

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2015

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the location of National Lottery terminals.
2. The Commissioner's decision is that the Gambling Commission (the Commission) has incorrectly withheld the information relating to the names and addresses of the independent retailers operating as sole traders by virtue of section 40(2). He also finds that the Commission has not been able to demonstrate the prejudice claimed by section 43(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. 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

5. On 22 May 2014, the complainant wrote to the Gambling Commission (the 'Commission') and requested information in the following terms:

"Please can you provide a list of National Lottery Terminals in excel format detailing the operator's name (i.e. Tesco PLC) and full address of the terminal including postcode."

6. The Commission responded on 13 June 2014 and refused to provide the requested information. It cited sections 43(2) and 40 of the FOIA as its basis for doing so.
7. Following an internal review the Commission wrote to the complainant on 4 August 2014. It maintained its original position but offered to provide aggregated data. The complainant did not respond to this offer.

Scope of the case

8. The complainant contacted the Commissioner on 4 September 2014 to complain about the way his request for information had been handled.
9. However, in correspondence with the Commissioner the complainant stated:

"In responding to the Internal Review request the Commission explained that it would provide part postcode and number of retailers in this postcode area. In my view by offering and possibly accepting this information, the Commission would provide personal information whilst applying an exemption at the same time. By being provided with the information, the recipient could visit a postcode area and identify the personal information of a Camelot retailer."

10. The complainant also pointed out that the Post Office provides location information through its website. He further stated that he would like the Commissioner to consider the release of both the name and full postal address of the terminal locations. However, he would also be willing to consider the release of the full postal address and postcode of the terminal locations as requested in the internal review. The Commissioner notes the complainant's comments but will have to consider whether this would also disclose personal data.
11. The Commissioner considers the scope of this case to be to determine if the Commission has correctly applied the exemptions it has cited.

Background

12. The Commission is responsible for the regulation of commercial gambling in Great Britain with the exception of spread betting. Since October 2013, this has included the regulation of the National Lottery which was previously the responsibility of the National Lottery Commission. The two organisations merged on 1 October 2013.
13. The Commission has statutory duties under the Gambling Act 2005 for gambling operators offering services to consumers in Great Britain, and separate duties under the National Lottery and etc Act 1993 in relation to the running of the National Lottery and the conduct of the licence holder (currently Camelot Plc).
14. The Commission's statutory duties are to:
 - ensure that the National Lottery, and every lottery that forms a part of it, is run with all due propriety;
 - ensure that the interests of every participant in the National Lottery are protected; and
 - subject to these two duties, to do its best in making sure that the proceeds of the National Lottery are as great as possible.
15. The Commission explained that it is required to make available a public register of gambling operators licences under the Gambling Act 2005, however there is no comparable requirement in the legislation with regard to National Lottery retailers. Camelot, as the operator of the National Lottery is responsible for selecting retailers and ensuring they comply with requirements.

Reasons for decision

Section 40(2)

16. Personal data is defined in section 1(1) of the DPA as -

"...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual".

17. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question. He has looked at whether the information relates to living individuals who can be identified from the requested information and whether that information is biographically significant about them.
18. As some of the requested information provides individual's names as owners of independent businesses operating as sole traders this is clearly personal data. These are living individuals and the information is biographically significant in that it relates to them owning a business. In addition, some of the retailers live at the same address.
19. The Commission acknowledges that with regard to businesses such as Tesco, there is no personal data attached.
20. The Commissioner considers that addresses are personal data, in this instance, although the addresses are business addresses some individuals live at the same address.
21. In the case of England & LB Bexley v the Commissioner (EA/2006/0060 & 0066) the Tribunal considered that *"the address alone, in our view, also amounts to personal data because of the likelihood of identification of the owner.."*
22. Having taken the above into account the Commissioner finds in this case that the addresses of the independent retailers are personal data.

Would disclosure breach the data protection principles?

23. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
24. The Commissioner has next considered if it would contravene the data protection principles to disclose the information relating to the independent business owners.
25. In considering whether disclosure of personal data would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner considers the following factors:
 - The data subject's reasonable expectations of what would happen to their personal data.

