



Neutral Citation Number: [2024] UKFTT 536 (GRC)

Case Reference: EA/2023/0518

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard by Cloud Video Platform
Heard on: 31 May 2024
Decision given on: 25 June 2024**

Before

**TRIBUNAL JUDGE HEALD
TRIBUNAL MEMBER COSGRAVE
TRIBUNAL MEMBER YATES**

Between

ANDREW CHALLINOR

and

**(1) THE INFORMATION COMMISSIONER
(2) THE SERIOUS FRAUD OFFICE**

Appellant

Respondents

Representation:

The Appellant: Mr Challinor represented himself

The 1st Respondent was not represented and did not attend

For the 2nd Respondent: Hollie Higgins of Counsel

Decision: The Appeal is Dismissed

REASONS

Introduction

1. This Decision relates to an Appeal brought by the Appellant, Mr Challinor, pursuant to section 57 Freedom of Information Act 2000 ("FOIA"). It is in respect of a Decision

Notice (“DN”) issued by the Information Commissioner (“the IC”) on 23 November 2023. It concerns a request for information (“the Request”) made to the Serious Fraud Office (“the SFO”) regarding BetIndex Limited (“BetIndex”).

2. References to page numbers in this Decision are to an open bundle (“the Bundle”) of 484 pdf pages provided for the Appeal.
3. Mr Challinor, Counsel for the SFO and the SFO’s witnesses are thanked for their attendance at the Appeal. The IC was not represented and did not attend.
4. What follows is a summary of the submissions, evidence and our view of the law. It does not seek provide every step of our reasoning.

Background summary

5. There is a considerable amount of available information about BetIndex and the process of its insolvency can be seen in decisions of the Royal Court of Jersey and in the decision of Vos J in the High Court in *Re Hyde and Others [2021] EWHC 1542 (Ch)*.
6. BetIndex was incorporated in Jersey. It traded as Football Index. It was a sports betting platform which launched in 2015 with an operating licence from the Gambling Commission. On 11 March 2021 the Gambling Commission suspended its gambling licence and BetIndex suspended its trading. After a period in Administration it was wound up with Joint Liquidators appointed on 5 November 2021.
7. There was (and remains) considerable public interest about BetIndex. Specifically concern has been raised about the ability of those with funds held by it to recover them and more generally it raised questions about on-line gambling and the regulatory response to such platforms. Mr Challinor in his Reply (73) said that Football Index was a:-

“novel internet-enabled (including mobile phone application-enabled) trading platform that allowed consumers to buy and sell notional shares in professional football players, playing in the major European football leagues. The value of shares increased or decreased on the Football Index market based upon share demand and supply algorithms determined by the operator”

8. He told us that in his view, if one includes families, the collapse of BetIndex will have directly harmed many thousands of people both financially and socially. He gave us his estimate that it will have caused losses in excess of £124m (73) and that some consumers had individual losses of over £100,000. He drew our attention to a victim impact statement exhibited by him in the Bundle (390) which described the very difficult impact the collapse of BetIndex has had on that person.
9. In his witness statement and at the Appeal he said that he believed “on substantial grounds” that BetIndex was a highly dangerous ponzi scheme (92). In his view, there were warning signs about BetIndex to which the authorities should have reacted before its collapse. As an example he referred to (89) a market update document

dated 16 March 2022 in which the annual dividend yield for BetIndex for February 2019 – January 2022 was calculated at 11.77% at a time when the Bank of England rate was at 0.75%.

10. We have no doubt that many people lost considerable amounts of money from being involved with BetIndex and this will have caused great distress.

The SFO

11. The SFO is a non ministerial government department. It was created by the Criminal Justice Act 1987. It describes its role, as being “...a specialist prosecuting authority tackling top level serious or complex fraud, bribery and corruption.” In its Response (31-32) the SFO said that:-

“The SFO receives many reports of suspected criminality, but significantly there is no legal obligation upon DSFO to investigate any specific matter. Instead DSFO has a broad discretion to choose which reports should be investigated and which should not, provided of course they appear to involve serious or complex fraud...”

