

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 18 October 2011

**Public Authority:** London Borough of Newham  
**Address:** Newham Dockside  
1000 Dockside Road  
London  
E16 2QU

### Summary

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The complainant submitted a request to the London Borough of Newham ('the Council') for information submitted to the Council by bidders who had tendered applications for a casino license. The Council withheld this information under sections 44(1)(a) and 43(2) of the Act. The Commissioner has investigated and found that the Council was entitled to rely on section 44 to withhold the requested information in its entirety as disclosure is prohibited by a statutory bar. In light of this he has not gone on to consider the application of section 43. The Commissioner does not require the Council to take any further action.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. In 2007, the London Borough of Newham won the right from the Casino Advisory Panel to grant a large casino licence. Sixteen of these licences are to be granted across England, Wales and Scotland, and the London Borough of Newham ran the first tender competition to grant a licence.

3. The tender process for granting a licence is governed by the Gambling Act 2005. It is a two-stage process. Stage one is set out in schedule 9, paragraph 4 of the Gambling Act. This is a regulatory stage where the authority considers which of the applications should receive a provisional decision to grant by reference to the test at section 153 of the Act. The authority looks at whether the applications comply with the licensing objectives under the Gambling Act, the authority's gambling policy, and any code of practice or guidance issued by the Gambling Commission. This stage is a public process, and the application itself and any representations are placed in the public domain.
4. The second stage is a competitive bid process used where more than one bidder is successful at stage one. It is set out at schedule 9, paragraph 5 of the Gambling Act. At this stage applicants submit detailed bids and the authority selects the application which "would be likely if granted to result in the greatest benefit to the authority's area".
5. In September 2010, three applicants made it to the second stage of the process. These were Aspers, Great Eastern Quays Casino, and Apollo Genting. At stage one, Apollo Resorts and Leisure Ltd and Genting UK had submitted separate applications. However, at stage 2 Genting UK confirmed that it would not pursue its own stage 2 application but would instead pursue a joint bid with Apollo.
6. The Council awarded the casino licence to Aspers. The complainant represents Great Eastern Quays Casino, one of the other companies that submitted a stage two application for this casino licence. Both Great Eastern Quays Casino and Apollo Genting (formerly Sevco) are currently pursuing judicial reviews against the Council in connection with its decision to award the licence to Aspers.

## The Request

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7. On 25 November 2010, the complainant submitted a request to the Council for copies of all correspondence and documents between the Council and Genting, Apollo and / or Sevco regarding:
  - o "...Genting's, Apollo's or Sevco's plans respectively for the transfer of the premises licence from Apollo to Genting if the former is successful in securing it; or
  - o The joint venture agreement between Apollo and Genting"

The complainant also requested:

- That the Council confirm whether it had received the relevant non-collusion certificates and declarations from Apollo, Genting and Sevco; and
  - "all related data submitted to the LBN in connection with those parties' compliance with the Acceptance of Conditions Undertaking in relation to this issue".
8. The Council acknowledged this request on 3 December 2010, and stated that it was likely that the requested information would be exempt due to the provisions of paragraph 5.4.5 of the Code of Practice, unless Apollo consented to disclosure. The Council confirmed that it had contacted Apollo to determine if it would consent.
9. On 6 December 2010 the complainant wrote to the Council setting out some initial concerns about the Council's approach to its request for information. The Council issued a formal refusal notice on 17 December 2010. This applied the exemptions at sections 44(1)(a) and 43 to the requested information. The Council explained that it believed paragraph 5.4.5 of the code of practice provided a statutory bar to disclosure of the requested information. In relation to section 43(2), the public interest test found in favour of maintaining the exemption.
10. The complainant requested an internal review on 24 December, including detailed grounds for why it believed the exemptions did not apply. The Council provided its 'stage one' internal review on 10 January 2011. This upheld the original response. On 18 January 2011, the complainant requested a second stage review. This was provided on 31 January 2011 and again reiterated the original position.

## **The Investigation**

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### **Scope of the case**

11. On 14 February 2011 the complainant contacted the Commissioner to complain about the way its request for information had been handled.

### **Chronology**

12. The Commissioner wrote to the Council on 11 March 2011 to inform it that he had received a complaint regarding this request. The Council

provided a submission in support of its position, along with the withheld information, on 1 April 2011. The Commissioner and the Council then exchanged further correspondence about the complaint during June and July 2011.

13. During the course of the investigation, the Council located and disclosed an email sent from Genting to the Council explaining that it would not now pursue its own stage 2 bid but would instead submit a joint venture with Apollo.

## Analysis

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### Substantive Procedural Matters

#### Section 44

14. Section 44(1)(a) provides that information is exempt if disclosure is prohibited by or under any enactment. The exemption is absolute, so it is not subject to a public interest test.

15. [Schedule 9, paragraph 6\(1\) of the Gambling Act 2005](#) provides that:

“The Secretary of State may issue a code of practice about—

(a) the procedure to be followed in making the determinations required by paragraphs 4 and 5, and

(b) matters to which a licensing authority should have regard in making those determinations”

Paragraph 5.4.5 of this [code of practice](#) states that:

“A licensing authority may not, during the second stage, discuss the details of a person’s application with the other competing applicants without the person’s permission.”

16. The Council has applied section 44(1)(a) on the basis that paragraph 5.4.5 of the Code of Conduct provides a statutory bar to disclosure of the requested information. This is because the requested information relates to Apollo / Genting’s application for the casino license. The Council has confirmed that the company has refused to consent to the information being disclosed.

