

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2021

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 company, now in administration, BetIndex Limited, trading as Football Index. The Gambling Commission (GC) refused to disclose the requested information, citing section 31(1)(g) by virtue of subsection 31(2)(c) of FOIA.
2. The Commissioner's decision is that the exemption is engaged but that the public interest lies in disclosure.
3. The Commissioner requires the GC to take the following steps:
 - Disclose the requested information to the complainant.
4. The Gambling Commission 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 15 April 2021, the complainant wrote to the Gambling Commission and requested information in the following terms:

"Your organisation has recently confirmed to me that it holds copies of BetIndex Limited trading as Football Index (in administration) unaudited accounts for the two years ended 31 December 2018.

This is a formal request for a copy of those unaudited accounts and any other financial accounts held by the Gambling Commission for this company."

6. The GC responded on 14 May 2021. It stated that it held the requested information but that it was refusing to disclose it, citing section 31(1)(g) by virtue of subsection 31(2)(c) of FOIA.
7. Following an internal review the GC wrote to the complainant on 24 May 2021. It stated that it was upholding the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 25 May 2021 to complain about the way his request for information had been handled.
9. The Commissioner has considered the GC's handling of the complainant's request, in particular its application of the exemption at section 31(1)(g) by virtue of subsection 31(2)(c) of the FOIA.

Reasons for decision

Section 31 – Law enforcement

10. Section 31 of the FOIA states that:

(1) *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

(2) *The purposes referred to in subsection (1) (g) are –*

(c) the purposes of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

11. The Commissioner's guidance states '*This reflects the fact that many activities and sectors of the economy are subject to statutory regulation.*'
12. In its submission to the Commissioner, the GC has confirmed that, as a regulator, it performs its functions in accordance with the Gambling Act 2005.
13. Section 22 of the Gambling Act 2005 outlines the GC's statutory duty to promote the licensing objectives as laid out in section 1 of the Act, which are:

"(a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,

(b) ensuring that gambling is conducted in a fair and open way, and

(c) protecting children and other vulnerable persons from being harmed or exploited by gambling."
14. The Commissioner is satisfied that the functions that the GC enacts as detailed above represent those referred to within section 31(2)(c) of the FOIA. Therefore, she will go on to consider whether the exemption is engaged.
15. In order for a prejudice-based exemption such as section 31(1)(g) to be engaged, there must be some degree of likelihood that disclosure of the requested information would prejudice the interest or interests 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.

The relevant applicable interests

16. Returning to the above, the GC has explained to the Commissioner that disclosure would '*reveal details about how the Commission conducts its investigations and revealing this information could seriously impact on the Commission's ability to fulfil its statutory functions.*'
17. The GC has expressed its concern that disclosure '*could undermine the regulatory activity that was being undertaken*' as disclosure would '*undermine its relationships with operators.*'
18. The Commissioner is satisfied that the submissions put to her by the GC outline how disclosure of the requested information would prejudice the applicable interests within the relevant exemption.

The nature of the prejudice

19. The Commissioner must now consider if there is a causal link between the withheld information and the prejudice that section 31(1)(g) by virtue of section 31(2)(c) aims to protect. Within the GC's submission to the Commissioner, it has outlined two main concerns regarding disclosure.

Disclosure would frustrate the Gambling Commission's current investigation

20. The GC has stated that the information that it holds relating to the BetIndex accounts was collected as part of the investigation process as set out in its Licensing, Compliance and Enforcement Policy Statement. This information is collected as part of the GC's assessment process to review the manner in which a particular class of licensees carry on the licensed activities authorised by their licences, and, in particular, how the licensees in question comply with the conditions attached to the class of operating licence. In particular, financial information is collected to assess the resources available for the purpose of carrying on the licensed activities. The GC has explained that disclosure would frustrate the current investigation as, although the investigation into the Operator Licence for BetIndex has concluded, the review of the Personal Management Licences is not yet complete and the GC's collection of information from operators would be more effective if the information remained confidential as there is a relationship of trust with the operators which would be undermined by disclosure.

Disclosure would have an impact upon the regulatory functions of the Gambling Commission

21. The GC has stated to the Commissioner that disclosure of the requested information would undermine its relationship with operators as the information that they provide to the GC as part of the review process is done so on the understanding that this will not be released

into the public domain. If this information was disclosed, the GC considers that this would damage the relationship that it has formed with operators which would result in them being less likely to share information with the GC in the future. The GC considers that this would undermine its regulatory functions and, as a consequence, have a detrimental impact on the wider public.