As a result of the sheer number of reports, it is inevitable that most will never lead to the SFO opening a formal criminal investigation. This might be because: whilst there is prima facie evidence of criminality, the offending behaviour does not constitute serious or complex fraud and/or the circumstances of the offending do not fall within the criteria for the SFO to take on the case as set out in Statement of Principle; or because no criminality has in fact occurred. To ensure the most efficient use of its finite resources, it is therefore necessary for the SFO to have a pre-investigation stage which involves receiving, gathering and reviewing information about reports in order to decide which should be put before DSFO so that he can decide whether they should be progressed to a full investigation. This work is conducted by the SFO’s Intelligence Division and is a vital stage in the SFO’s investigation process.

12. In a witness statement made by Samuel Wright of the SFO he said (379) that the SFO “takes on a handful of investigations every year that meet the Director’s Statement of Principle (“DSOP”).” He exhibited the DSOP as SW1 (387). In a witness statement made by Chloe Wootton of the SFO she set out (373) a number of ways in which the SFO is held to account. She referred to the statutory obligation to report to Parliament, the giving of oral evidence to Select Committees in Parliament, the ability of Members of Parliament to ask questions of the AG and the provision of performance statistics. We also noted that:-

(a) the SFO’s accounts are audited by the National Audit Office

(b) complaints from victims of crime about the SFO can be made to the Parliamentary and Health Service Ombudsman.

(c) HM Crown Prosecution Service Inspectorate (“HMCPPI”) has a statutory duty to inspect the operation of the SFO (as well as the CPS) by section 3A The Crown Prosecution Service Inspectorate Act 2000 and does so pursuant to a published protocol dated 29 January 2020 entered into between the Law Officers (the AG and Solicitor General) and the Chief Inspector of HMCPPI. Para 7 of this protocol

provides that *“The independence of HMCPsi in the exercise of its inspection functions is of fundamental importance.”* The Protocol also states that the purpose of HMCPsi reports is for example to *“provide assurance to Parliament and the public about the operation of public prosecution organisations.”*

In the Bundle (94- 248) we were provided with a lengthy and detailed in depth follow up report of May 2023 prepared by HMCPsi on the SFO from which we noted the type and level of scrutiny undertaken and criticism and challenges directed to the SFO including for example at 1.13 (102) and the statement at para 1.2 (100) that:-

“1.2. The SFO has a mixed performance record. There have been some high-profile case failures, including the recent G4S, Serco and Unaoil cases. But the SFO has also enjoyed a number of major successes.”

(d) the SFO is subject to scrutiny in the Courts and Tribunals including in this Appeal

Entitlement to Information

13. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1)(a) FOIA) and if that is the case to be provided with that information (section 1(1)(b) FOIA).
14. These entitlements are subject to exemptions which can be absolute by section 2(2)(a) FOIA or qualified and subject to the public interest balancing test (“PIBT”) set out in section 2(2)(b) FOIA which is that *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*

Role of the Tribunal

15. The Tribunal exercises a *“full merits appellate jurisdiction”* (IC v Malnick and ACOBA [2018] UKUT 72) and its role is set out in section 58 FOIA. This provides that:-
 - (1) *If on an appeal under section 57 the Tribunal considers –*
 - (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
 - (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based*

Request, Response and Review

16. Mr Challinor confirmed that the wording of his Request was:-

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

2 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 (Bebbies Traynor)

3 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?

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

5 What is the current status of investigation into Football Index?"

17. The SFO responded on 5 July 2023 (457). It indicated that if it had any relevant information then it would be exempt by section 30(1)(b) FOIA and by section 30(3) FOIA it was entitled to provide a neither confirm nor deny ("NCND") response. It also set the SFO's position on the PIBT (458). The SFO maintained its position follow an internal review (459) and also referred to sections 30(3) and 31(3) FOIA.
18. Counsel for the SFO confirmed that due to the exemption(s) the SFO relied upon, they had not taken issue with the "yes/no" parts of the Request and the exemptions relied upon were those found at sections 30(1)(b) with 30(3) and section 31 with 31(3).

