

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2021

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

Decision (including any steps ordered)

1. The complainant has requested information associated with the National Lottery and National Lottery terminals. The Gambling Commission released information relevant to two parts of the request, advised it does not hold information within scope of four parts and withheld information within scope of the remaining two parts under section 43(2) of the FOIA (commercial interests).
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the Gambling Commission does not hold the information the complainant has requested in parts 2, 3, 6 and 7 of the request and has complied with section 1(1)(a) of the FOIA.
 - The Gambling Commission is entitled to withhold the information requested in parts 5 and 8 of the request under section 43(2) of the FOIA. Disclosing this information would be likely to prejudice another person's commercial interests and the public interest favours maintaining the exemption.
 - There was no breach of section 16(1) of the FOIA (advice and assistance) in the Gambling Commission's handling of the request.
3. The Commissioner does not require the Gambling Commission to take any remedial steps.

Request and response

4. On 11 December 2020 the complainant wrote to the Gambling Commission and requested information in the following terms:
- “ 1. A copy of the report referred to at paragraph 24 of a decision notice of the ICO Reference: IC-44654-C3Z9 of the 5th November 2020 signed by Pamela Clements Group Manager at the Information Commissioner’s Office (i.e. “a report, downloaded from the Camelot ICS to a Commission system, that contains the winning lottery numbers outlined in [my previous] request and the retailer ID code for where those tickets were purchased.”)

 2. A list of National Lottery Terminals in excel format detailing the operator’s name and full address of the terminal including postcode at 3rd March 2017 consistent with the ICO decision relating to the Gambling Commission in Decision Notice (FOIA) 12 February 2015: https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1043304/fs_50553684.pdf

 3. A list of the operator/retailer ID codes relating to each such terminal on that March date.

 4. A copy of the licence to run the National Lottery that was in force at 3rd March 2017.

 5. In respect of the current licence to run the National Lottery [<https://www.gamblingcommission.gov.uk/PDF/NL-licences/NL-Third-licence.pdf>] , the document or documents specifying the functionality to be possessed by Independent Verification System referred to in current licence condition 5.14(b) which states

“The Licensee shall:(a)establish, operate and maintain in pursuance of its obligations under Conditions 5.10(b) and 5.14(e) an Independent Verification System which possesses the functionality specified by the Commission; (b)establish, operate and maintain a separate copy of the Independent Verification System for the use of the Commission, which possesses the functionality specified by the Commission and which is maintained independently of the system referred to in Condition 5.14(a);”

 6. A full list of all categories of data referred to in condition 5.14(e) of that licence whether listed there or not.

7. The format specified by the Commission under condition 5.14(h) of that licence.
8. The three Contracts/Agreements relating to the relationship between Camelot, Elsym and the Gambling Commission referred to at paragraph 38 of the decision notice referred to at 1. above. These are as follows
 - Software Supply Agreement between Camelot and Elsym
 - Consultancy Agreement between Camelot and Elsym
 - Consulting Agreement between Camelot/Elsym and the [Gambling] Commission."
5. On 13 September 2021 the Gambling Commission responded. It released the information requested in part 1 and part 4 of the request; advised it does not hold the information requested in parts 2, 3, 6 and 7 and withheld information within scope of parts 5 and 8 under section 43 of the FOIA.
6. Following an internal review, the Gambling Commission wrote to the complainant on 26 February 2021. It upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner on 26 March 2021 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has focussed first on whether, on the balance of probabilities, the Gambling Commission holds the information the complainant has requested in parts 2, 3, 6 and 7. She has then considered whether the information requested in parts 5 and 8 of the request is exempt from disclosure under section 43(2) of the FOIA, and the balance of the public interest. Finally, the Commissioner has considered whether there was any breach of section 16(1) in the Gambling Commission's handling of the request.

Reasons for decision

Section 1 – general right of access to information held by public authorities

9. Under section 1(1) of the FOIA anyone who request information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the

information communicated to him or her if it is held and is not exempt information.

10. In its submission to the Commissioner, the Gambling Commission first provided the following context. The Gambling Commission confirmed that it advised in its response to the request that it did not hold the information relating to questions 2,3,6 and 7. To establish whether any of relevant information was held it had consulted with its existing National Lottery Team and also the "4th National Lottery Licence project team".

11. The complainant asked for the following information for questions 2 and 3:

"A list of National Lottery Terminals in excel format detailing the operator's name and full address of the terminal including postcode at 3rd March 2017 consistent with the ICO decision relating to the Gambling Commission in Decision Notice (FOIA) 12 February 2015: https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043304/fs_50553684.pdf

and

"A list of the operator/retailer ID codes relating to each such terminal on that March date."

