

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2023

Public Authority: Department for Culture, Media and Sport
Address: 4TH Floor
100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information about Malcolm Sheehan QC and his role in the inquiry regarding the collapse of the betting product Football Index.
2. The Department for Culture, Media and Sport relied on sections 36(2)(c) (prejudice to the effective conduct of public affairs), 43(2) (commercial interests) and 40(2) (personal information) to withhold requested information from the complainant
3. The Commissioner's decision is that Department for Culture, Media and Sport correctly relied on sections 36(2)(c) and 43(2) to withhold requested information.
4. The Commissioner does not require the public authority to take steps to ensure compliance with the legislation.

Background

5. The Department for Culture, Media and Sport ("the public authority") commissioned an independent report into the regulation of BetIndex, the providers of the novel product Football Index which collapsed in

early 2021. Malcolm Sheehan QC was appointed to lead the inquiry. The report was published on 22 September 2021¹.

Request and response

6. On 18 August 2022, the complainant requested information from the public authority by saying as follows:

"I am requesting information under the Freedom of Information Act.

The information I am requesting is:

(1) Correspondence to / from [name redacted] on the subject of Football Index.

(2) The amount paid to [name redacted] for his work on the Football Index report."

7. On 12 October 2022, the public authority responded. It provided some information within the scope of his request but refused to provide the remainder. It cited the following exemptions.

- Section 40(2) (personal information)
 - Section 43(2) (commercial interests)
- and
- Section 36(2)(c) (Prejudice to the effective conduct of public affairs)

8. The complainant requested an internal review. The public authority sent him the outcome of its internal review on 3 November 2022. It upheld its original position; however it made no mention of Section 40(2).

¹ [Government publishes independent report into regulation of Football Index - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/government-publishes-independent-report-into-regulation-of-football-index)

Scope of the case

9. The complainant contacted the Commissioner on the 3 November 2022 to complain about the way his request for information had been handled.
10. The Commissioner considers he has to determine whether the public authority was entitled to withhold requested information from the complainant.

Reasons for decision

11. Section 36(2)(c) provides that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. The public authority has submitted and provided evidence to the Commissioner that the opinion was sought from the then Parliamentary Under Secretary of State for Tech and the Digital Economy on 29 September 2022. This qualified person gave their opinion that the exemption was engaged on 5 October 2022.
13. Having considered the public authority's submissions and evidence, the Commissioner accepts that the exemption provided by section 36(2)(c) is engaged.
14. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public Authority's submissions

15. In favour of releasing the information, it recognises there is a general public interest in government transparency. It recognises that greater transparency makes the government more accountable to the electorate and increases trust. However, it does not feel the public interest in releasing informal correspondence is greater than the interest in withholding this information.
16. In favour of withholding the information, it considers release of the information within the correspondence would have a negative impact on its relationship with key stakeholders now and in the future. Independent expert reviews are an important tool for the government,

and it is important that officials and experts can exchange information, evidence, comments on draft reports, and liaise about publication without fear of the information being released out of context. In this specific case, Malcolm Sheehan was appointed through the Attorney General's Office process for procuring expert legal support for the government. Departments should be able to exchange confidential information with appointed counsel without risk of disclosure.

Complainant's Submissions

17. The document produced by Mr Sheehan is described as an "Independent Report". The report cannot be described as "Independent" if the public authority is refusing to disclose full correspondence with Mr Sheehan. There is the potential and the perception of the potential for the public authority to have exerted influence over Mr Sheehan regarding the content of the report. Full disclosure of the correspondence will eliminate this issue and allow the report to be referred to as "Independent".

Commissioner's Reasonings

18. The Commissioner agrees with the public authority assessment of the public interest in this matter. That is releasing the withheld information would clearly detriment the process of public inquires generally. Public inquires need to be able to foster and maintain behaviours which encourage a free exchange of information. Exchanges which are not stymied or tailored by the belief that the exchanges may soon be placed in the public sphere. The Commissioner acknowledges the points made by the complainant but in this instance, they do not carry the weight to favour the release of the information. Overall the public interest favours the maintaining of the exemption

Section 43(2) – commercial interests

19. The public authority relies on this exemption to the request for information regarding the amount paid to Malcolm Sheehan QC for his work on the Football Index report.

Section 43(2) of FOIA states:

- "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority) holding it.
20. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information were 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 protect. Furthermore, the resultant prejudice which is alleged should 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 or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Public Authority's Submissions

21. Senior counsel nominated by the Attorney General typically carry out important public work at below their commercial rate. Disclosing the amount paid might affect Mr. Sheehan in future commercial negotiations. If he were to take on a similar sized task in future, knowing the total figure paid would almost certainly give those that may instruct an upper hand in negotiations.

Commissioner's Reasonings

22. The Commissioner is satisfied first that the harm the public authority envisages relates to the commercial interests of Mr. Sheehan. Second the Commissioner accepts that a causal link exists between disclosure and commercial prejudice; those the public authority detailed at paragraph 22 above. The Commissioner considers that the envisioned prejudice would be likely to happen. The Commissioner's decision is therefore that the public authority was entitled to apply section 43(2) to the withheld information and he will go on to consider the associated public interest test.

Public Authority's Submissions

23. It considers that the balance of the public interest test determines that the public interest in withholding this information outweighs the public interest in disclosing it.

Commissioner's Reasonings

24. There is public interest in knowing a component part of the cost to the public purse of holding the inquiry. However the Commissioner notes that the costs of holding inquiries is generally well publicised. The Commissioner considers this to be a factor that addresses the public interest in transparency.
25. In this instance the public interest in releasing the withheld information is outweighed by the public interest in allowing a person to engage in commercial matters without their commercial position being undermined by the release of commercially sensitive information. Whilst that undermining decreases overtime, at the time of the refusal the information was still potent information that would (if released) harmed the commercial activity of a particular person.
26. The Commissioner for the reasons given above is of the view that the balance of the public interest slightly favours maintaining the exemption.

Section 40(2) (personal information)

27. The public authority has withheld information that consists of the names of junior staff by relying on section 40(2) (personal information)
28. The complainant has informed the Commissioner that he does not take issue with the public authority so withholding the personal data comprising of the names of junior members of staff .

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

**Gerrard Tracey
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