

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 October 2022

**Public Authority:** Financial Conduct Authority  
**Address:** 12 Endeavour Square  
London  
E20 1JN

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about Football Index. The Financial Conduct Authority ("the FCA") withheld the requested information and relied variously on sections 31 (law enforcement), 42 (Legal Professional Privilege) and 44 (statutory prohibition) of FOIA to withhold the requested information.
2. The Commissioner's decision is that the FCA is entitled to rely on section 44 to withhold some of the requested information. Of the remaining information, some engages section 42 of FOIA and, where it does, the balance of the public interest favours maintaining the exemption. The information to which neither of those exemptions applies engages section 31 of FOIA and the balance of the public interest favours maintaining that exemption too.
3. The Commissioner does not require further steps.

#### **Background**

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4. BetIndex Ltd (which traded as Football Index) was marketed as a gambling product. Whilst various different options were offered, in broad terms, punters were able to buy notional "shares" in a particular football player using real money. Football players who performed well would see the value of their "shares" rise, whereas those who performed poorly would see a fall. Punters could also receive "dividend" payments based on the performance of the players whose "shares" they held.

5. In March 2021, BetIndex Ltd slashed the dividends it would pay out per share to less than a fifth of their previous value – this was partly due to the suspension of football matches due to the pandemic. This caused the “portfolios” of punters (who had purchased shares based on anticipation of the previous dividend payments) to plunge in value by between 50% and 90%. On 11 March 2021, BetIndex Ltd suspended trading on its platforms. Later the same day the Gambling Commission suspended BetIndex Ltd’s gambling licence and the company went into administration.
6. On 2 June 2021, the Department for Digital, Culture, Media and Sport appointed Mr Malcom Sheehan QC to carry out a review of BetIndex Ltd’s regulation – including the interactions between the Gambling Commission and the FCA. The Sheehan Report noted that the level of effective co-operation between the two regulators over the regulation of BetIndex Ltd had been “clearly insufficient.” The Report found that the FCA had not given sufficient priority to determining which regulator should be regulating which area of BetIndex Ltd’s trading and that:  
  
“Instead a regulatory impasse was allowed to develop and continue over far too long a period.”<sup>1</sup>

## **Request and response**

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7. On 16 March 2021 the complainant requested information of the following description:  
  
“Information requested: All information held on the financial conduct of BetIndex Limited trading as Football Index.”
8. On 16 April 2021, the FCA responded. It refused to confirm or deny that it held the requested information. It relied upon section 31, section 43 and section 44 of FOIA in order to do so.
9. The complainant requested an internal review on 17 April 2021. The FCA sent the outcome of its internal review on 7 September 2021. It revised its position.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1017268/Report\\_of\\_the\\_Independent\\_Review\\_of\\_the\\_Regulation\\_of\\_BetIndex\\_Limited\\_Final\\_version\\_130921\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017268/Report_of_the_Independent_Review_of_the_Regulation_of_BetIndex_Limited_Final_version_130921_.pdf)

10. Although the FCA did not explicitly state that it no longer wished to neither confirm nor deny holding any information, it now cited a range of exemptions upon which it wished to rely to withhold information falling within the scope of the request. These exemptions were sections 31, 40(2), 42 and 44 of FOIA.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 7 September 2021 to complain about the way his request for information had been handled.
12. As section 44 is an absolute exemption, the Commissioner intends to look at that exemption first. As section 42 is the qualified exemption considered to have the strongest inbuilt public interest in favour of withholding the information, the Commissioner will look at that next. Finally, he will consider whether the remaining information engages section 31. If any information falls to be disclosed, the Commissioner will also consider whether the FCA is entitled to rely on section 40(2) of FOIA to withhold the names of staff members.

### **Reasons for decision**

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13. Section 44(1) of the FOIA states that information will be exempt from disclosure under the FOIA if its disclosure would otherwise be prohibited by another piece of legislation.
14. A variety of pieces of legislation can act as statutory prohibitions on disclosure. The task for the Commissioner in determining whether section 44 has been applied correctly is to:
  - a) Ascertain whether the identified legislation is capable of acting as a statutory prohibition on disclosure of particular classes of information
  - b) Determine whether, on the facts of the case, the withheld information falls within such a class
  - c) Examine whether there are any lawful gateways to disclosure that would allow the information to be disclosed.
15. The FCA argued, in its initial response, that a portion of the information falling within the scope of the request would fall within the definition of "confidential information" for the purposes of the Financial Services and Markets Act 2000 (FSMA). As disclosure of confidential information, by an FCA employee, would be a criminal offence under FSMA, the FCA

argued that there was a statutory bar on disclosure of the information and thus section 44 of the FOIA would be engaged.

16. "Confidential information" in this context has a precise legal meaning that is set out in section 348 of the FSMA, which states that:
  - (1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—
    - (a) the person from whom the primary recipient obtained the information; and
    - (b) if different, the person to whom it relates.
  - (2) In this Part "confidential information" means information which—
    - (a) relates to the business or other affairs of any person;
    - (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the FCA, the PRA or the Secretary of State under any provision made by or under this Act; and
    - (c) is not prevented from being confidential information by subsection (4).
  - (3) It is immaterial for the purposes of subsection (2) whether or not the information was received—
    - (a) by virtue of a requirement to provide it imposed by or under this Act;
    - (b) for other purposes as well as purposes mentioned in that subsection.
  - (4) Information is not confidential information if—
    - (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
    - (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
17. Section 352(1) of the FSMA states that:

A person who discloses information in contravention of section 348 or 350(5) is guilty of an offence.

