

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 August 2023

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

Decision (including any steps ordered)

1. The complainant has requested information about the due diligence carried out on a particular licensee. The above public authority ("the public authority") relied on section 31 of FOIA (law enforcement) to withhold the requested information.
2. The Commissioner's decision is that the public authority has correctly applied section 31 and the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 23 June 2023, the complainant wrote to the public authority and, referring to a specific licence holder ("the Licensee") requested information in the following terms:

"Under the relevant FOI legislation, I would like to request the following information:

- the licensee agreement for [the Licensee]
- documents relating to the due diligence carried out into this license holder

- documents relating to the due diligence carried out by either the license holder or the Commission into [the Licensee's] sub-licensees [redacted], [redacted] or [redacted]."
5. The public authority responded on 27 June 2023. It relied on section 21 to withhold some information that was already in the public domain. It relied on section 31 of FOIA to withhold the information not already in the public domain – a position it upheld following an internal review.

Reasons for decision

6. Section 31 allows a public authority to withhold information whose disclosure could harm an organisation's ability to enforce the law. This includes the ability of regulators to judge whether regulatory action is necessary.
7. The public authority noted that it already publishes information about the process it follows to assess whether a particular applicant is suitable for a gambling licence.
8. Releasing more detailed granular information about precisely how the public authority assesses applications would give unscrupulous applicants valuable information. This information could then be used to frame their applications and responses to subsequent follow-up queries, in such a way as to minimise regulatory attention – making it more likely that a licence will be granted to an unsuitable holder.
9. The public authority also argued that disclosing this information, which the Licensee had supplied in confidence, would make it more difficult to acquire such information in the future.
10. Whilst the public authority has formal powers to compel the provision of information, this is not always as effective as an informal approach.
11. In previous decisions, the Commissioner has accepted that disclosure of due diligence-related information does have the potential to cause harm, but that the chance of this happening is less likely than the chance of it not happening.¹

¹ See for example <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019059/ic-103690-t0b0.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023813/ic-157416-x5t5.pdf>

12. The Commissioner therefore accepts that section 31 of FOIA is engaged, but at the lower bar of prejudice (“would be likely to”).

Public interest test

13. The complainant pointed to the fact that the Licensee had recently been fined by the public authority for failing to have adequate anti-money laundering checks in place.

14. He also noted that a number of concerns have been expressed about so-called “white label” operators in the gambling market. This describes a situation in which a licence holder sells products or services under its own branding, when they are in fact being provided on behalf of third parties. The complainant argued that such an arrangement made it more difficult for the public authority to determine whether the products or services being offered meet regulatory requirements. Such a situation relied too heavily on the licence holder carrying out its own due diligence to ensure the products and services it offers meet the terms of its licence.

15. The complainant considered that the public authority’s due diligence checks had either been insufficiently robust to begin with, or had not been adequately carried out – otherwise a breach could not have occurred. However, he further noted that the aim of the request was to “support” the public authority’s work. He noted that:

“evidently the support of investigative journalists and other concerned parties will only enhance this [due diligence] work.”

16. Finally, the complainant pointed to a previous decision in which the Commissioner had required the public authority to disclose similar information.² He argued that a precedent had been set that such documents were not sensitive and could be disclosed without harm.
17. For its part, the public authority drew attention to the harm that it considered would occur if the information were disclosed and the strong public interest in allowing it to regulate effectively.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023813/ic-157416-x5t5.pdf>

The Commissioner's view

18. The Commissioner has considered the situation set out in decision notice IC-157416-X5T5, but he does not consider that it is sufficiently similar to the current situation.
19. Decision notice IC-157416-X5T5 relates to a company called BetIndex Ltd, which traded as Football Index. That company collapsed in early March 2021. Many of its customers lost a considerable amount of money that they had "staked" within the product. In addition, customers lost access to their accounts and were, until some time afterwards, unable to withdraw funds transferred to their FootballIndex account, but not used.
20. In summing up why he had decided that the balance of the public interest should favour disclosure, the Commissioner noted that he:

"must be mindful of the sheer impact that the collapse of Football Index had, both in monetary terms and emotional distress to users and some of the losses, for individuals, will have been life changing. **He is satisfied that the majority of operators would recognise the exceptional circumstances surrounding Football Index**, which collapsed with approximately £90 million of customer stakes trapped inside the platform and was described in the media as 'the biggest failure in UK gambling history.' He is satisfied that other operators would also acknowledge that disclosure of the testing information, in this instance, is equally exceptional." [emphasis added]
21. In this particular case the Commissioner does not consider that the facts point toward a similarly exceptional set of circumstances.
22. When the public authority responded to the request that became the subject of decision notice IC-157416-X5T5, BetIndex Ltd had already gone into administration. A leading barrister, commissioned by the Government, had produced an independent report, criticising both the public authority and the Financial Conduct Authority for their approach to regulating the products the company was offering. The public authority in particular was found to have not properly understood the nature of the products it was licencing and the associated risk – although this was, at least in part, because of a failure by BetIndex Ltd to provide accurate information.
23. BetIndex Ltd was incapable of having commercial interests once it had gone into administration – reducing the sensitivity of information revealing its business model. However, in this situation, the Licensee is still operating as a going concern. Disclosing similar information is much more likely to have an adverse effect when it relates to a company that is still trading.

24. Moreover, whilst other licence holders may not be too concerned about records relating to a defunct company being released, if the public authority begins disclosing records that **active** companies have provided in confidence, they are less likely to be as willing or as candid in providing information to the public authority in future. There is a strong public interest in protecting the free flow of information between the regulator and the organisations they regulate.
25. Furthermore, whilst the Commissioner recognises that there will always be a stronger public interest in disclosure in relation to suspicions of wrongdoing, in this case, the public authority has already identified wrongdoing on behalf of the Licensee. The result of the public authority's investigation was that the Licensee was fined and had additional conditions attached to its licence. In the Commissioner's view such action would suggest that the public authority's systems were operating as they should.
26. It is unreasonable and unrealistic to expect that every potential issue with a company will be spotted during the licence application process. Ongoing regulation is required to ensure that licence holders are abiding by the terms of the licences which they have been granted. The mere fact a licence holder has subsequently been found to have breached the terms of its licence does not automatically imply that there must have been a failure of due diligence when the licence was granted.
27. The Commissioner is not aware that the public authority has previously expressed any need for the support of investigative journalists to carry out its regulatory work, but would assume that it could make such a request, if it needed to do so, without making information available to the world at large. If the complainant has evidence that the Licensee has committed further breaches of its licence, he is at liberty to provide that information to the public authority so that it can investigate accordingly. The Commissioner does not consider that publication of the information would be a proportionate means of addressing any concerns about the Licensee's operations.
28. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Right of appeal

29. 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

30. 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.
31. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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