

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2023

Public Authority: Department for Digital, Culture,
Media & Sport

Address: 4th Floor
100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested certain correspondence the Department for Digital, Culture, Media & Sport received from named parties concerning contracts entered into (by the named parties) with certain betting operators.
2. The Commissioner's decision is that Department for Digital, Culture, Media & Sport wrongly relied on sections 41 (information provided in confidence) and 43(2) (commercial interests) to withhold the requested information from the complainant.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the requested information but the names of Authorised Betting Partners to be withheld.
4. The public authority 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.

Background

5. The Horserace Betting Levy Board (HBLB) is a non-departmental public body of the Department for Digital, Culture, Media and Sport. It is a statutory body established by the Betting Levy Act 1961 and is now operating in accordance with the provisions of the Betting, Gaming and Lotteries Act 1963 (as amended)¹.
6. HBLB is required to assess and collect a statutory levy from the gross profits of bets taken on British horseracing. The Levy raised £95m in 2017/18 with the majority of Levy expenditure (over 90%) applied in support of British horseracing.
7. The British Horseracing Authority (BHA) is the regulatory authority for horse racing in Great Britain.
8. The Racecourse Association Limited (RCA) is a company incorporated on 22 May 1907 with the registered office located in Ascot, Berkshire.
9. The BHA and RCA are together referred to as "Racing" in this decision notice.
10. From the late 1990s a number of bookmakers with remote (non-retail) betting operations based in Britain relocated these to certain overseas jurisdictions. Other firms set up remote platforms in such jurisdictions at the very outset of their trading. These so-called offshore moves placed the remote business out of the scope not just of the United Kingdom betting duty but the Levy, which was enforceable only on betting operations based in Britain.
11. Racing was keen to ensure that until such time as the levy system was reformed or replaced, measures could be agreed that would see contributions being made voluntary from bookmakers overseas. This led to the Authorised Betting Partner (ABP) scheme which was a voluntary scheme that aimed to reward betting operators who committed to contributing from their betting activity to fund British racing. A number

¹ <https://www.hblb.org.uk/page/1>

of such agreements were entered into with various betting businesses and these were widely publicised.²

Request and Response

12. On 18 December 2020, the complainant requested information from the Department for Digital, Culture, Media & Sport ("the public authority"), by saying as follows:

"Please can you supply me with any correspondence that was sent from 1st July 2017 to 30th June 2019 by:

1. Individual A
2. Individual B
3. Individual C
4. Correspondence signed on behalf of The BHA, ROA ,RCA or the "Racing Authority"
5. HBLB or Individual D
6. A combination of the above
7. The National Audit Office

to DCMS ministers or their staff about what are known as the Authorised Betting Partner (ABP) contracts that were entered into by members of the BHA/ROA/RCA on behalf of the HBLB".

13. On 2 March 2021, the public authority responded and refused to provide the requested information. It cited the following exemptions as its reasons for doing so:

- Sections 41 (Confidential information) and
- 43(2) (Commercial interests)

² Example, <https://www.thejockeyclub.co.uk/about-us/media-centre/press-releases/2015/10/british-racing-to-establish-authorized-betting-partners/>

Example, <https://www.britishhorseracing.com/authorized-betting-partners-sample-behind-the-scenes-experience/>

14. The complainant requested an internal review on 2 March 2021. The public authority sent him the outcome of its internal review on 14 May 2021. It upheld its original position.

Scope of the case

15. The complainant contacted the Commissioner 17 May 2021 to complain about the way his request for information had been handled.
16. During the course of the Commissioner's investigation the complainant confirmed that any names of individual authorised betting partners could be withheld. The Commissioner informed the public authority of this, however the public authority declined to alter its response to his request for information.
17. The Commissioner considers he has to determine whether the public authority's reliance on the previously mentioned exemptions, not to provide requested information, was correct.

Reasons for decision

18. The withheld information comprises of three letters as detailed below.
 - HBLB to DCMS
 - RCA to DCMS
 - BHA to DCMS
19. 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 considers that three criteria must be met:
21. 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;
22. 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 against. Furthermore, the resultant prejudice, which is alleged should be real, actual or of substance; and

23. 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. 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 submissions

