

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2023

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant requested information relating to Football Index. The Serious Fraud Office (SFO) refused to confirm or deny whether it held information falling within the scope of the request, citing section 30(3) (investigations and proceedings) by virtue of 30(1)(b) and section 31(3) (law enforcement) of FOIA.
2. The Commissioner's decision is that the SFO is entitled to rely on section 30(3) of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. The Commissioner acknowledges that the earlier decision notice, referred to by the SFO in this case, states, by way of background:

"BetIndex Ltd (which traded as Football Index) was marketed as a gambling product.

[..]

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".

Request and response

5. On 7 June 2023, the complainant wrote to the SFO and requested information in the following terms:

“On what date was a concern first raised to the SFO about Football Index?

Have the SFO been contacted by any of the following organisations in relation to Football Index: Gambling Commission / Financial Conduct Authority / Insolvency Service / Company’s administrators (Begbies Traynor)

Have the SFO carried out a preliminary investigation into the circumstances of Football Index in order to establish whether there are reasonable grounds for a full investigation?

Have the SFO specifically assessed whether Football Index was a Ponzi scheme?

What is the current status of investigation into Football Index?”

6. As a preamble to the request, the complainant told the SFO:

“My request is the same as the one made below (on 26 January 2023) where the SFO continued to [neither] confirm or deny whether information is held. Sufficient time has now passed for the SFO to be able to supply a full response to my request”.

7. The SFO responded on 5 July 2023. It neither confirmed nor denied holding the requested information, citing section 30(3) (investigations and proceedings) of FOIA, by virtue of 30(1)(b).
8. Following an internal review the SFO wrote to the complainant on 31 July 2023, citing sections 30(3) and 31(3) (law enforcement).
9. In its correspondence, the SFO acknowledged the similar requests made by the complainant on 30 May 2022 and 26 January 2023.
10. It also referred to a decision notice issued by the Commissioner in case IC-182333-M1L5. The request for information in that case, dated 30 May 2022, was made by the same complainant and also related to Football Index. In that case, the Commissioner found that the SFO correctly relied on section 31(3) of FOIA to refuse to confirm or deny whether it held information falling within the scope of the request.

Scope of the case

11. The complainant disputes the SFO's refusal to confirm or deny whether it holds the requested information. They told the Commissioner that they consider that sufficient time has now elapsed for the SFO to provide the requested information.
12. However, when considering a 'neither confirm nor deny' response, the single issue the Commissioner must determine is whether, at the time of the request, the public authority was correct to neither confirm nor deny whether it holds the requested information.
13. During the course of the Commissioner's investigation, the SFO told the Commissioner that it considers that the request in this case "is essentially identical" to the request made by the complainant in May 2022 and the same as the request made by the complainant in January 2023.
14. During his investigation, the SFO clarified its position with both the Commissioner and the complainant, confirming its application of sections 30(3) and 31(3) of FOIA in this case.
15. Mindful of the history of this request, the SFO told the Commissioner:

"As has been the case at each stage of handling this request, the SFO cannot see any reason that current circumstances would necessitate the publication of any investigation, or lack thereof, into Football Index".
16. The Commissioner has first considered the SFO's application of section 30(3). Should section 30(3) not apply to all the requested information, the Commissioner will go on to consider the application of section 31(3).
17. In light of the above, this notice considers whether the SFO is entitled to neither confirm nor deny holding the requested information. The Commissioner has not considered whether the information – if held – should be disclosed.

Reasons for decision

Section 30 investigations and proceedings

18. Under section 30(3) of FOIA, the duty to confirm or deny does not arise in relation to information which, if held, would be exempt by virtue of one of the subsections of section 30(1) of FOIA.

19. Section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings.

20. In this case, the SFO considers section 30(3) applies by virtue of section 30(1)(b):

“Information held by a public authority is exempt if it has at any time been held by the authority for the purpose of –

[...]

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct”.

21. The SFO told the complainant:

“It is clear that your questions relate to information that you believe may be held by the SFO for the purposes of criminal investigations, as set out in section 30(1)(b), ...”.

22. It told the Commissioner it considered that the requested information may, or may not, have been held for the purposes of an investigation which may lead to a decision to institute criminal proceedings.

23. The Commissioner accepts that the SFO is a non-ministerial department with a statutory remit to investigate and prosecute offences of serious or complex fraud.

24. Mindful of the wording of the request, the Commissioner is satisfied that, if the SFO does hold any information relevant to the request, it would do so for the purposes of an investigation.

