

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2023

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

Decision (including any steps ordered)

1. The complainant has requested details of an investigation into a specific company. The above public authority ("the public authority") originally refused to confirm or deny that it held any information. It subsequently confirmed that it held some, but continued to rely on section 31(3) of FOIA (law enforcement) to refuse to confirm or deny that it held the remainder.
2. The Commissioner's decision is that the public authority is entitled to rely on section 31(3) of FOIA to refuse to confirm or deny that it holds any information within the scope of elements [2] and [3] of the request. In respect of element [1], the Commissioner considers that the public authority does not need to rely on exemptions because it does not hold any further information than that which it has already provided. The public authority breached section 10 of FOIA as it failed to provide confirmation or denial and to communicate non-exempt information within 20 working days.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 25 February 2023, the complainant wrote to the public authority and requested information in the following terms:

"On the 8th Oct 2021, the gambling commission wrote an article on its website around a Football themed website called Sorare. In the article it was stated:

"The Gambling Commission is currently carrying out enquiries into the company to establish whether Sorare.com requires an operating licence or whether the services it provides do not constitute gambling."

"I'm trying to decide if I am going to put some money into the platform and to be able to make such a decision, I'd like to know the following:

- [1] Has the enquiry concluded and what is the outcome?
- [2] Has there been informal enquiries only, or was a formal review undertaken/being undertaken?
- [3] At any point as part of these enquiries, has the FCA been contacted regarding Sorare?"

5. The public authority responded on 24 March 2023. It refused to confirm or deny that it held any information and relied on section 31 of FOIA in order to do so. It upheld this stance following an internal review.

Scope of the case

6. At the outset of the investigation, the Commissioner wrote to the public authority to set out his provisional view of the complaint. He noted that, as the public authority had already publicly confirmed the existence of an investigation, confirming its current status would not make it any more or less likely that Sorare.com would want or be able to take measures to avoid regulatory attention. He therefore suggested that the public authority confirm whether or not it held information within the scope of element [1].
7. The public authority issued a fresh response to the request on 9 June 2023. It maintained its reliance on section 31(3) to refuse to confirm or deny that it held information within the scope of elements [2] and [3]. In respect of element [1], it confirmed that its investigation had yet to conclude, but it relied on section 31(1)(g) of FOIA to withhold information about the "outcome."

Reasons for decision

Elements [2] and [3]

8. Section 31 of FOIA allows a public authority to withhold information whose disclosure would make it more difficult for an organisation to enforce the law.
9. Section 31(3) allows a public authority to refuse to confirm or deny that it holds particular information, if the mere act of confirming or denying that such information was held would, in itself, make it more difficult for an organisation to enforce the law.
10. The public authority has, in its response of 9 June 2023, referred to sub-sections 31(2)(a), (b), (c) and (d) as the law enforcement functions that would be prejudiced by disclosure of information within the scope of element [1]. Though it has not stated this explicitly, the Commissioner has assumed that it is these functions that the public authority considers would be harmed by confirming or denying that information within the scope of elements [2] and [3] is held. The functions are the respective ascertaining of: whether a person has complied with the law; whether a person is responsible for improper conduct; whether regulatory action is necessary and; whether a person is fit and competent to carry out a particular role.
11. The Commissioner accepts that these are functions relevant to the exemption and that the public authority has been entrusted with carrying out these functions.
12. The public authority noted in its refusal notice that:

“confirming or denying information which makes specific individuals or events identifiable could alert individuals involved to the fact that the Commission was/is or alternatively wasn’t/isn’t investigating a particular case and provide them with an opportunity to alter their behaviours or evade detection. This would result in making it more difficult for the Commission to achieve its aims.

“Further to this, simply confirming or denying this request for information would impact on the openness of stakeholders when sharing important information with us or other law enforcement agencies. The amount of information released is carefully considered in order to protect the integrity of investigations and individuals or operators from being unfairly associated with unsubstantiated allegations.

“Finally, once or if a formal decision has been made the Commission will ordinarily publish all such decisions in full. Fulfilling this request may prejudice the outcome of future investigations by the Commission, or another body, to the detriment of the public interest.”

13. In its internal review, it added that:

“To disclose to the public whether we hold this information could impact on the free and frank exchange of information between the Commission, its stakeholders and other regulatory bodies, which could ultimately result in consumers not being protected from organisations who are unfit or incompetent in their activities.”