17. The complainant's grounds of appeal can be summarised as follows:

- The code of practice is not an "enactment" as required by section 44(1)(a), and so this exemption cannot apply;
- The prohibition on disclosure at paragraph 5.4.5 of the code of practice only applies during the second stage of the bidding process. This stage has now concluded;
- Paragraph 5.4.5 should be read in the context of paragraph 3.3, and this means that it would be appropriate to disclose the requested correspondence in the interests of fairness; and
- Genting had withdrawn its own bid so that it could join with Apollo, and so any correspondence from Genting would not be part of a stage 2 bid. Consequently paragraph 5.4.5 could not be engaged.

*Can the Code of Conduct provide a statutory bar to disclosure?*

18. The Commissioner has first considered whether the provisions of the Code of Practice can provide a statutory bar to disclosure. The complainant argues that no part of the code of practice can provide a statutory bar, because it is not part of "an enactment". The Council, however, contends that section 44(1)(a) specifies that information is exempt if prohibited "...by or under any enactment" (the Council's emphasis). The Council argues that the expression "or under" connoted a prohibition not contained in an enactment but in another instrument made under an enactment, such as the Code of Conduct.

19. The Commissioner notes that schedule 9, paragraph 6(2) of the Gambling Act provides that "a licensing authority shall comply with a code of practice under sub-paragraph (1)". He also observes that paragraph 1.3 of the Code itself states that a public authority "must" comply with its provisions. The Commissioner considers that due to paragraph 6(2), the Code is an instrument made under the Gambling Act, which is itself an enactment. Schedule 9, paragraph 6(2) makes this Code enforceable and demonstrates that it is not merely a good practice recommendation but a procedure which must be followed. The Commissioner notes that the [Gambling Act \(Commencement No. 8\) Order 2008/1326](#) brought schedule 9, paragraph 6 into force on 19 May 2008.

20. The Commissioner's conclusion is consequently that the Code of Practice has been issued in accordance with schedule 9, paragraph 6(1) and can constitute a statutory bar as a result of schedule 9, paragraph 6(2) which provides that an authority shall comply with the Code. As the Commissioner is satisfied that the code, in the particular circumstances of this case, can act as a statutory bar, he has gone on to consider whether paragraph 5.4.5 prohibits the disclosure of the information requested by the complainant.

*Does the requested information fall within the scope of paragraph 5.4.5?*

21. Paragraph 5.4.5 provides that:

"A licensing authority may not, during the second stage, discuss the details of a person's application with the other competing applicants without the person's permission"

22. The Commissioner notes that the Council is the "licensing authority" for the purposes of the casino. The second stage of the bidding process opened in September 2010 and concluded in March 2011. The complainant submitted its request on 25 November 2010, and so the Commissioner is satisfied that the request was made during the second stage. The Commissioner also notes that the complainant made this request on behalf of a company that was also bidding for this license. He is therefore satisfied that the complainant represented a "competing applicant" when making the request. Finally, he notes that Apollo / Genting has explicitly refused to give its consent to the disclosure of this information.
23. The Commissioner has reviewed the withheld information and is satisfied that it relates in its entirety to Apollo / Genting's application for the casino license. He therefore considers that by disclosing the information, the Council would breach the prohibition set out at paragraph 5.4.5. The complainant contends that certain parts of the requested information are "ancillary" to the applications, rather than part of them, and would therefore not be covered by paragraph 5.4.5. The Commissioner however considers that the prohibition on disclosure is phrased to cover all information submitted as part of an application.
24. The complainant also argues that paragraph 5.4.5 should be read in the context of the rest of the code of practice, specifically paragraph 3.3. This paragraph states:

"A licensing authority must ensure that any pre-existing contract, arrangement or other relationship they have with any person

does not affect the procedure so as to make it unfair (or appear unfair) to any applicant”.

The complainant argues that in the context of this paragraph, the Council should disclose the requested information in order to ensure that the procedure is fair. The Commissioner however does not accept that paragraph 3.3 disapplies the provisions of paragraph 5.4.5 of the Code. Whilst paragraph 3.3 states that a licensing authority should ensure that the process is not prejudiced, it does not specify that it must disclose the details of applications in order to do this. He agrees with the Council’s submission if the code allowed for various parts of the applications to be disclosed, then “the code of practice in seeking to preserve confidentiality between the applicants and the licensing authority failed to meet its own objective”.

25. The Commissioner’s decision is that paragraph 4.5.4 of the Code of Conduct provides a statutory bar to disclosure of this information under the Freedom of Information Act. He therefore finds that the Council was correct to withhold the information under section 44(1)(a).

### **Section 43**

26. As the Commissioner has concluded that the Council was correct to withhold the requested information in its entirety under the absolute exemption at section 44, he has not gone on to consider the Council’s application of section 43(2).

### **The Decision**

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27. The Commissioner’s decision is that the London Borough of Newham was correct to rely on section 44(1)(a) to withhold the requested information.

### **Steps Required**

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28. The Commissioner does not require the Council to take any further action.

## Other matters

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29. Although it does not form part of this decision notice, the Commissioner wishes to highlight the following matter.
30. The Commissioner notes that in this case the council conducted two internal reviews of its response to the complainant. The complainant had the option of pursuing the complaint throughout all three stages of the council's internal review procedure. The Commissioner's view, as set out in his guidance, is that the internal review process should be "as prompt, thorough, clear and simple as possible", and should therefore have only one stage. .



## Right of Appeal

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31. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 18<sup>th</sup> day of October 2011**

**Signed .....**

**Gerrard Tracey  
Principal Policy Advisor  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### *Section 44 - Prohibitions on disclosure.*

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).