question, or entice customers of the National Lottery.
37. However, the Commissioner questions the extent to which this competition would affect the National Lottery in relation to a product which it no longer produces. Firstly, any competitor will have been able to study the limited number of £10 products whilst they were on the market. Likewise, they may be unable to do so now since the products are off the market. Secondly, the Commissioner notes that the requested information does not break down into any granular detail the revenue of a scratchcard or IIWG that the National Lottery is still offering.
38. The Camelot Group has also indicated *'there appears to be little value in seeking this historical data, other than potentially to attempt to create a negative perception of the National Lottery. Negative interest stories offer a reputational risk to the National Lottery and our products but also, by allowing the creation of lack of trust in the social responsibility of TNL products, can translate into a risk to wider sales and returns to Good Causes.'*
39. Whilst the Commissioner recognises this concern, he has not been provided with anything more than mere assertion or belief that this prejudice would arise. The Commissioner also notes that any affects on returns to Good Causes is unlikely to be captured by the section 43

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<sup>5</sup> [Scratchcards - Gambling Commission](#)

exemption. If the GC is concerned about reputational damage, it could mitigate this risk with the inclusion of a supplementary statement to accompany disclosure.

40. Ultimately, it is up to the GC to convince the Commissioner that disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any legal party. In order to establish a causal link the Commissioner must be satisfied that the prejudice claimed is at least possible.
41. Whilst the GC has named itself, the regulator, as a party whose commercial interests would be prejudiced, it has offered no further rationale for this position. Therefore, the Commissioner does not accept this argument.
42. Whilst the Commissioner is less convinced than the Camelot Group and the GC by these own arguments, he does accept that there are circumstances in which the prejudice could arise.

#### *Likelihood of the prejudice*

43. In its submission to the Commissioner the GC has explained '*there is more than a 50% chance that prejudice would be likely to be caused to one or more of the parties by disclosure.*' At this stage the Commissioner would like to reemphasise the definitions of the two thresholds of prejudice as outlined in his guidance. '*Would prejudice*' means that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. '*Would be likely to*' prejudice means there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.<sup>6</sup>
44. In this case, the GC has failed to explain its rationale for its reliance upon the higher threshold of prejudice, other than the generic arguments presented to the Commissioner in its submission.
45. The GC has failed to provide any detailed summation as to the frequency with which the prejudice would occur or any further analysis of the supposed prejudice. The GC has failed to convince the Commissioner that the chain of events leading to the prejudice is clearly more likely than not to arise. Whilst he accepts such prejudice is possible, he is mindful that the products in question are no longer live and therefore, the risk of such prejudice is reduced.

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<sup>6</sup> [the prejudice test.pdf \(ico.org.uk\)](https://ico.org.uk/the-prejudice-test.pdf)

46. The Commissioner therefore does not accept that the higher threshold of 'would' has been demonstrated. Having viewed the withheld information the Commissioner considers the lower threshold of prejudice, 'would be likely' is more appropriate.

*Is the exemption engaged?*

47. The Commissioner's guidance on the prejudice test states '*Establishing the appropriate level of likelihood is also important because it has an effect on the balance of the public interest test.*'<sup>7</sup>
48. Since the Commissioner considers the exemption to be engaged on the lower threshold of likelihood he has now gone onto consider whether the public interest lies in disclosure or maintaining the exemption.

### **The public interest test**

*Public interest arguments in favour of disclosure*

49. The GC acknowledges that '*there is a public interest in promoting the transparency of the Commission and in providing an understanding of the performance and operation of the National Lottery. In this specific instance, we also considered the fact that the products within the scope of the request were removed from the market due to concerns about an association with higher rates of problem gambling, which could be relevant from a public interest perspective.*' The GC has offered no further public interest arguments in support of disclosure.

*Public interest arguments in favour of maintaining the exemption*

50. The GC has recycled its previous arguments as to why the exemption should be maintained, including the prejudice that disclosure may have on Camelot's return to Good Causes. The Commissioner is mindful that it is unlikely to be in the public interest to hinder charitable work and he has assigned appropriate weight to this argument.
51. Both Camelot and the GC have indicated that there is no rationale behind the sharing of the '*historic*' information and have explained that '*specific details of performance at a highly granular product level does not contribute to an understanding of the overall performance of the National Lottery.*'

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<sup>7</sup> [the\\_prejudice\\_test.pdf \(ico.org.uk\)](https://ico.org.uk/the_prejudice_test.pdf)



*Balance of the public interest*

52. The GC has explained that *'Looking at all the circumstances of the case and the nature of the request, there is more than a 50% chance that prejudice would be likely to be caused to one or more of the parties by disclosure. Public knowledge of the details of performance at a highly granular product level is unlikely to contribute to a proper understanding of the performance of the National Lottery and would potentially cause prejudice to Camelot, the Commission, and the National Lottery itself.'*
53. However, the Commissioner is mindful of his own guidance which indicates that the significance of the information and the matters that it addresses must be taken into account.<sup>8</sup> Disclosure would allow further discussion surrounding the concern that the National Lottery's migration towards products *'which are more reminiscent of online casinos than your typical lottery draw, have allowed Camelot to increase their profits at the expense of both player safety and returns to good causes – all under the Gambling Commission's watch.'*<sup>9</sup>
54. Furthermore, in September 2021 Public Health England produced a rapid review titled *'The impact of COVID-19 on gambling behaviour and associated harms'*. Since the £10 IIWG were available during lockdown, disclosure would help to inform discussion around this topic in relation to the National Lottery.
55. The Commission disagrees with the GC when it says that disclosure *'does not contribute to an understanding of the overall performance of the National Lottery.'* This concern has stemmed from ongoing debates surrounding the extent to which the National Lottery is profiting from activities that promote, encourage or are associated with problem gambling. Disclosure of the requested information would illuminate the extent to which this is the case and this is not a concern specific only to the requestor.
56. The Commissioner is also not aware of any other means by which such scrutiny can be made. To reiterate, the Camelot Group publishes annual figures relating to scratchcards and IIWG<sup>10</sup> but the issue at hand here is the revenue brought in by products no longer on sale.

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<sup>8</sup> [the\\_public\\_interest\\_test.pdf \(ico.org.uk\)](https://ico.org.uk/your-information/your-rights/the-public-interest-test/)

<sup>9</sup> <https://committees.parliament.uk/writtenevidence/38924/pdf/>

<sup>10</sup> [annualreport2021.camelotgroup.co.uk](https://www.camelotgroup.co.uk/annualreport2021)

57. The public interest test must be carried out by a public authority with the specific circumstances of the case in mind and, in this instance, the Commissioner believes that the GC has overestimated the severity and the likelihood of the prejudice that disclosure would cause. He also considers that the GC has underestimated the public interest in the disclosure of the withheld information, especially against the backdrop of DCMS's review of the Gambling Act 2005.<sup>11</sup>
58. The Commissioner also notes that Camelot underwent a strategic review in November 2017, after a National Audit Office report found that its profits had risen by 122% over seven years while returns to good causes only grew by 2%.
59. Whilst the Commissioner considers the balancing act in this case to be fine, he believes that the public interest lies with disclosure. Returning to the *'trust in the societal responsibility of the National Lottery'* that the Camelot Group refers to in paragraph 38, the Commissioner considers disclosure is warranted.
60. Having considered all the arguments presented to him the Commissioner has determined that, although section 43(2) is engaged, the public interest favours disclosure of the requested information.

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<sup>11</sup> [Review of the Gambling Act 2005 Terms of Reference and Call for Evidence - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

## **Right of appeal**

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61. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.
63. 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**

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**