22. The GC also stated that establishing trust with operators is key to having open and frank exchanges and this, in turn, will make operators more inclined to provide commercially sensitive information on the basis it is trusted to be kept with appropriate safeguards. Disclosing the requested information without sufficient rationale would undermine this trust and make operators less likely to co-operate fully in the future. The Commission considers that if it were to be in a situation in the future where it must use its formal powers to compel the provision of information then this information, provided under compulsion, would be of a different and arguably less satisfactory quality than if information was voluntarily supplied.
23. The GC also considers that disclosure may lead individuals to think they can reduce the possibility of any non-compliance being detected by the GC because they understand the matter and priorities the Commission has or has not decided to direct its resources towards. The GC believes that this may result in operators or individuals knowing how to present accounts to avoid further scrutiny. According to the GC, non-disclosure is more likely to raise overall standards in the gambling industry if operators are not able to second guess or predict what specific matters will be subject to a more detailed consultation or investigation, the resources that will be devoted to it and the methodology the GC will use.
24. The GC is of the view that prejudice and disruption would be likely to arise to its regulatory functions as a result of disclosure of the requested information as this could impact on the flow of information the GC receives as part of its role as the gambling regulator. The GC is dependent on its communications to and from persons that operate in the gambling sector and the public generally being full and frank in nature so that it can effectively provide advice, investigate and consider any abuses of its regulatory requirements.
25. The GC further stated that, the more information about how a regulator allocates its resources and the activities it is concerned with, added with information on how it goes about investigating matters, the better able an unscrupulous organisation will be to make an accurate assessment of the likelihood of a particular activity coming to the attention of that regulator and therefore to determine the risk of carrying out that activity.

26. In summary, the GC believes that, even once its investigation into Bet Index Limited has concluded, any prejudicial effect on its ability to carry out its regulatory functions would still occur over time as disclosure would lead to a loss of flexibility in its use of supervisory or enforcement processes or could lead individuals or operators or potential operators to act in a way that might harm the conduct of the regulatory functions.
27. Regarding the expectation of confidence, the Commissioner acknowledges that, whilst formal means of gathering information can be employed by the GC, it will be more effective if operators and stakeholders have faith in the confidentiality of the application process.
28. The Commissioner also acknowledges that disclosure may undermine the trust between the GC and applicants and stakeholders. However, the Commissioner is not entirely convinced by this argument. The GC has a statutory duty, as outlined by the Gambling Act 2005, to regulate gambling and supervise gaming law in Britain. Therefore applicants and stakeholders are required by law to assist the GC with its regulatory activity and do not need to be compelled by a good working relationship with the GC to do so.
29. The Commissioner would argue that any applicant or stakeholder who is unwilling to engage in open and honest communication with the GC already has their own reasons for doing so. Disclosure of the withheld information is unlikely to have more than a marginal effect on such individuals.
30. 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 law enforcement activities that the GC carries out in order for the exemption to be engaged.
31. In order to establish a causal link the Commissioner must be satisfied that the prejudice claimed is at least possible. Whilst the Commissioner is less convinced by the GC's arguments, he acknowledges that there are circumstances in which the prejudice could arise.

The likelihood of the prejudice occurring

32. The Commissioner must now consider the threshold of prejudice upon which the GC is relying.
33. The GC has confirmed that it is relying upon the higher threshold of prejudice, disclosure 'would prejudice' the interest that section 31 is designed to protect. 'Would prejudice' means that there is a more than 50% chance of disclosure causing the prejudice, i.e. it is more likely

than not, even though it is not absolutely certain that disclosure would do so.

34. The Commissioner acknowledges that a public authority may not be able to provide hard evidence in support of its application of 'would' prejudice. To do so would require disclosure which would undermine the purpose of the exemption. However, the GC has failed to explain its rationale for reliance upon the higher threshold of prejudice, other than the generic arguments presented to the Commissioner in its submission.
35. The GC has failed to provide any detailed summation as to the frequency with which this 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.
36. 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 to occur' is more appropriate and has been demonstrated. 'Would be likely to' represents a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
38. Therefore the Commissioner considers that the exemption as set out in section 31(1)(g) by virtue of section 31(2)(c) is engaged as the lower threshold of prejudice applies.
39. The Commissioner's guidance on the prejudice test¹ states '*Establishing the appropriate level of likelihood is also important because it has an effect on the balance of the public interest test.*'
40. Since the Commissioner considers the exemption to be engaged on the basis that disclosure would be likely to cause prejudice, he has now gone onto consider whether the public interest lies in disclosure or maintaining the exemption.

The public interest test

41. The Commissioner's guidance states that:-

'Although there is a clear public interest in protecting the ability of public authorities to perform their law enforcement activities, the public

¹ [the prejudice test.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-information-commissioner/guidance-on-the-prejudice-test/)

interest test requires that all the circumstances of the case are considered. This will include the significance of the information itself and the issues that it addresses.'