The Commissioner's view

14. The Commissioner has considered the arguments put forward by the public authority as well as the approach he has taken in similar cases.
15. Elements [2] and [3] of the request go beyond seeking the outcome of an investigation. They seek to understand the nature of the investigation and the precise methods of investigation the public authority has deployed.
16. If the public authority were to confirm that it held information, it would be confirming that it had adopted particular investigative methods in this particular investigation.
17. If the public authority were to deny that it held such information, it would be confirming that it did not take a specific action in a given set of circumstances. Whilst it may not be confirming the precise method used on this occasion, it would be narrowing the range of possible options – making it easier for someone to guess. Furthermore, a public authority cannot only refuse to confirm or deny holding information when the information is in fact held. If it did, this would quickly become obvious and would defeat the purpose of refusing to confirm or deny in the first place.
18. The Commissioner accepts that regulators have to preserve a certain ambiguity about the methods they will deploy in any given scenario. If they do not, those that they regulate will eventually develop counter-measures in order to avoid regulatory attention.
19. If a regulator becomes too predictable, those that they regulate will be able to get away with doing the bare minimum that they need to do in order to avoid or minimise attention – rather than focusing on maintaining high standards.

20. Given the nature of these elements of the request, the Commissioner is satisfied that confirming or denying that the information is held would cause the prejudices identified and therefore the exemption is engaged.

Public interest test

21. In the Commissioner's view the public interest favours maintaining the exemption.
22. The Commissioner recognises that there is a public interest in knowing whether a particular entity does or does not have a gambling licence – however that interest is already met by the public authority publishing licence details on its website.
23. Furthermore, the Commissioner notes that Sorare.com does not claim to have a UK gambling licence. Anyone who chooses to hand over their money to the company does so at their own risk and would (or, at least, should) know that any monies could be beyond the reach of UK regulators in the event of something going wrong.
24. Secondly, the Commissioner notes that there is a public interest in the public authority being transparent about the work that it does. However, this interest is already met by the public authority publishing details of the outcomes of its investigations, once those investigations have concluded.
25. Therefore the public interest in issuing a confirmation or a denial is limited, whilst the public interest in maintaining the exemption is relatively high, given the harm that would be caused to the public authority's various law enforcement functions.
26. Therefore the Commissioner concludes that the balance of the public interest favours maintaining the exemption in respect of elements [2] and [3].

Element [1]

27. During the course of the investigation, the public authority confirmed that the investigation had yet to conclude. However, it maintained that it wished to rely on section 31(1)(g) of FOIA to withhold information relating to the "outcome" of the investigation.
28. The Cambridge Dictionary defines the word "outcome" as being:

"a result or effect of an action, situation, etc."¹

29. The Collins dictionary states that:

"The outcome of an activity, process, or situation is the situation that exists at the end of it."²

30. Dictionary.com defines the word as:

"a final product or end result; consequence; issue."³

31. In the Commissioner's view, the public authority could not hold information on the "outcome" of its investigation because, as it has already pointed out, the investigation has yet to conclude.

32. The public authority may (or may not) have progressed its investigation to the point at which it may have a fair idea of what the likely outcome will be – but that is not what the request asked for. The request sought "the outcome" of the investigation. An investigation that is yet to conclude has, by definition, not reached an outcome.

33. As the investigation had not reached an outcome at the point at which the public authority issued its refusal notice, it follows that the public authority could not have held this information at that time.

34. The Commissioner is therefore of the view that there is no need for the public authority to cite an exemption from the duty to disclose information – as it had already disclosed the information it held: that the investigation had yet to conclude. No further information is held that would fall within the scope of the request.

Procedural matters

35. As the public authority failed to confirm or deny that it held information within the scope of element [1] within 20 working days of the request being submitted and failed to communicate the non-exempt information it held, it breached section 10 of FOIA.

¹ <https://dictionary.cambridge.org/dictionary/english/outcome>

² <https://www.collinsdictionary.com/dictionary/english/outcome>

³ <https://www.dictionary.com/browse/outcome>

Right of appeal

36. 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

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

37. 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.
38. 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

Roger Cawthorne
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Information Commissioner's Office
Wycliffe House
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