

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2019

Public Authority: 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 qualifications of an individual employee.
2. The Commissioner's decision is that the Gambling Commissioner has correctly cited the exemption at section 40(2) of the FOIA.
3. The Commissioner does not require the public authority to take the any steps.

Background

4. The complainant made a previous complaint to the Commissioner which has been dealt with in decision notice reference FS50807162. This complaint relates to the same matter.

Request and response

5. On 5 June 2019, the complainant wrote to the public authority and requested information in the following terms:
 - i. Was this 'relevant betting specialist' employed directly by the Gambling Commission – in other words were they paid through the Gambling Commission's PAYE system?*

- ii. If not, were they paid on a self-employed basis or through another company?*
 - iii. Has this individual received payment for their 'betting specialist' services from any of the major bookmakers in the last 5 years?*
 - iv. Most importantly what qualifications if any does this individual claim to hold to enable them to describe themselves as a 'betting specialist'?*
6. The public authority responded on 20 June 2019. It provided information in response to the first three parts of the request. It refused to provide the information requested at part 4 and cited section 40(2) of the FOIA. It stated that it would be disproportionate to publicly disclose the information unless there is a strong public interest in doing so. If further argued that the individuals in question have a legitimate expectation that the information would not be unnecessarily disclosed.
7. Following an internal review the public authority wrote to the complainant on 2 July 2019 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 29 July 2019 to complain about the way his request for information had been handled.
9. He stated that he had requested the information to ensure that staff are suitably qualified to perform their roles, in particular that of the 'relevant betting specialist'.
10. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. The most common scenario is that the withheld information would identify a specific individual. However, in this case the scenario is slightly different as there is only one person employed as a betting specialist by the Gambling Commission. It explained that a basic internet search would reveal the name of that individual and consequently would be identifiable. As such it considered that the

¹ As amended by Schedule 19 Paragraph 58(3) DPA

requested information was personal data and disclosure would be a breach of the DPA.

20. In the circumstances of this case, having considered the withheld information and the explanation from the Gambling Commission, the Commissioner is satisfied that the information relates to a specific individual. The qualifications of an individual quite obviously is information that relates to, has biographical significance and has the betting specialist as its main focus. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

24. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

26. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*².

² Article 6(1) goes on to state that:-

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
28. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

29. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
30. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. In this case, the complainant believes that a bookmaker wrongfully changed the terms of an on-line bet and consequently he, and potentially many others were disadvantaged. The Commissioner considers the complainant has a legitimate interest in ensuring that users of bookmaker's on-line services are fairly treated.

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

33. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

34. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

35. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

37. In this case, although the information relates to a professional role, the individual is not in a public facing, or senior role. The information is not in the public domain and there would be no reasonable expectation that it would be disclosed.

38. The Commissioner considers that disclosing information of biographical significance such as an individual's qualifications or experience would be intrusive.
39. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
40. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
41. The Commissioner has therefore decided that the Gambling Commission was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

42. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

Pamela Clements
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