24. The disclosure of the information would prejudice the commercial interests of Racing, both as a collective and for each of its constituent bodies. Racing (and each constituent body) have a commercial interest in maximising income for the sport, in maintaining good relationships with betting operators and in competing with other sports and betting products. A breakdown in relations with and/or loss of confidence from betting operators would impact Racing's future ability to generate income for the sport. This fear is not academic; it is eminently real at the current critical point in time with other key income streams significantly reduced or stopped altogether.
25. Further, disclosure of the information would damage the commercial interests of the ABPs named within it, since the ABPs were not aware of the intricacies of the commercial deals struck with their competitors. Disclosure would reveal to the world (and to the ABPs' competitors) the different terms of the ABP contracts that were entered into, which would not only damage Racing's ability to maximise income (because of the damage to relations explained above) but it would also lead to these betting operators gaining an unfair and inappropriate insight into the commercial arrangements of direct competitors. It is again to be noted that the ABP contracts never formed a part of the HBLB's (or DCMS's) affairs. The HBLB was solely a benefactor of the ABP monies because Racing chose to route the ABP monies through the Levy structure. The private contractual matter of ABP rebates (which is the subject of the letters) is unrelated to any accountability issues related to HBLB's spending of Levy funds.

The Commissioner's Analysis

26. As the complainant now agrees that the individual names of ABPs can be withheld, the harm that the public authority originally foresaw is (in the Commissioner's view) unlikely to occur. Without the names of individual ABPs being released it is difficult to comprehend how releasing the

withheld information would cause friction between individual ABPs and Racing. Similarly, with the withholding of the names, it is difficult to envisage how individual ABPs would suffer their competitors gaining an unfair and inappropriate insight into their commercial arrangements. The likelihood of commercial harm to Racing and ABPs is now, with the withholding of the names of individual ABPs, so remote as to prevent the engagement of the exception.

27. Section 41 of FOIA states that:

'(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

28. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

29. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,
- whether an unauthorised use of the information would result in detriment to the confider.

30. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Public Authority Submissions

31. The public authority maintains that the withheld information was explicitly provided in confidence and to release it would constitute an actionable breach of confidence.

32. It states that the letters were provided to it by the senders on a private and confidential basis, under both express and implied obligations of confidence. The letters being expressly marked "Private & Confidential". It is separately clear from the content of the letters, that the information therein was shared under an implied obligation of confidence given the sensitivity of the issues discussed within them.
33. Disclosure of the letters would not only breach the obligations of confidence the public authority owes to the senders, but would also put them (i.e. the senders) in breach of the confidentiality provisions of the contracts entered into with ABPs in 2016 as the letters reveal information which falls within the scope of those confidentiality provisions.
34. The breaches of confidence, which would occur if the letters were disclosed under FOIA, would be of detriment to Racing by damaging Racing's and the ABPs' commercial interests. This would occur because Racing would not be seen to be a trusted counterparty in maintaining the confidentiality of information that has been properly agreed to be confidential. Disclosure would also have the potential to undermine future negotiations with betting operators at a critical time for the future funding model for the sport.

The Commissioner's Analysis

Was the information from a third party?

35. The Commissioner notes that the withheld information constitutes letters to the public authority from third parties, he is therefore satisfied that this limb of the test for confidentiality is met.

Does the information have the necessary quality of confidence?

36. The Commissioner notes that the letters are headed "Private and Confidential" or given a classification of "confidential". This is clear evidence for the Commissioner, that the senders of the letters considered the letters were being sent in "confidence". Further, the contents of the letters clearly indicate that the senders considered they were imparting confidential information to the letter's recipient. Accordingly because of these factors the Commissioner is satisfied the information has the necessary quality of confidence.

Whether an unauthorised use of the information would result in detriment to the confider.

37. As stated above, the complainant no longer seeks the names of the individual ABP's. Accordingly it is highly unlikely that an ABP, who has not been identified in any released information, could successfully bring

an action for breach of confidence. It not being clear how released information could detriment an unidentified ABP.

38. The Commissioner is similarly not persuaded that releasing the information, without the names of ABPs, could realistically see Racing successfully pursue a claim for breach of confidence. As noted above the creation and existence of the contracts, between Racing and ABPs were widely publicised at the time by Racing. The public authority has not specified what information contained in the letters is not in the public domain. The claim that releasing the information would give rise to a successful claim for a breach of confidence is an unpersuasive speculative one in the Commissioner's view. The assertions lack sufficient weight to persuade the Commissioner that a tangible broadly quantifiable detriment will occur. Having not been persuaded that an actionable detriment would occur, the Commissioner finds the exemption not to be engaged.

Conclusion

39. Having found that the public authority could not rely on sections 41 and 43 to withhold the requested information, the Commissioner orders that the withheld information (but not the names of any ABPs) be released to the complainant within 35 calendar days of the date of this decision notice.

Right of appeal

40. 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

41. 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.
42. 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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