12. The Gambling Commission had advised the complainant that it does not hold a list of National Lottery terminals. It *does* hold a list of retailers where National Lottery terminals are located, but it does not hold a specific list of terminals as there is no requirement for the Gambling Commission to have this information.

13. The complainant asked for the following information in questions 6 and 7:

"A full list of all categories of data referred to in condition 5.14(e) of that licence whether listed there or not."

and

"The format specified by the Commission under condition 5.14(h) of that licence."

14. The Gambling Commission notes that it advised the complainant that it does not hold information in relation to the above questions. It has provided the Commissioner with a copy of the National Lottery Third Licence ('the Licence') where the conditions above are set out.

15. The Gambling Commission has explained that the existing National Lottery (NL) team has been working with the current Licence for many years and its role is to ensure that the current provider, Camelot, operates within the conditions of that Licence. This includes the specific parts identified in questions 6 and 7. As such, this team has a wealth of relevant knowledge and would know whether the requested information is held.
16. Condition 5.14(e) [of the National Lottery Third Licence] states the licensee shall:

“...ensure that the Independent Verification Systems referred to in Conditions 5.14(a) and 5.14(b) are capable of performing end-of-day financial auto-balancing between the gaming systems and the Independent Verification Systems for the categories of data specified by the Commission, including:

 - i. ticket sales by game and day
 - ii. Subscriptions paid, by game, day and Subscriber
 - iii. prizes to be paid by game, tier and day
 - iv. prizes paid by game, tier and day
 - v. Player account closing balances by day and Player; and
 - vi. any other categories of data as may be specified by the Commission”
17. The Gambling Commission has told the Commissioner that after consulting with the NL team, it can confirm that it does not hold any further information relating to categories of data further to what is listed in condition 5.14(e) of the licence, above.
18. Condition 5.14(h) states the licensee shall:

“...ensure that the test reports for the Independent Verification Systems referred to in Condition 5.14(a) and 5.14(b) are submitted to the Commission in such format and timescale as it may specify”
19. The Gambling Commission has told the Commissioner that after consulting with the NL Team, it can confirm that it does not hold any recorded information in relation to any specific format in which the Gambling Commission requires information to be provided to it. It has pointed out the use of the word “may” in the above clause. The Gambling Commission has confirmed it does not hold any records that specify a format.
20. The Gambling Commission’s submission goes on to explain that, as discussed above, it has relied on the knowledge of its staff to advise whether the information is held. Both NL teams have thoroughly

checked their electronic working and storage areas for relevant material and, as the Gambling Commission initially suspected, no relevant material was located.

21. Electronic records relating to the work of either NL team are strictly segregated from the physical and electronic working areas of the rest of the Gambling Commission as different legislation and a different regulatory regime apply. The Gambling Commission has confirmed that it has conducted a search of its SharePoint system for questions 6 and 7 using the specific Licence conditions, namely 5.14(e) and 5.14(h), and it has been unable to identify the information requested.

The Commissioner's conclusion

22. In her request for an internal review and her correspondence to the Commissioner, the complainant has not presented a case supporting a position that the Gambling Commission does hold information within scope of parts 2, 3, 6 and 7 of the request.
23. The Commissioner has considered the Gambling Commission's correspondence with the complainant and its submission to her. With regard to parts 2 and 3 of the request, the Commissioner has been presented with no reason to doubt the Gambling Commission's assertion that it does not hold a list of National Lottery terminals at 3 March 2017 [or at any other date] and that it does not hold a list of the operator/retailer ID codes associated with each of those terminals. The Gambling Commission has explained that it has no business need for this information.
24. In her request, the complainant has referred to the Commissioner's decision in FS50553684¹. In that decision, the request was for a "list of National Lottery terminals". However, and acknowledging that the decision could have been clearer, what the Commissioner instructed the Gambling Commission to disclose was the names and addresses of independent retailers where National Lottery terminals are located. She did not instruct the Gambling Commission to disclose a list of National Lottery terminals.
25. In further correspondence to the Commissioner, the Gambling Commission confirmed that it *does* hold a list of National Lottery retailer locations. However this list contains neither the detail of how many

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043304/fs_50553684.pdf

Lottery terminals are installed at that location nor a list of individual terminals at that specific location. Furthermore, the list of retailers that the Gambling Commission holds includes any site that has previously been a retailer but is not one any longer (and so would no longer have a terminal installed at that site). The Gambling Commission has advised that there is no indicator in the list of retailers that it holds as to whether that retailer is 'live' or not. It is therefore impossible to correlate the list of Lottery retailers to an accurate list of Lottery terminals. The Gambling Commission has confirmed that, as it has advised the complainant, it does not hold a list of Lottery terminals. (The distinction between National Lottery retailers and terminals is discussed further under the section 16 analysis, below.)