- The consequences of disclosure.
- The balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations of the data subject

26. The Commissioner understands that Camelot's privacy policy with regard to the "data subjects" makes it clear that their information would be used for the legitimate purposes of Camelot and would not be publically disclosed. The Commission has not consulted directly with the retailers and there is no specific evidence about the expectations of the retailers. It is not clear whether the general privacy policy specifically applies to this information. There is potentially an expectation of privacy but the test is whether it is a *reasonable* expectation. Given the public facing nature of all retailers the Commissioner is not convinced that that there is a reasonable expectation of non-disclosure.
27. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.
28. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.

Consequences of disclosure

29. The Commission has not provided the Commissioner with any detailed explanation as to the possible consequences of disclosure. The Commissioner cannot discern any obviously adverse consequences of disclosure.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

30. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
31. The Commissioner has considered the complainant's submission that:

- The personal data argument does not apply as the Gambling Commission has stated, that Camelot retailers will actively promote the National Lottery
 - Retailers make it clear through marketing and promotional materials that they sell National Lottery products
 - By marketing National Lottery Products the Camelot retailer would also be advertising their location and business name which in turn would be releasing personal information about the business if they were an Independent Camelot operator.
 - The National Lottery is the only company that does not actively help its customers identify their nearest Lottery Terminal by means of a 'locator' on their website.
32. When balancing fairness to the individual with any legitimate interest in the public having access to the information the Commissioner notes that under the FOIA a disclosure is to the world at large.
33. In terms of the consequences of disclosure, any intrusion or detriment appears to be minimal. Therefore the Commissioner is satisfied that disclosure would not breach the first data protection principle of fairness.
34. When a disclosure would be fair, the Commissioner must also consider whether it would be necessary in accordance with Condition 6 in Schedule 2 of the DPA. The full wording of Condition 6 is as follows:
- "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject"*. The Commissioner has gone on to consider whether any of the schedule 2 conditions of the DPA are met for disclosure of the information.
35. In order for the condition to be met, the Commissioner considers that disclosure must satisfy a three part test:
- (i) there must be a legitimate interest in disclosing the information
 - (ii) the disclosure must be necessary for that legitimate interest
 - (iii) even where the disclosure is necessary it must not cause unwarranted interference or harm to the rights, freedoms and legitimate interests of the data subject.

36. There is always some legitimate public interest in the disclosure of any information held by public authorities.
37. The Commissioner also finds that disclosure would not be unwarranted by reason of prejudice to the rights of legitimate interests of the data subjects.
38. The Commissioner is satisfied that there is a wider public interest in the disclosure of the information which is sufficient to outweigh the rights of the individuals concerned, that being informing the general public about how the lottery works and the extent and the precise geographic distribution of the terminals.
39. Having considered the circumstances of this case, the Commissioner is satisfied that the schedule 2 condition is met.
40. Having decided that disclosure of the information would be fair and would meet a schedule 2 condition the Commissioner has gone on to consider whether disclosure would be lawful. The information is not protected by any duty of confidence or statutory bar and he therefore considers that its disclosure would be lawful.
41. He has next gone on to consider the application of section 43(2) to the withheld information.

Section 43 – commercial interests

42. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
43. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."¹

¹ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

44. The Commission explained that a third party maintains a system which records the details of all retailers (approximately 37,000) and it also logs all transactions that are made, i.e. each ticket that is bought. This also includes the online transactions that are made through Camelot's website.
45. A third party is contracted to maintain this system for Camelot and for the Commission. There are two versions of the system which contain the information; an operational system used by Camelot and a system which contains a copy of all of this information which is used by the GC to monitor compliance. This is primarily as a financial auditing tool to ensure the money to good causes is correctly allocated.
46. The Commission further explained that it does not use all of the information that is contained within the system (including the retailer information) but it does hold it for the purposes of the FOIA
47. The list of retailers is not made publically available by Camelot. It identifies the locations that they use to sell tickets and it is considered by them to be of a commercially sensitive nature.
48. The Commissioner has been provided with a sample of the withheld information, both as it is recorded on the 'system' and how it would look after it has been extracted.
49. The Commissioner is satisfied that it relates to Camelot's ability to participate competitively in a commercial activity, i.e. the sale of lottery tickets.

Whose commercial interests and the likelihood of prejudice?

50. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. The Commission stated that it believed that prejudice to commercial interests *would be likely* to result.
51. In order to apply the exemption the Commission stated it had considered whether prejudice would be likely to be caused to Camelot should the information be released. Camelot does not provide terminals on request, they seek to ensure that the right numbers are in the right locations to offer the best sales opportunities – and therefore the best returns to good causes.