25. The information would therefore be exempt by virtue of section 30(1)(b) of FOIA, and it follows that section 30(3) of FOIA is engaged.

Public interest test

26. Section 30 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 30 is engaged, confirmation or denial must still be provided unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.

27. In accordance with his guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect. In broad terms, the

section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.

28. In accordance with the Upper Tribunal's decision in *Montague*¹, the Commissioner accepts that the public interest balance must be assessed on the basis of how matters stood at the time of an authority's decision on a request. That is, at the 20 working days limit. This is the time when an authority is required to respond in accordance with the requirements and statutory timeframes in Part I of FOIA.

Public interest arguments in favour of confirming or denying

29. The Commissioner accepts that the complainant considers that the passage of time is relevant to the consideration of the public interest test. However, they did not put forward any specific arguments in support of that view.
30. In the circumstances of this case, the SFO recognised the interest of the large number of individuals, who have lost money, in knowing whether any action is being taken to investigate the collapse of Football Index.
31. The SFO also recognised that there is a general public interest in publicising its work so that the public knows that serious fraud, bribery and corruption are being investigated and prosecuted effectively and so that the public can be reassured about the general conduct of the SFO and how public money is spent.
32. It explained that it takes steps to meet this interest by publishing casework information on its website where appropriate.
33. In support of its position, the SFO told the Commissioner that, in accordance with its policy on making information about its cases public, it aims to provide as much information as possible without compromising its law enforcement work, causing avoidable reputational

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https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf

damage or harm to individuals or businesses under investigation or prejudicing the right of defendants to a fair trial.

Public interest arguments against confirming or denying whether the information is held

34. Arguing in favour of maintaining the exemption, the SFO told the complainant that it is in the public interest to safeguard the investigatory process and that investigating bodies should be afforded the space to determine the course of any investigation. It argued that to confirm or deny whether the requested information is held (if held) would be likely to prejudice the SFO's conduct of any criminal investigation/ability to tackle and prevent serious crime. It argued that this would not be in the public interest.
35. It also argued that the right of access to information should not undermine the investigation and prosecution of criminal matters. While it recognised that there may sometimes be a large number of people interested in knowing whether there is an investigation into a particular matter, it told the Commissioner there is also a strong public interest in allowing the SFO to publish cases following its own internal publication procedures "rather than publicising cases following FOIA 2000 requests".
36. In that respect, it said that, in the case of the SFO, FOI requests may be used to determine whether investigations are focussing on a certain type of fraud and not another. It argued that deviating from existing procedures would not be in the public interest.

Balance of the public interest

37. The purpose of section 30 is to preserve the ability of applicable public authorities to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the act of confirming or denying whether the requested information is held could have a harmful impact on the ability of the public authority to carry out effective investigations.
38. This does not mean that public authorities should use a NCND response in a blanket fashion. They should base their decision on the circumstances of the particular case with regard to the nature of the information requested and with appropriate consideration given to the public interest test. Clearly, it is not in the public interest to jeopardise the ability of a public authority to investigate crime effectively.
39. In considering the balance of the public interest in this case, the Commissioner recognises that there is a significant public interest in the need to prevent disclosure (by way of confirmation or denial) that would prejudice either a particular investigation or set of proceedings, or the

investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings. This goes to the heart of what the section 30 exemption is designed to protect.

40. The Commissioner also considers that significant weight has to be given to the need to protect the SFO's ability to adopt a consistent approach when responding to similar requests in the future.
41. The Commissioner recognises that confirmation or denial in relation to an investigation might generally be harmful to the SFO's ability to manage its investigations effectively. He accepts that it has the potential to undermine its present and future investigations and therefore hinder its ability to conduct its statutory functions, which would not be in the public interest.
42. However, it needs to be borne in mind that section 30 is not an absolute exemption and there will be occasions where the public interest overrides any inherent harm in this exemption; this goes, too, for the NCND principle.
43. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is the public interest in the SFO being able to effectively carry out its function of conducting investigations into economic crime cases.
44. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of confirmation or denial do not equal or outweigh those in favour of maintaining the exemption. Accordingly, the Commissioner is satisfied that the SFO is entitled to rely on section 30(3) of FOIA.

Other exemptions

45. In light of his decision above, the Commissioner has not found it necessary to consider the SFO's application of section 31(3) to the same information.

Right of appeal

46. 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

47. 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.
48. 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

Michael Lea
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