The Complaint (462) and Decision Notice ("DN")(1-8)

19. On 31 July 2023 Mr Challinor complained to the IC. He said that the information requested should be provided and that "*Sufficient time has now elapsed for the public authority to provide the information.*" On 23 November 2023 the IC issued the DN with the conclusion that the SFO was entitled to rely on section 30(3) FOIA and that as regards the PIBT (7) "*...the factors in favour of confirmation or denial do not equal or outweigh those in favour of maintaining the exemption.*"

The Appeal (9)"

20. On 29 November 2023 Mr Challinor issued his Notice of Appeal. The outcome he sought was (13) "*...the disclosure of the withheld information.*" The Appeal was supported by Grounds of Appeal ("the GoA"). The parties' positions were then set out in:-

the IC Response of 29 January 2024 (20-27)

Mr Challinor's Reply to the IC of 10 February 2024 (72-79)

the SFO's Response of 5 February 2024 (28-40)

Mr Challinor's Reply to the SFO of 18 April 2024 (388-398)

21. We were assisted by the SFO's open submissions of the 8 April 2024 (348 - 365) and the authorities bundle. We were also assisted by the information provided by Mr Challinor during the Appeal and after the Appeal namely his notes, a speech by Sara Lawson KC and a copy of the questions he asked the SFO's witnesses.
22. The Bundle contained (92-93) a statement from Mr Challinor, the Appellant. Two statements were also filed by the SFO from (1) Chloe Wootton who has worked at the

SFO since 2021 (367- 377) and (2) Samuel Wright who has worked at the SFO since July 2013 (378 -387). Both gave evidence at the Appeal.

23. We also had a closed bundle provided pursuant to rule 14(1) 2009 Rules and held a short closed hearing with Counsel for the SFO. We reviewed the closed bundle and were satisfied that the rule 14 Direction had been appropriate.

Gist

24. Counsel for the SFO provided a gist of the closed material and closed hearing for the Tribunal and parties (*Barrett v The Information Commissioner & Financial Ombudsman Service [2024] UKUT 107 (AAC) (20 April 2024)*). A copy is attached to this Decision. A copy was provided to Mr Challinor and the Tribunal had the opportunity to consider his comments on it dated 21 June 2024 together with information from the Jersey Gambling Commission provided by him.

Relevant Law

25. Relevant parts of Section 30 (1)-(3) FOIA provide as follows:-

(1)Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes 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..

(3)The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

26. The relevant part of Section 31(1) FOIA says:-

(1)Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice
(a)the prevention or detection of crime,
(b)the apprehension or prosecution of offenders,
(c)the administration of justice,

27. Section 31(3) FOIA provides that:-

(3)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

28. The exemptions claimed are subject to the PIBT which is determined as at 5 July 2023 (*Montague v ICO and Department for Business and Trade [2022] UKUT 104 (AAC)*).

29. In addition for example to *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560 (para 149)* and *Christopher Martin Hogan and Oxford City Council v the Information*

Commissioner EA/2005/0026&0030 we were referred to authorities including these relating to having a consistent NCND policy and setting a precedent such as:-

- *Hensley v IC, Chief Constable of Northamptonshire, IT, 10 April 2006:-*
- *Maurizi v IC, CPS (EA/2017/0041):-*
- *Manzarpour, R (On the Application Of) v Secretary of State for the Home Department [2014] EWHC 1086 (Admin) (10 April 2014) in which it was held:-*

“10...It is plain that the UK Government is entitled, in the exercise of prerogative or common law powers, to have a blanket policy... and the justification for the policy is summarised in the Parliamentary Answer. If an affirmative answer is given to such a question, then the opportunity is being given to a person whose extradition has been requested by a friendly state, to evade and frustrate that extradition request, in breach of the UK Government's international obligations. Unless the same answer – neither confirm nor deny (NCND) - is given in every case then an inference will inevitably be drawn by the questioner in a given case from a refusal to answer.”

Is the exemption engaged?

30. The parties agreed that the SFO was entitled to deploy the exemption(s) claimed. We agree. The issue between the parties is therefore whether the PIBT (judged at 5 July 2023) favours disclosure of the information requested or maintenance of the exemption(s) claimed.