26. In the absence of evidence to the contrary, the Commissioner accepts the Gambling Commission's explanation and is satisfied, on the balance of probabilities, that the Gambling Commission does not hold the information requested in parts 2 and 3 of the request; that is, a list of addresses of National Lottery terminals on a specific date in March 2017 or a list of the operator/retailer ID codes relating to each terminal on that March date.
27. With regard to parts 6 and 7 of the request, the Commissioner notes that the Gambling Commission's experienced National Lottery team has worked with the National Lottery Third Licence for a number of years and is very knowledgeable about the Licence. The team has, however, also carried out searches for any relevant information in what were, in the Commissioner's view, appropriate areas of the business. That team has confirmed that the Gambling Commission does not hold the information requested in those parts.
28. Again, in the absence of evidence to the contrary, the Commissioner accepts the Gambling Commission's explanation and is satisfied, on the balance of probabilities, that it does not hold the information requested in parts 6 and 7 of the request; that is, information about a condition of the current National Lottery Licence.
29. To summarise, the Commissioner's decision is that the Gambling Commission complied with section 1(1)(a) of the FOIA when it advised the complainant that it does not hold the information that she requested in the above four parts of the request.

Section 43 – commercial interests

30. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

31. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that 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.
32. Second, 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 that is alleged must be real, actual or of substance.
33. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there 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.
34. Section 43(2) is subject to the public interest test.
35. The Gambling Commission has applied section 43(2) to parts 5 and 8 of the request. These were for information that specifies the functionality that the Independent Verification System[s] referred to in the current Licence condition 5.14(b) must possess, and the three contracts/agreements between the Gambling Commission, Camelot and Elysm, discussed in the Commissioner's decision FS50553684.
36. The Gambling Commission explained to the Commissioner that the only recorded information it holds within scope of part 5 is contained within the three agreements requested in part 8. It has provided the Commissioner with copies of the three agreements.
37. First, the Commissioner has considered whether the harm that the Gambling Commission alleges would be caused, or would be likely to be caused, by disclosing the agreements relates to any party's commercial interests?
38. In its submission, the Gambling Commission confirms that the information that has been requested relates to specific contractual documents which are not otherwise in the public domain.

39. The Gambling Commission says that the information contained in these documents includes information about the whole Lottery solution, system interfaces and processes.
40. It has gone on to say that both Schedule 1 of the Transition Contract Elsym Camelot Gambling Commission Agreement and the Transition Contract Elsym Software Supply Agreement, give very specific descriptions of the whole Lottery solution.
41. The Commissioner is satisfied that the harm envisioned relates to the appropriate interests ie other parties' commercial interests. This is because the withheld information concerns how contracted parties will deliver and manage the National Lottery.
42. The Commissioner has next considered the second criterion and whether the Gambling Commission has demonstrated that disclosing the information would, or would be likely to, prejudice any party's commercial interests.
43. In its submission, the Gambling Commission has said that damage to Camelot's or Elsym's commercial interests and ability to secure future investment, partnerships or customers would be caused through disclosing information which is not intended for public scrutiny. Disclosure would, the Gambling Commission considers, undermine the trust that it has with these organisations and could potentially impact on any future relationships that the Gambling Commission has with the provider of the National Lottery.
44. The Gambling Commission says that revealing commercially sensitive documentation about the existing contractual arrangements that are in place with Camelot and Elsym, to operate the current National Lottery, would undermine the ability of Camelot and Elsym to compete effectively and fairly in future competitions for the National Lottery licence.
45. The Gambling Commission has noted that redacted copies of these documents have previously been provided to third parties for commercial reasons (and not under the FOIA) and all recipients signed non-disclosure agreements to protect the integrity of the information. Access to these documents was limited further by granting access to these documents to only a very small number of named staff of the third party e.g. legal counsel.
46. In addition, the Gambling Commission says, disclosing the contractual documents could potentially compromise the integrity and security of the National Lottery itself. This will affect public confidence in the

National Lottery, prejudicing the commercial interests of the current and any future operator.

