

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 December 2016

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

### Decision (including any steps ordered)

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1. The complainant has requested details of the advice and discussions that took place between various parties and the Gambling Commission to inform their report 'Research into Gambling Machines'. The Gambling Commission considered the information was exempt from disclosure on the basis of section 36(2)(b)(i) and (ii) of the FOIA.
2. The Commissioner's decision is that the Gambling Commission has correctly applied the exemptions and the balance of the public interest lies in maintaining the exemption. She requires no steps to be taken.

### Request and response

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3. On 12 January 2016, the complainant wrote to the Gambling Commission and requested information in the following terms:

*"1) Details of the advice and discussions between the Gambling Commission and the RGSB concerning FOBT or B2 stake size that were part of the advice and discussions which are referred to in 1.3 of the Gambling Commission's March 2015 report, 'Research into Gambling Machines':*

*"Our advice here draws heavily on **advice from and discussions with RGSB, our independent advisory body**. RGSB's formal advice is at Appendix B. We have also benefited from discussions with Heather Wardle and David Excell, who were key members of the research team."*

*2) Details of the advice and discussions between the Gambling Commission and Heather Wardle concerning FOBT or B2 stake size that were part of the advice and discussions which are referred to in 1.3 of the Gambling Commission's March 2015 report, 'Research into Gambling Machines':*

*"Our advice here draws heavily on advice from and discussions with RGSB, our independent advisory body. RGSB's formal advice is at Appendix B. **We have also benefited from discussions with Heather Wardle and David Excell**, who were key members of the research team."*

*3) Details of the advice and discussions between the Gambling Commission and David Excell concerning FOBT or B2 stake size that were part of the advice and discussions which are referred to in 1.3 of the Gambling Commission's March 2015 report, 'Research into Gambling Machines':*

*"Our advice here draws heavily on advice from and discussions with RGSB, our independent advisory body. RGSB's formal advice is at Appendix B. **We have also benefited from discussions with Heather Wardle and David Excell**, who were key members of the research team."*

4. The Gambling Commission responded on 9 February 2016. It stated that it considered the information exempt from disclosure on the basis of section 36(2)(b)(i) and (ii) of the FOIA – that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
5. Following an internal review the Gambling Commission wrote to the complainant on 15 March 2016. It stated that it maintained its position that any information within the scope of the request was exempt from disclosure under the section 36(2)(b) exemptions.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 4 May 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the Gambling Commissioner has correctly applied the section 36(2)(b)(i) and (ii) exemptions and, if so, where the balance of the public interest lies.

## Background

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8. The Gambling Commission was set up under the Gambling Act 2005 ("GA2005")<sup>1</sup> to regulate commercial gambling in partnership with licensing authorities. Section 22 of the GA2005 sets out the Gambling Commission's statutory duties in promoting licensing objectives set out in section 1 of the GA2005. These include preventing gambling from being a source of crime and disorder, ensuring gambling is conducted in a fair and open way and protecting vulnerable people from being harmed or exploited by gambling.
9. Under section 26 of the GA2005 the Gambling Commission is required to give advice to the Secretary of State on the incidence of gambling, the manner in which gambling is carried on, the effects of gambling and the regulation of gambling. Advice can be given in response to a request from the Secretary of State or on other occasions the Gambling Commission thinks appropriate. The Gambling Commission has explained that it is therefore required to provide advice on gambling to its sponsor body, the Department for Culture Media and Sport (DCMS), to develop policies for gambling in Great Britain.
10. All gambling operators have a mandatory requirement to contribute to research and education in relation to gambling related harm as part of their licence conditions on social responsibility. This is often done by contributing to the Responsible Gambling Trust (RGT). There is a tripartite arrangement between:
  - RGT – responsible for fund-raising and distribution of funds;
  - Responsible Gambling Strategy Board (RGSB) – responsible for defining the strategy minimising gambling related harm and advising the Gambling Commission; and
  - The Gambling Commission – responsible for advising DCMS on policy
11. RGT commissioned a research project on gaming machines in bookmakers. This was published<sup>2</sup> in December 2014 and January 2015. RGSB then published its advice, based on the research, and the

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2005/19/contents>

<sup>2</sup> <http://about.gambleaware.org/research/research-publications/>

Gambling Commission then published its advice which was provided to DCMS<sup>3</sup>.

12. It is this advice from March 2015 which is referred to in the request and the information requested is details of advice and discussions which helped to inform this report.

## **Reasons for decision**

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13. Section 36(2)(b)(i) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank provision of advice.
14. Section 36(2)(b)(ii) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.
15. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
  - Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given, and
  - Consider whether the opinion was reasonable.
16. The Gambling Commission has stated its qualified person is its Chief Executive, Sarah Harrison. The Gambling Commission has provided the Commissioner with evidence that the qualified person was asked for and provided their opinion. It is clear from this that the qualified person considered the requested information exempt under section 36(2)(b)(i) and (ii).
17. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange either 'would' occur or would

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<sup>3</sup> <http://www.gamblingcommission.gov.uk/pdf/Recent-research-into-Gaming-Machines.pdf>

only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.

18. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition to the free and frank exchange of views should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
19. The qualified person has clearly provided her opinion on the basis that the inhibition "would be likely" to occur. It is on this basis the Commissioner will consider whether the qualified person's opinion is reasonable.
20. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
21. However, in determining if the opinion is reasonable the Commissioner will consider all relevant factors when assessing whether the opinion was reasonable, including the nature of the information and the timing of the request, and whether the prejudice relates to the specific subsections of section 36(2) that are being claimed.
22. With regard to sections 36(2)(b)(i) and (ii), it is understood that it is the process which may be inhibited rather than what is necessarily contained within the requested information itself. The important question is whether disclosure could inhibit the process of providing advice or exchanging views in the future.
23. The Commissioner has summarised below the arguments which have been advanced in relation to the different subsections of the exemptions which the qualified person offered their opinion:

Section 36(2)(b)(i)

- The Gambling Commission has to be able to assure itself and the Government as to the effectiveness of the arrangements between the parties.
- The Gambling Commission and RGSB have to be able to explore all options robustly to reach the right conclusions. Although formal advice is published there is a requirement to provide free and

frank advice subsidiary to this and any inhibition to this process will be likely to impact on the overall quality and effectiveness of the advice process and the published advice.

Section 36(2)(b)(ii)

- Disclosure of the requested information would cause a 'chilling effect'; inhibiting free and frank discussions in the future, causing prejudice to the process of developing advice and policy.
  - The nature of the relationships between the parties necessitates some direct discussions to take place out of the public view when exploring the finer points and considering wider options. If such a 'safe space' was removed it would undermine the effectiveness of the arrangements to the detriment of work on research, educations and treatment to contribute to minimising problem gambling.
24. The Commissioner is satisfied that the qualified person's arguments not only correspond with the activity described in each of the exemptions but also correspond with the withheld information itself. She notes the withheld information in this case consists of emails between the various parties named in the request discussing and advising on the Gambling Commission's upcoming advice to DCMS on 'Research into Gaming Machines'. As well as advice and free and frank opinions being shared the withheld information also consists of draft copies of the advice with tracked changes and comments.
25. With regard to sections 36(2)(b)(i) and (ii), the Commissioner considers it is reasonable for the qualified person to accept that there is a real risk that disclosure could deter contributors from being as forthright with their views. This reflects the cooperative nature of the relationships between the Gambling Commission, RGSB and RGT and the need to maintain this to produce high quality guidance and reports.
26. In light of the above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one as all of the withheld information can be seen to be demonstrating the free and frank exchange of views for deliberation and delivery of the final advice and the free and frank provision of advice.. Therefore the Commissioner finds the exemptions provided by section 36(2)(b)(i) and (ii) is engaged.

*Public interest arguments in favour of disclosure*

27. The Gambling Commission recognises there is a legitimate public interest in promoting accountability and transparency in its work. The issue of gambling related harm and the effects of gaming machines in

this area is high profile and disclosure may help interested parties better understand the issues involved.

28. The Gambling Commission also appreciates there have been criticisms of the research and disclosure may help to address some of these concerns and support the conclusions that have been reached by providing greater understanding of the process involved and the rationale for decisions.
29. The complainant argues the public interest in this issue has not been met by the publishing of the advice. He has gone on to state that there are widespread concerns that the research programme that informed the report was inadequate and unable to deliver recommendations that were not influenced by the interests of the gambling industry, particularly with regard to the issue of stake size on machines.
30. The complainant considers that the research that informed the advice was designed to avoid producing evidence that would support stake reduction on gaming machines. However, some evidence that higher stakes tended to "impair decision making" leading to a "reduction in self-control when gambling" did emerge and can be seen in Appendix C, of RGT's report 5. However, point 4.3 of the report says "cutting stakes is not likely to have much – if any – impact on problem gamblers." The complainant argues that this shows there was some dubious evidence base to these reports due to the conflicting position. Therefore if the advice from the Gambling Commission to DCMS drew heavily from this then there is a need for a greater level of transparency in the evidence base and the discussions.
31. The complainant also points to the timing of the request, at a point when the advice had been written and published. He makes the point that the information in question relates to historical discussions concerning a decision that has already been made and advice already produced. He considers if there are concerns surrounding quality then the public interest demands more insight into how the advice to DCMS was formulated.

*Public interest arguments in favour of maintaining the exemption*

32. The Gambling Commission explained that the advice presented to DCMS has been published as has the advice from the RGSB on which this was largely founded. The published RGSB advice was based on published research products produced by RGT. In terms of transparency, this is a high level and there has been plenty of opportunity for scrutiny at each stage.

33. The Gambling Commission also highlights that the issue of gambling related harm linked to gaming machines in bookmakers remains high on the political and social agenda, with coverage in the media and ongoing action from campaign groups. Whilst the advice to which the information relates is published, it is expected that further research and advice will follow, given that it is a live and ongoing issue. Prejudice that disclosure would cause to subsequent work is therefore still a valid concern.