The PIBT

31. The IC's submissions on the PIBT are mainly found in the DN from para 29-44. The SFO's position is in its Response to the Request (458) and Response to the Appeal from para 39 (37) and in the 2 witness statements. Points were highlighted by Counsel in the open submissions and at the Appeal (348). Mr Challinor's position can be seen in the GoA (16-19) and his Reply to the IC (72-29) and his Reply to the SFO (388-398). We also had regard to his witness statement and what he told us at the Appeal (which we also saw in his notes).
32. A number of reasons have been put forward as to why the public interest favours disclosure. These include:-
 - (a) to allow there to be more information about what the SFO does and how it carries out its investigatory and law enforcement role
 - (b) the public interest in the SFO being held to account and subject to scrutiny about what it does leading to potentially the reassurance of the public or alternatively evidence based concern about its performance and thus appropriate levels of challenge
 - (c) the public interest in understanding the SFO's role in tackling crime and the types of criminal threats faced by the UK and what is being done to oppose them

(d) the public interest in knowing how effective the SFO is at performing its roles and how it spends its budget

(e) the public interest in the high profile collapse of BetIndex and to satisfy the understandable desire of the public generally (and the many caught up in it more particularly) to understand the SFO's role in what happened

(f) the public interest is knowing whether the BetIndex collapse could and should have been prevented and if it could be prevented in the future

(g) as a response to the evidence of the harm the collapse has caused to so many people

(h) because higher levels of publicity might act as a deterrent which Mr Challinor says is (396) *"to reduce economic crime and social harm (including potential suicides) in the area of novel internet-enabled consumer trading platforms trading virtual assets...so reducing future resource demands on the SFO, justice system and social support services in the area of consumer trading of virtual assets"*.

(i) because publicity would *"increase the probability that relevant evidence held by the extensive former Football Index consumer base is retained."* (396)

(j) to prevent the use of NCND *"to hide embedded operational inefficiency and ineffectiveness."*

(k) as a way to provide *"transparency into the effectiveness or otherwise inter-agency working in the area of economic crime, including with, but not limited to, Gambling Commission and Financial Conduct Authority"*

(l) *"to promote public confidence in the SFO and justice system in the area of potential internet economic crime and thus reduce public dis-engagement with that system."*

(m) *"to promote public confidence in information rights systems in the area of potential economic crime and thus reduce public dis-engagement with those information rights systems occurring through systematic use of NCND responses ("stonewalling")"*.

33. Mr Challinor set out 5 *"magnifying factors"* at para 46 of his Reply to the SFO (397) he said:-

(A) *The victims of the collapse of Football Index (and their dependent family members) are a large, unconnected financially distressed group that have suffered substantial trauma and have less access to justice systems.*

(B) *In May 2023, HM Crown Prosecution Service Inspectorate found "There remains a lot of work {for the SFO} to do to achieve the Director's {of the SFO} vision of an organisation which progresses cases effectively and to the best of its ability." [Note N3]*

(C) *The SFO appear to have an undisclosed tolerance level of economic crime (i.e. cases that meet the statutory criteria for investigation but are not investigated further).*

(D) The SFO does not have freedom of information documented procedures leading to the potential for the provision of NCND responses to be culturally embedded

34. In his Reply to the SFO he also made these points:-

(a) if it turns out the SFO does not hold the information requested that in itself would warrant disclosure in the public interest as it would be a *“failure in inter-agency communication; and / or represent an SFO intelligence failure.”*(395)

(b) the SFO has a necessary and understandable *“organisational culture of secrecy which gives to the SFO substantial and potentially overwhelming challenges to the SFO in objectively carrying-out the public interest test.”* (398)

35. Another matter raised by Mr Challinor in favour of disclosure was (76) because in his view the SFO has *“a publicly-recognised lamentable performance in investigating and prosecuting.”* In the GoA (para 15) he says that *“thus there is a public interest in improving scrutiny of their work.”* He says that NCND can be used inappropriately by bodies to hide *“operational inefficiencies and ineffectiveness”*.

36. He says that:-

“Substantial and overwhelming weight must be applied in the public interest test to the actual social harm arising from the collapse of Football Index and as a deterrent effect to reduce future harm” (78)

37. In so far as the SFO agree they that there are public interest reasons for disclosure they argue that either the interests are already satisfied (at least in part) by steps they take or by the way in which the SFO is already scrutinised or they are not as strong as the reasons in favour of maintaining the exemption.

38. Reasons put forward as to why the public interest favoured the NCND response being maintained included these:-

(a) *“the right of access to information should not undermine the investigation and prosecution of criminal matters”* and *“On some occasions, releasing information about what is held or not held by law enforcement bodies would be detrimental to”* the public interest in safeguarding their investigatory process.

