

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2023

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information relating to a meeting on 25 May 2022 between the Parliamentary Under-Secretary of State for Tech and the Digital Economy and the All-Party Betting and Gaming Group (APBGG) of MPs concerning the Gambling Review.
2. The Department for Digital, Culture, Media & Sport¹ (DCMS) confirmed that they held information within scope of the request. They originally withheld the minutes of the meeting under section 21(1) of the FOIA (information reasonably accessible to the applicant) and applied section 36(2)(b)(i) to a briefing paper prepared for the Minister and section 36(2)(c) to a report provided by a third party. During the Commissioner's investigation, DCMS withdrew reliance on section 36 and instead withheld the briefing paper under section 35(1)(a)(formulation or development of government policy). DCMS also applied section 41(1)(information provided in confidence) to withhold

¹ As a result of the machinery of government changes in February 2023, the Department for Digital, Culture, Media & Sport was replaced by the Department for Science, Innovation & Technology (DSIT) and Department for Culture, Media & Sport (DCMS). The latter body retained responsibility for the policy area which is the focus of this request and this notice is therefore served on that body. The decision notice refers to DCMS throughout as that was the public body which handled the request.

the third party report. DCMS also withdrew reliance on section 21 and provided the complainant with a copy of the minutes of the meeting.

3. The Commissioner's decision is that DCMS correctly applied section 35(1)(a) to the briefing paper. However, the Commissioner has found that the balance of the public interest favours disclosure of some of the information contained in the paper.
4. The Commissioner has found that the third party report is exempt in its entirety under section 41(1) of FOIA.
5. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the parts of the briefing paper specified in the Confidential Annex attached to this notice.
6. 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

7. The All-Party Betting & Gaming Group (APBGG) is a group of MPs whose stated purpose is:

"To keep in contact with the industry; to discuss with them, and in Parliament, fair gambling, safe gambling and policies towards gambling; to act as a go-between for the industry, Parliament and government; and to advise Parliament and the government on gambling-related issue"².
8. During the Commissioner's investigation, he noted that the APBGG advised on their website that, "we regularly meet with stakeholders in the industry. The Group maintains a view that gambling should be legal and well-regulated but beyond that, encompasses a wide spectrum of beliefs into the extent and scope of gambling provision that should be allowed". However, at the current time, the APBGG's website appears to

² [House of Commons - Register Of All-Party Parliamentary Groups as at 5 April 2023: Betting and Gaming](#)

no longer be active and the Commissioner understands from DCMS that the APBGG have since broken up.

9. The Muggleton Report refers to an article which was published in Nature Human Behaviour in February 2021 titled, 'The Association Between Gambling and Financial, Social and Health Outcomes in Big Financial Data'³ (authored by Dr Naomi Muggleton and others).

Request and response

10. On 16 and 17 August 2022, the complainant wrote to Department for Digital, Culture, Media & Sport (DCMS) and requested information in the following terms:

"Please could you provide a copy of:

- The minutes of the meeting between Chris Philp, Scott Benton and Philip Davies to discuss the Gambling Review referenced on page 7 of the document titled "DCMS Mail Re Meeting with the Betting and Gaming APPG⁴ to discuss the Gambling Review (redacted)".
- A copy of any briefing prepared for Philp ahead of this meeting
- In addition to this, could you also provide a copy of the document referred to as " a critique of the same (Muggleton) report", sent to Philp by Benton, as referenced in the document " DCMS Mail Re Muggleton report (redacted)" sent in response to FOI 2022/09708?"

11. DCMS responded on 18 October 2022 and confirmed that they did hold some information within scope of the request. They advised that the minutes of the meeting were exempt from disclosure under section 21(1) of FOIA as they were already accessible to the public via the APBGG website and they provided the complainant with a link. The Commissioner notes that the complainant must have been able to successfully use the link at that time as he subsequently commented on the meeting minutes in his request for an internal review.

³ [Gambling study led by Dr Naomi Muggleton reveals health risks to gamblers | Department of Social Policy and Intervention \(ox.ac.uk\)](#)

⁴ All-Party Parliamentary Group

12. DCMS confirmed that they held the briefing paper for the meeting and the document dealing with the Muggleton report⁵. DCMS stated that this information was exempt from disclosure under section 36(2)(b)(i) of FOIA.
13. In respect of the public interest test, DCMS recognised that greater transparency makes the government more accountable to the electorate and increases trust. However, they did not consider that this public interest was greater than the public interest in withholding the information.
14. DCMS contended that disclosure of the briefing notes and associated information would be likely to impact upon the 'safe space' as they included details which were not in the public domain. DCMS advised that, "when briefing Ministers for meetings, officials need to alert the Minister to all issues relevant to the discussion as failing to do so may leave Ministers unprepared. As such, officials should be able to provide advice to ministers in confidence where it relates to active policy development or ongoing legal proceedings".
15. The complainant requested an internal review on 20 October 2022. He noted that the link to the minutes "provide no information about what was actually discussed, and cannot meaningfully weigh in favour of the other documents not being released by way of partial transparency".
16. The complainant contended that DCMS had misapplied section 36 in a blanket manner. He noted that, "FOIA is an information regime not a documents regime, and records must be released in a redacted manner if some information is not exempt. This does not seem to have been fully considered in this case, as it seems unlikely that every line of every document in the scope of this request is exempt".
17. The complainant advanced detailed public interest arguments for disclosure of the information (examined later in this notice) and stated that it was not clear that the public interest balancing by the department had fully taken the public interest in disclosure of the withheld information into account. He contended that the public interest required the disclosure of additional information in this case.
18. Having not received the internal review by 11 January 2023, the complainant wrote to DCMS chasing the same. By 28 March 2023, having still not had a response from DCMS, the complainant complained to the ICO. The Commissioner notified DCMS on 29 March 2023 that in