52. The Commission (and formerly the National Lottery Commission) has received a number of requests previously for this information and has consulted Camelot when these have been received in order to establish whether prejudice would be likely to be caused and the exemption rightly engaged.

Nature of the prejudice

53. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
54. The Commissioner's view is that "prejudice" means not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some real way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted.
55. In 2010, the National Lottery Commission provided a summary in terms of the number of retailers by postcode areas but did not provide a complete list. The National Lottery Commission took the view that the specific addresses should be redacted as they would amount to personal data in respect of independent retailers. The representations and the disclosed information were provided to the Commissioner.
56. The Commission further explained that a similar request was made to the National Lottery Commission in 2012. In this instance, Camelot provided representations that the commercial landscape had now changed.

"Were THL [The Health Lottery] to receive this information they would then be in a position to target those retailers who are not currently selling THL tickets in order to gain a presence in those stores. We also believe that our highest performing stores within those postcode areas could be targeted in order to introduce a higher volume of promotional and point-of-sale material in those stores. We are very careful to establish the best positioning for our terminals in our stores and by disclosing this information we are concerned that this would allow our competitor to focus their own efforts in these areas. We know that display and visibility is key in driving sales in an impulsive category like ours and, therefore, we believe the effect on sales could be significant, thus impacting negatively on Good Causes.

We are therefore of the firm view that due to a change in the competitor landscape over the last couple of years that the disclosure of this information could severely prejudice our commercial interests."

57. The Commission also explained that a report produced by NERA Economic Consulting in 2012 stated that *"a plausible range for the impact on National Lottery sales is between £40,000 and £305, 000 per week"* due to the introduction of the Health Lottery. Whilst not a significant reduction, this does demonstrate in the Commission's view that the Health Lottery has a potential impact on the commercial interests of Camelot and the National Lottery.
58. In light of these representations, the National Lottery Commission was satisfied that it was likely that prejudice would be caused to Camelot's commercial interests should the information be released. The information was therefore withheld.
59. The Commission stated that Camelot considers that these factors remained relevant at the time of this request. The Commissioner was provided with evidence of Camelot's submission.
60. The Commissioner has considered the arguments presented by the Commission with regard to the nature of the prejudice.
61. He notes that it seems to be saying that disclosure would allow competitors to target its highest performing operators. However the request was for a list of all operators terminals simply by name and address and it did not request only the top operators. The Commissioner understands this was a specific request made in 2012 when it also relied on section 43. However it is difficult to see how disclosure of a full list could lead to this effect in relation to the current request.
62. As the Commission has pointed out retailers already make it clear through marketing and promotional materials that they sell National Lottery products. It is therefore already possible for competitors to ascertain current points of distribution and carry out targeted campaigns should they chose to do so. Although disclosure of a comprehensive list may admittedly make this easier to do so it will not reveal which are the highest performing stores and allow competitors to target them in the manner suggested.
63. The Commission clearly has concerns that if Camelot opted to do more targeted regional campaigns and a competitor became aware of this in the future, this could lead to a request for the target list and attempt to disrupt activity in its strongest selling regions, which would be commercially damaging. As such it would not wish to make it easier for competitors by providing them with a target outlet list.

64. However the Commissioner has to consider the nature of the prejudice claimed in relation to the wording of this actual request. Future more specific requests will be considered on their own merits based on the arguments supplied by the public authority at that time.
65. Its argument in paragraph 38 clearly states that it would not cause a significant reduction in National Lottery sales and only has a "*potential impact*".
66. The Commissioner accepts that the prejudice test relates to something that may happen in the future, if the information were disclosed. Therefore it is not usually possible to provide concrete proof that the prejudice would or would be likely to result. However there must be more than a mere assertion or belief that disclosure would lead to prejudice ie a logical connection between the disclosure and the prejudice in order to engage the exemption.
67. Based on the above the Commissioner is not satisfied that the Commission has sufficiently demonstrated that link exists in this case and therefore finds that the exemption does not apply.
68. As the Commissioner does not consider that section 43(2) is engaged in this case he is not obliged to consider the public interest test.
69. The Commissioner's decision is that the Commission should disclose the information withheld by virtue of section 43(2) which does not relate to sole traders to the complainant.

Right of appeal

70. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

71. 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.
72. 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

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