(b) to avoid any conflict with the SFO’s obligation of privacy (ZXC-v- Bloomberg LP [2022] UKSC 5 (e.g. para 146)

(c) because of the SFO’s concern that *“revelation of information that linked individuals to alleged criminality before they were charged would conflict with their article 8 ECHR rights, and may lead to the SFO becoming embroiled in satellite litigation. Similarly companies prematurely linked to SFO investigations might seek similar redress”*

(d) the SFO (like other investigatory bodies) *“should be afforded the space to determine the course of any investigation.”*

(e) *“the...strong public interest in safeguarding its general investigatory process. This process includes ensuring that its ability to combat serious and complex fraud is not harmed by being forced to disclose information about investigations prematurely and otherwise than in accordance with its own internal procedures.”*

(f) to prevent a precedent being set for future FOIA requests and because of the need for a consistent approach to such requests to avoid insights being gained into the focus and activity of the SFO by comparing when NCND is and is not used.

(g) to prevent the risk of the cumulative effect of responding to unconnected FOIA requests overtime revealing the SFO’s focus or intelligence and *“the approach and capacity of the SFO to investigate...which could be used by criminals to facilitate the commission of offences”*

(h) to protect the SFO’s ability *“to work confidentially with criminal justice and regulatory partners.”*

(i) because the SFO has its own publication scheme

39. Mr Challinor accepts that there are some reasons that favour maintaining the exemption but says that in his view these are reduced by:-

(a) society’s expectation is that information is held by the SFO making the NCND response without a purpose.

(b) the passage of time by which the purpose of a NCND response will have deteriorated. He says (77) *“A substantial period of time (comprising the Football Index trading period and post trading period), a total of seven years ten months, has now elapsed for the SFO to investigate Football Index undisturbed by public scrutiny.”*

(c) the SFO’s approach to publication being both contradictory and *“operationally-aligned rather than public interest-aligned – and operates outside the checks and balances of the Freedom of Information Act.”*

40. In his opening notes (para 14/15) he also said that:-

“14...I do recognise there could be potential reasons for a NCND response. However, in this case they appear not to apply. I believe there is nothing that precludes disclosure of whether information is held and ultimately a disclosure of what information is held...”

15 I believe the cost of not disclosing information on Football Index will be an increased frequency of events such as Football Index. It is for this reason and for the reasons set out in my submissions that the public interest favours disclosure, initially of whether information is held and ultimately disclosure of that information.”

Witness Evidence

41. It was useful to hear from Samuel Wright, whose evidence we accepted, in response to the questions. He was asked about the use of the term “ponzi scheme” and was referred to a speech made by the General Counsel of the SFO on 2 September 2019 in

which she said *“Our caseload displays all flavours of fraud and corruption. We see pension fraud schemes, we see ponzi schemes”*. While he was careful to clarify that he was speaking hypothetically he confirmed that (as he says at page 19 (395) para iv) the term *“ponzi scheme”* is sometimes referred to in the SFO.

42. He said he was opposed to all forms of criminality and that his advice to a member of the general public who had reason to believe that *“there was a £120 million highly dangerous Ponzi scheme in operation”* was (hypothetically) to report it to the Police, the SFO or for example a Member of Parliament.
43. He was also asked to give an example, of any ponzi scheme operated by a commercial business *“that wouldn’t be on the SFO’s intelligence radar, i.e. that the SFO would be comfortable with?”* We thought it understandable that he was not able to give such an example.
44. He set out for the Tribunal what factors the SFO used to decide whether to launch an investigation. He referred to its statutory role and the DSOP exhibited to his statement at SW1 (387). From this we noted that the Director’s duty to investigate is discretionary.
45. He explained the process for taking on and closing investigations following on from para 21 of his statement (382). From his answers we noted that some referrals proceed to investigations but some do not and that even if referrals do not proceed the SFO remain open minded if more information comes to light and a referral can be reopened. He also said that some matters from referral through investigation to a charging decision can take *“5,6,7 years maybe more”*
46. He told us that the SFO does not take on all matters that are reported to them for various reasons but including resourcing.
47. It was also helpful to hear the answers to questions put to Chloe Wootton, whose evidence we also accepted, who explained from her perspective how FOIA requests are dealt with at the SFO, her experience in dealing with them and how they came to her to consider at the review stage.
48. It was put to her that there was a potential for NCND responses to be culturally embedded and that the SFO had a FOIA strategy which was not to provide information. She said that there was no *“SFO strategy”* for FOIA except to comply with the legislation. However Mr Challinor referred her to the exhibit to her statement (376). This is called *“FOI Desk Notes s30 and 31 exemptions.”* It is in effect a guide on to how to respond to certain FOIA requests. It has a number of start points but these guides appeared to conclude a number of times by saying that using NCND will always be the SFO’s approach and they contained no reference to the PIBT. She pointed out that while it started with the words *“Always apply neither confirm nor deny”* the guide actually said *“Always apply ‘neither confirm nor deny’ to prevent the use of FOI requests to reveal covert investigations”* and that while PIBT is absent from the document she said that this document had been prepared by her and