Public interest arguments in favour of disclosure

42. The GC acknowledges that disclosure would promote accountability and transparency. It has stated *'It is important that the public are assured that the Commission is carrying out its functions in ensuring that any individuals who are involved in providing gambling facilities to the public have undergone the necessary due diligence checks and will uphold the licencing objectives ensuring that consumers are protected.'*
43. The GC also acknowledges that, at the time the request was made, BetIndex Limited was under investigation and acknowledges that there could be positive advantages to disclosing the requested information as the matter under consideration was and still is the subject of public concern. Disclosure of this information could alleviate these concerns and curtail speculation on the robustness of the GC's processes.
44. The complainant has stated that:

"In March 2021, Bet Index Limited trading as Football Index collapsed into administration. The company was licenced by and within the regulatory oversight of The Gambling Commission. The collapse has been described as the biggest failure in UK gambling history. Consumers are estimated to have lost £100 million."

45. The complainant has elaborated:

"There is a very strong public interest that The Gambling Commission is a capable and effective regulator with oversight of gambling businesses within its remit. In the case of Bet Index Limited trading as Football Index there is a very strong public interest in understanding The Gambling Commission's regulatory oversight of this company – including its actions and inactions. The public interest is served by transparency and accountability with a full understanding of The Gambling Commission's failings so that corrective action can be taken."

Public interest arguments in favour of maintaining the exemption

46. The GC argues that releasing information relating to a live investigation would compromise that investigation itself. This would have led to the Commission being unable to make the full use of its statutory powers to ensure gambling is fair and safe. Revealing this information is likely to also reveal the techniques the Commission uses in general when conducting investigations. This could severely hamper the effectiveness of the GC's investigatory processes in future.

47. The GC also argues that this information is strictly confidential. Disclosure could seriously impact the GC's ability to conduct the investigation process, if information relating to what data it uses to inform the licence review became known; this is strongly not in the public interest as it would impair the Commission's ability to regulate effectively.
48. The GC also states that operators are required to provide detailed information and there are statutory mechanisms in place to compel the provision of information, but this is not the most effective way to obtain information. The GC relies on the voluntary provision of information to perform its functions and open and frank exchanges are integral to decision making. Establishing trust with operators is important to this so they will willingly provide commercially sensitive information in a competitive market in the understanding that this information will be subject to appropriate safeguards. Disclosing operational information (such as the information requested here) without sufficient rationale would undermine this trust and make operators less likely to cooperate with requests in future. This would potentially result in the GC having to use its more formal statutory powers in the future, leading to more guarded disclosures which would not be in the public interest. There is no compelling public interest argument for disclosure given the limited use that the requested information could have to anyone. The financial information alone would not be of any assistance in furthering the public debate in this matter as this is only part of the information that it holds and uses to assess operator suitability.
49. The GC states that the information that is publicly available on its website clearly sets out the assessment process that applies to all licence applications and the subsequent published report on the Independent Review of BetIndex Limited provides further details into the specific licensing of BetIndex Limited. Therefore, it is the GC's view that there is sufficient information publicly available about the licensing process to adequately address the public interest in this matter.

The balance of the public interest

50. The GC is of the opinion that there would be no compelling public interest in disclosure of the requested information as the information would be of limited use to anyone. 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.
51. On the one hand, the Commissioner understands the complainant's position. He acknowledges that, at the time that the GC suspended Football Index's gambling license, the platform had 278,585 customer

accounts² and many of Football Index's customers will have suffered significant monetary losses as a result of the business's collapse.

52. On the other hand, due to the interest that section 31 is designed to protect, it follows that the public interest arguments required to overturn the exemption must be significant. The Commissioner has taken into account how far the report goes to answer the complainant's questions regarding the appropriateness of the GC's actions and the lessons learnt as a result of Football Index's collapse. To a certain extent, the publication of this report goes a long way to addressing the public interest arguments.
53. He has also considered the extent to which disclosure would prejudice the interests that section 31 is designed to protect, taking into account the GC's application process and the generic arguments that the GC has provided in support of its application of the exemption.
54. Returning to the GC's concern that the information would be of limited use to anyone and that therefore there is no compelling public interest in disclosure, the Commissioner is mindful that there is an inherent interest in the public understanding how an important decision, such as the granting of a gambling license, is reached and if this decision was made using the appropriate information. The need to create a full picture of what exactly happened increases with the circumstances, and repercussions, of the decision reached.
55. The Commissioner remains mindful of that the collapse of Football Index had a huge public impact, both in monetary terms and emotional distress to users. The Commissioner concurs with the complainant that some of the losses, for individuals, will have been life changing.
56. The public interest test must be carried out by a public authority bearing in mind all the specific circumstances of the case. In this instance, the Commissioner is of the view 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 requested information, especially against the backdrop of DCMS's review of the Gambling Act 2005.³

²[Report of the Independent Review of the Regulation of BetIndex Limited. Final version 130921 .pdf \(publishing.service.gov.uk\) Paragraph 3.4](#)

³ [Gambling-related harms evidence review: summary - GOV.UK \(www.gov.uk\)](#)

57. Whilst the Commissioner accepts that the public interest factors in this case are very finely balanced, ultimately he considers that the public interest lies in disclosure. He considers disclosure is warranted in this instance by all the circumstances of the case.

Right of appeal

58. 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

59. 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.

60. 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

Deirdre Collins
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