*Balance of the public interest arguments*

34. In finding that the exemptions are engaged the Commissioner has accepted that disclosure would be likely to have a prejudicial effect on the exchange of ideas and views.
35. It is plainly in the public interest for a regulator, such as the Gambling Commission, to have processes in place to improve the quality of advice it provides to Government. The inclusion of voices which are outside of Government and the regulatory sphere, such as RGT and RGSB, is beneficial as it prevents insularity in terms of views and advice put forward which are taken into account by the Gambling Commission in advising Government.
36. There is a suggestion that the research conducted by RGT and the advice published by RGSB which formed the basis of the Gambling Commission's advice to DCMS may have been unduly influenced by the gambling industry and the advice produced by the Gambling Commission may therefore be based on a dubious evidence base. The complainant has pointed to the RGT's accountancy firm having links to bookmakers<sup>4</sup> as evidence of this. The argument for transparency has therefore been argued by the complainant as being particularly high.
37. In defence of this, the Gambling Commission points to the fact that RGT is a registered charity subject to the requirements of the Charity Commission, the expertise and academic qualifications of those on the RGSB Board is available online, the Gambling Commission itself is an independent non-departmental public body which is sponsored by and subject to oversight from DCMS, and the research products on which the advice to DCMS was based are all published and can be analysed by anyone.
38. The Commissioner does not consider it appropriate for her to comment on whether or not she believes the RGT reports and subsequent RGSB

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<sup>4</sup> <http://www.thetimes.co.uk/article/gambling-charitys-link-to-bookmaker-l66qjcjj2>

advice which formed the basis of the advice to DCMS was subject to undue influence from the gambling industry. She cannot come to any conclusive decision on this matter and nor does she consider it within her remit to do so. That being said, she does recognise there are some genuine concerns over this so she has considered whether disclosure of the requested information would go some way to addressing this by providing a greater level of transparency and scrutiny.

39. In considering this point, the Commissioner has noted the specific nature and content of the withheld information and does not consider the information would address the complainant's concerns about the quality of the RGT and RGSB advice. The information shows that the Gambling Commission received free and frank advice and opinions from RGSB and other experts to help inform their advice to DCMS, as well as drawing from the information in the RGSB and RGT research. Disclosing the nature of these communications would not reveal information which would assist in understanding whether the RGSB or RGT advice was unduly influenced; rather it will show that the Gambling Commission drew on advice and opinions from a variety of sources in reaching its own conclusions and providing advice to DCMS.
40. That being said, even if it cannot be argued that disclosure would assist in the debate about the influence of the gambling industry in the earlier research and advice, it unquestionably would increase transparency in the processes of the Gambling Commission in an area which does attract a significant amount of media and wider public interest. It is in the public interest to know that the Gambling Commission is performing its duties effectively and it is making well-informed decisions and providing advice to the Government which is of high quality and has been formed by a range of opinions from different areas.
41. The Commissioner also notes that at the date of the request all of the withheld information was still relatively fresh as the advice to DCMS had only recently been published. The Commissioner acknowledges that the correlation between the timing of a request and the severity of any chilling effect will not be uniform but will be dependent on the contents of the withheld information and the situation at the time of the request. The Commissioner explores the operation of the chilling effect in her guidance by saying the following:

*"49. Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It*

*will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.*

*50. Whether it is reasonable to think that a chilling effect would occur would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question."*

42. In the Commissioner's view, the age of the information is an important factor. From her inspection of the withheld information she considers that a lot of the issues that are contained in the information would still have been the subject of discussion at the time of the request. This is because although the advice had been published it is clear that the issue was still 'live' and open to further discussions. Throughout the advice to DCMS there is reference to there being more work to do and the final conclusions state that no definitive answer had been found. As such there is a clear indication that further work and discussions would be needed. In the Commissioner's opinion, the severity of the potential chilling effect on discussions is higher due to the potential for further discussions and debates on an ongoing live issue.
43. The Commissioner has taken this into account when deciding where the public interest lies. In this respect, the Commissioner has found that the respective strength of the arguments for and against disclosure is finely balanced. There are strong public interest arguments for the disclosure of information which may provide further insight into the information considered by the Gambling Commission when formulating its advice to Government on an issue which continues to be debated and attract media attention.
44. Conversely there is a legitimate and strong public interest in not causing a chilling effect when the issue in question is still live. The Gambling Commission has convincingly argued that it relies on advice from a variety of sources, bodies and experts to inform its position and advice. It has drawn on all of these resources in this case and there is a genuine risk that disclosing details of the advice and discussions that took place would have a chilling effect on future discussions; impacting on the quality of discussions, advice and policy which would not be in the public interest.
45. The Commissioner considers these two primary arguments to be finely balanced but her decision has been made by also taking into account the fact that the Gambling Commission has published its advice, the RGSB advice has also been published and so have the reports by the RGT. There have been opportunities for scrutiny of this advice and transparency through the publication of this information. It is not clear

that disclosing the information that has been requested would provide any further insight and is unlikely to answer any questions about the influence gambling operators had on the earlier research. The Commissioner does not consider this would outweigh the impact of the chilling effect on future discussions and the quality of advice.

46. Therefore she has concluded the balance of the public interest lies in maintaining the exemption and the Gambling Commission has correctly applied the exemption to withhold the requested information.

## Right of appeal

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47. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**