18. The Commissioner is satisfied that section 348 of the FSMA is capable of acting as a statutory prohibition on disclosure for confidential information.
19. The Commissioner is also satisfied that the information to which the FCA has applied section 44 of FOIA falls within the definition of "confidential information" set out in section 348 of FOIA.
20. In this case, the Commissioner did not seek original copies of the information which was covered entirely by section 44, but the FCA did provide a schedule of the material it had sought to apply the exemption to, including a summary of each item. Based on this schedule, the Commissioner is satisfied that each of the items in question must constitute "confidential information" as, by definition, it relates to the affairs of BetIndex Ltd and would have been obtained by the FCA in its regulatory capacity (ie. in determining whether the company should be subject to FCA regulation). The Commissioner also notes that some of the correspondence might not meet the definition of "confidential information" itself, but would contain "confidential information" which, once removed, would render the remaining information incomprehensible.
21. The information was not, at the time of the request, in the public domain and, because of the wording of the request, it would not be possible to redact the information in such a way as to break the connection to BetIndex.
22. The Commissioner has considered the various gateways to disclosure set out in sections 349, 350 and 351A of the FSMA. None apply on the facts of this case.
23. The Commissioner is therefore satisfied that disclosure of the withheld information that the FCA has identified would be prohibited by the FSMA. It follows that section 44 of FOIA is engaged in respect of this information.

## **Section 42 – legal professional privilege**

24. Some of the information within the correspondence provided, to the Commissioner, by the FCA, engages legal professional privilege. This is because it either is correspondence to or from the FCA's in-house lawyers for the purpose of seeking legal advice or because it contains information drawn from such correspondence.

25. The Commissioner notes that some of the correspondence between the FCA and the Gambling Commission does contain references to the legal advice the FCA has received. Given that this correspondence was intended to be confidential correspondence between the two regulators, the Commissioner does not consider that the FCA has waived privilege. Therefore he is satisfied that section 42 of FOIA applies.

### **Public interest test**

26. Previous caselaw has emphasised the very strong inherent public interest in preserving legal professional privilege as a cornerstone of the justice system. Whilst it remains a qualified exemption, there must be equally weighty public interest reasons in favour of disclosure for the exemption to be overturned. Such instances are likely to be rare.
27. Had the FCA been responsible for regulating Football Index, punters may have had some recourse to the Financial Services Compensation Scheme. Whether Football Index should have been regulated by the FCA is not for the Commissioner to decide – but he is not aware that its promoters ever claimed that they were FCA-regulated. Punters would therefore have had no reasonable expectation that the Financial Services Compensation Scheme or the FCA would protect them.
28. The Commissioner considers that those who choose to stake their money either in bets or investments know (or should know) that there is a chance that they will lose some or even all of the money they stake.
29. The Commissioner does recognise however that, when BetIndex suspended trading, it did freeze the accounts of players – meaning that punters did not have access to funds that they had made available for play, but which had not yet been staked. Although punters were eventually able to recover most of this money, the Commissioner recognises that this may have caused financial hardship for some.
30. However, the Commissioner does not consider that this represents a compelling case for disclosure of the withheld information. Whilst Mr Sheehan had not been appointed when the request was originally responded to, contemporary news reports had indicated that an independent investigation was to be carried out. An independent investigator can seek documents on a confidential basis that would not normally be released into the public domain.
31. The Commissioner is therefore satisfied that the balance of the public interest lies in favour of allowing the FCA to seek and receive high quality legal advice on matters of public controversy. The public interest in learning lessons from the collapse of BetIndex is met by allowing an

independent investigation to have access to relevant documents and records in order to produce a final report.

32. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining this exemption.

### **Section 31 – law enforcement**

33. The Commissioner is satisfied that this exemption applies as regulators occasionally need a safe space in which to discuss confidential and sensitive matters – without fear that individual opinions may eventually be placed into the public domain.
34. This is particularly the case where, as with Football Index, the regulated activity did not fall within traditional categories – making it unclear which activities should be regulated and by whom. Regulators need to be able to have frank discussions and to share intelligence to ensure that activities are being adequately regulated.
35. Finally, the Commissioner has considered the balance of the public interest.
36. The public interest in transparency and accountability is the same as in respect of section 42. Weighed against that is the importance of allowing regulators to discuss sensitive matters and to agree on how certain types of activities should be regulated.
37. In this case, the Commissioner also notes that, once that material exempt under either section 44 or section 42 is removed, the remaining information presents only a partial picture of the conversation. He is therefore satisfied that the public interest in disclosing this information is weaker than the public interest in maintaining the exemption.
38. As all the information is otherwise exempt, the Commissioner has not gone on to consider section 40(2) of FOIA.

## Right of appeal

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39. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**