47. The Gambling Commission has also consulted with Camelot and Elsym to obtain their view on disclosure and it has provided the Commissioner with a copy of Camelot's view, which she has reviewed. Camelot has confirmed that it considers that substantial parts, if not all, the information in question should be withheld under section 43(2).
48. The Commissioner is satisfied that disclosing the withheld information would, or would be likely to, prejudice other parties' commercial interests, for the reasons that the Gambling Commission has given. Namely:
 - by damaging Camelot's or Elsym's ability to secure future investment, partnerships or customers
 - undermining their ability to compete effectively and fairly in future competitions for the National Lottery licence; and
 - compromising the integrity and security of the National Lottery itself by eroding the public's confidence in it, and future operators of the Lottery.
49. Finally, the Commissioner has considered the third criterion and the level of likelihood of the prejudice that the Gambling Commission has envisioned occurring. The Gambling Commission has told the Commissioner that it considers that its commercial interests and those of Camelot, Elsym and the National Lottery itself *would* be prejudiced if the requested information was to be disclosed.
50. The Commissioner does not consider that the Gambling Commission has made a compelling case that the prejudice it envisions would (definitely) occur. She does, however, accept that the likelihood of prejudice occurring meets the lower threshold of 'would be likely to' prejudice the commercial interests of the organisations currently operating the National Lottery (and perhaps future operators too). For example, there is a hypothetical chance that competitors would attempt to use the contract documents to gain a competitive advantage, by reviewing detail associated with Camelot and Elsym's current National Lottery solution.
51. In her request for an internal review and her correspondence to the Commissioner the complainant has not presented a case supporting a position that the withheld information does not engage the exemption under section 43(2) of the FOIA.

Conclusion

52. Since the three criteria have been met, the Commissioner has decided that the information within scope of parts 5 and 8 of the request engages the exemption under section 43(2) of the FOIA. This is consistent with her decisions in, for example, IC-82233-M0J5 and FS50749494 which also involved requests for contracts and section 43. She has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

53. The complainant has not presented any public interest arguments for disclosure in her request for an internal review or her correspondence to the Commissioner.
54. The Gambling Commission has acknowledged that there is a public interest in promoting its transparency and in understanding the performance and operation of the National Lottery as a vehicle for providing money to good causes.

Public interest in maintaining the exemption

55. The Gambling Commission has argued that specific details of contractual documents between the relevant parties does not contribute to the understanding of the overall performance of the National Lottery. It considers disclosing this information could potentially compromise the integrity and security of the National Lottery.
56. In the Gambling Commission's view, disclosure would harm Camelot and Elsym and their ability to compete and secure contracts. This would cause significant commercial damage to both companies and would give competitors information that they would not otherwise be able to obtain legally.
57. The licence to run the National Lottery renews periodically. The Gambling Commission considers that it is imperative that the Licence competition is run fairly and effectively and provides all potential applicants with the opportunity to compete from the same standpoint. Disclosing the requested information would prejudice the Gambling Commission's ability to run a fair competition and obtain the best outcome for good causes. It would also negatively impact on the ability of Camelot and Elsym to compete competitively.
58. The Gambling Commission has a statutory duty to maximise returns to good causes through the awarding of a licence to run the National

Lottery. Consequently, the weaker the competition the greater the risk that it does not meet that statutory duty.

59. Finally, the Gambling Commission considers that disclosing the information could discourage future licensees from freely providing information to it. This would prejudice the Gambling Commission's ability to monitor and regulate the National Lottery.

Balance of the public interest

60. The complainant may well have her own personal interest in the information she is seeking but she has not made a case for there being any wider public interest in it.
61. On the evidence presented to her, the Commissioner is satisfied that there is greater public interest in maintaining the section 43(2) exemption for the reasons the Gambling Commission has given. That is, the public interest in the National Lottery being operated securely, in future competitions for the National Lottery licence being run fairly and in the Gambling Commission being able to maximise returns to good causes by making sure that competition for the National Lottery licence is strong.

PROCEDURAL MATTERS

Section 16 – advice and assistance

62. Section 16(1) of the FOIA places a duty on a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
63. In her complaint to the Commissioner, the complainant has said that she considers that under section 16(1) of the FOIA the Gambling Commission had a duty to provide her with advice and assistance, but that

“...in drawing a distinction between “retailer” and “terminal” and relying on this distinction...”

the Gambling Commission failed to assist her when it could have done so.

64. The Commissioner understands the complainant to mean that, in her view, “retailer” and “terminal” are the same thing but that, by erroneously categorising them as different things the Gambling Commission obstructed her.

65. In the context of the complainant's request, a National Lottery "retailer" where Lottery terminals are located, and a National Lottery "terminal" from which Lottery tickets and scratch cards are sold, are distinct things.
66. The Gambling Commissioner has explained to the Commissioner that a National Lottery retailer may have multiple terminals in any given location. Whilst it is common for there only to be one terminal at a location, there are numerous scenarios where there is more than one - within large supermarket outlets for example.
67. The Commissioner is therefore satisfied that it was entirely reasonable for the Gambling Commission to draw a distinction between these two terms - they relate to separate things. And the Commissioner notes that the complainant did not raise the matter of its definition of these two terms when she requested an internal review from the Gambling Commission. As such, the Commissioner considers it was entirely reasonable for the Gambling Commission to be unaware that the complainant was dissatisfied with its approach.
68. The Commissioner has therefore decided that there was no breach of section 16(1) of the FOIA in the Gambling Commission's handling of the request.

Right of appeal

69. 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

70. 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.
71. 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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