that she had created it to help people in the team, that it was not an official SFO document and that the PIBT is part of relevant FOIA assessments.

49. She was asked about how the SFO made decisions about publicising investigations dealt with by her at paras 15- 21 of her statement. She was not aware of any internal formal guidance on when to make information public. Her answer was that the SFO is a small enough organisation that these decision are made on a case by case basis by a dedicated group of more senior people and so there is no perceived need for internal guidance which one might need if such decisions were delegated to more junior people. She said that the SFO would generally not bring a pre charge case into the public domain but that this might happen for example if there was overt operational activity such as a search or if the investigation had become public in some way such as if it had been mentioned in Parliament.

The Tribunal's view

50. We accept that Mr Challinor and the SFO had given appropriate consideration to the PIBT question and considered reasons in favour of disclosure, against, the weight of such arguments and the balance. In our deliberations we kept in mind the considerable concern about the BetIndex situation and that people had suffered as a result.
51. In our view all the reasons which related to the public interest in holding the SFO to account and opening them up to scrutiny or related to concerns about their operational or budgetary performance would have had a high weight but this was considerably reduced because of the many ways in which the SFO is already held to account as seen towards the start of this Decision.
52. The Request seeks information about the fact of, stage reached and scope of what might or might not be an operational matter for the SFO. The nature of the SFO's role is that they will be dealing with the most complex and serious levels of alleged criminality within their remit. They might often be reliant upon potential whistleblowers. Such investigations will often be lengthy and necessarily involve covert techniques. Exposing the SFO's investigations to risks associated with disclosure are unlikely to be in the public interest.
53. We accept the principle of the SFO's arguments about the desirability for consistency. Even when in a particular case the answers might present a low or even no operational risk there is a risk that a selective application of NCND replies on being analysed could lead to the SFO revealing information about their focus and approach generally.
54. We also accept that if the SFO did not maintain a NCND position in such cases then over time an observer, being able to view many responses to FOIA requests, might also gain intelligence or obtain a clearer picture about the SFO's approach and focus which could be exploited against the public interest.

55. We accept that responding to a FOIA request prior to charge or some overt action might create an issue as regards the obligation of privacy. While this is not a bar on publication (or answering a FOIA request) it does mean that answering would require some very clear reasoning especially when pre charge.
56. We agree with Mr Challinor that in the case of BetIndex any hypothetical pre charge release of information about the company could not now harm it. However it could (theoretically if such information exists) negatively impact the Directors and potentially other employees.
57. We agree with Mr Challinor that the passage of time might be a relevant factor when considering the risks raised by the SFO. Mr Challinor suggested that when calculating the passage of time the start point by when BetIndex should have been on the SFO radar was 2015. However we note the SFO have maintained a NCND response and in any event up until March 2021 BetIndex held a gambling licence. There is no formulaic answer where after x years the balance would shift. Each case would need to be considered when deciding how to respond based on the all the relevant factors known at the relevant date. In our view it was not relevant in this case.
58. Mr Challinor suggested that the answers to his questions are so well known a NCND response has no value. Where the “cat is out of the bag” and information requested is widely known then we agree that this might be a reason favouring disclosure “to the world”. In this case our conclusion was that while there are assumptions being made there was no evidence provided by Mr Challinor that the public knew the answers to the questions asked.
59. We also considered the submission that the SFO’s strategic approach to FOIA requests was to be opposed to providing information because it has an understandable organisational culture of secrecy. We noted the questions put to Chloe Wootton on this. We make no findings as to the organisational culture at the SFO but it would come as no surprise to us if it did have a very strong culture of operational and data security and confidentiality. However having heard the evidence, including Chloe Wootton’s explanation of her role in the FOIA process, we accept that that words “always” and/or the absence of a reference to the PIBT in the document exhibited at CW1 do not show that the SFO failed to carry out its review of FOIA requests or this Request properly before deciding to seek to rely on an exemption. We noted in any event that the SFO’s response to the original Request in this matter came with its explanation of the PIBT consideration.
60. As regards the SFO’s approach to the publication of information while Mr Challinor was critical of the SFO’s processes we heard no evidence that made us doubt the witness evidence. Towards the end of the Appeal he did mention a case from the SFO’s website which he said indicated an inconsistent approach about which Counsel was unable to take instructions at that stage. Our conclusion was that it is possible that the SFO might at times appear to have an inconsistent approach but that this might be because it operates a case by case approach.

61. It was clear to us that there were a number of reasons why the public interest was in favour of disclosure and in favour of maintaining the exemption(s) claimed however as a result of the matters set out above in our view the balance favoured the position put forward by the SFO.

Decision

62. Therefore it is our Decision that, if the SFO holds the information the subject of the Request, the information would be exempt by section 30(1)(b) FOIA and therefore the provision of section 30(3) FOIA applies and that the balance of the public interest favours maintaining the exemption and the NCND response.

63. The DN was in accordance with the law and it is not our view that the IC should have used its discretion differently. The Appeal is dismissed.

Signed Tribunal Judge Heald

Date 24 June 2024

Promulgated on: 25 June 2024

GIST OF THE CLOSED MATERIAL PROCEEDINGS ON 31.05.2024

1. The following written evidence was put before the Tribunal on behalf of the Second Respondent

(a) Closed written submissions;

(b) A closed witness statement; and

(c) An unredacted copy of the letter from the SFO to the Information Commissioner dated 19 October 2023 (a redacted copy of which appears at p.468 of the hearing bundle).

2. The evidence heard in the closed session related to:

(a) The applicability of the exemptions under the Freedom of Information Act 2000; and

(b) Factors relevant to the public interest balancing test.

3. The Tribunal also heard oral submissions made by counsel for the Second Respondent in relation to that evidence. Those oral submissions related to:

(a) The public interest in understanding what (if anything) is being done by the Second Respondent regarding the Football Index matter; and

(b) The chilling effect that disclosure might have on the Second Respondent's ability to obtain Information in future investigations.

(4) One of the matters addressed by the Second Respondent's evidence was the fact that the Football Index matter is or was under investigation by the Gambling Commission and Insolvency Service. Enquiries made

by counsel for the Second Respondent subsequent to the hearing have confirmed that this information is in the public domain. See:

(a) "Government publishes independent report into regulation of Football Index"

- <https://www.gov.uk/government/news/government-publishes-independent-report-into-regulation-of-football-index> ("The Gambling Commission is also carrying out a separate regulatory investigation into BetIndex Ltd on which it will report in due course, and has referred the case to the Insolvency Service.... BetIndex Ltd has been referred to the Insolvency Service by the Gambling Commission to ask that they consider whether the actions of the directors prior to administration breached insolvency or fraud laws").

(b) "Football Index updated – 29 June 2021" -

<https://www.gamblingcommission.gov.uk/news/article/football-index-update-29-june-2021> ("there will be limitations on what information we can publish whilst our regulatory investigations are ongoing").

(c) On 20 September 2022, the Department for Digital Culture, Media and Sport responded to a written question submitted by Mr Richard Holden MP and stated: "the Insolvency Service has confirmed that the conduct of BetIndex Limited's directors is currently being investigated by them. The progress and outcome of the investigation will depend on the evidence obtained. It will not be possible for the Insolvency Service to comment on the investigation while it is ongoing." See <https://questions-statements.parliament.uk/written-questions/detail/2022-09-02/45150/> .