⁵ [Gambling study led by Dr Naomi Muggleton reveals health risks to gamblers | Department of Social Policy and Intervention \(ox.ac.uk\)](#)

view of the length of time that had passed since the complainant had requested the internal review, the Commissioner would be accepting the complainant's complaint for investigation without a review.

Scope of the case

19. As noted, the complainant contacted the Commissioner on 28 March 2023 to complain about the way his request for information had been handled.
20. In submissions to the Commissioner DCMS advised that they had incorrectly withheld the critique of the Muggleton report under section 36(2)(b)(i) when in fact it was actually withheld under section 36(2)(c). DCMS advised that they were also withholding the critique of the Muggleton report under section 41(1)(information provided in confidence).
21. DCMS subsequently revised their position and advised that they were withdrawing their reliance upon section 36 and were instead withholding the briefing paper under section 35(1)(a). This was due to the briefing paper containing information which related to government policy. Section 36 cannot apply to information which is exempt under section 35 (i.e. information relating to the formulation or development of government policy).
22. DCMS also advised that they were withdrawing their reliance on section 21 (in respect of the minutes of the meeting of 25 May 2022) as these were no longer publicly available following the breakup of the APBGG and the deletion of the material on their website. DCMS provided the complainant with a copy of the minutes on 30 October 2023. As noted, it is apparent that the complainant had already had sight of these minutes when DCMS had previously provided him with the (then) working link to the APBGG website.
23. The Commissioner considers that the scope of his investigation is to determine whether DCMS correctly withheld the requested information under the exemptions applied.

Reasons for decision

Section 35(1)(a)(formulation or development of government policy)

24. Section 35(1)(a) applies to information if it relates to the formulation or development of government policy.
25. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department of Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374, of the First-Tier Tribunal's findings in that matter, the phrase:

"Should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context', and that a 'mere incidental connection between the information and a matter specified in a sub-paragraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph".
26. Therefore, there must be a clear and tangible relationship between the content of information withheld under this exemption and the process that is being protected.
27. The Information Tribunal has made it clear that in cases where section 35(1)(a) applies, the timing of the request is central to the consideration of the public interest test. This is because once the formulation or development of a policy has been completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced, and so the public interest in maintaining the exemption will require less weight.
28. Furthermore, the Tribunal has made it clear that policy formulation and development is not one which is a 'seamless web', i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy.
29. Having had sight of the information contained in the briefing paper (withheld information), the Commissioner is satisfied that it clearly relates to the government's policy concerning the Gambling Review and the White Paper which the Government had been planning to publish at the time of the Minister's meeting with the APBGG on 25 May 2022.
30. The Commissioner notes that the Gambling Act Review White Paper was published in April 2023 and set out the Government's plans for modernising the regulation of gambling in the UK. This included a number of measures to adjust outdated regulatory restrictions applying

to the land-based gambling sector⁶. As the Government's policy concerning the Gambling Review and the associated White Paper was still at the formulation and development stage in May 2022, the Commissioner is satisfied that the briefing paper is exempt from disclosure under section 35(1)(a).

31. Section 35(1)(a) is subject to the public interest test and the Commissioner must decide whether the public interest factors in favour of maintaining the exemption outweigh those public interest factors in favour of disclosing the information.

The position of DCMS

32. In their original request response of 18 October 2022, DCMS recognised that greater transparency makes the government more accountable to the electorate and increases trust. DCMS did not recognise or acknowledge any specific (as opposed to generalised) public interest in disclosure of the specific requested information in either the submissions provided to the qualified person (when they were relying on section 36) or the submissions provided to the Commissioner.

33. In their original request response DCMS stated that they did not consider that the general public interest in disclosure noted above was greater than the public interest in withholding the information. They contended that the disclosure of the briefing notes would be likely to impact upon the 'safe space' as they included details which were not in the public domain. DCMS stated:

"When briefing Ministers for meetings, officials need to alert the Minister to all issues relevant to the discussion as failing to do so may leave Ministers unprepared. As such, officials should be able to provide advice to ministers in confidence where it relates to active policy development or ongoing legal proceedings".

34. In brief submissions to the Commissioner, DCMS essentially repeated the above contention though they did provide an illustrative example. This example is referenced in a Confidential Annex attached to this notice.

The position of the complainant

⁶ [Measures relating to the land-based gambling sector - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/policies/land-based-gambling)

35. In his request for an internal review the complainant contended as follows:

"There is a clear public interest in transparency around government interactions with the MPs in the APPG for Betting and Gaming. There has been widespread reporting on the issue of problem gambling, and questions about whether the sector is doing enough to tackle the issue, with many tragic cases of young people taking their own lives after falling into debt. This has prompted debate about reforms to gambling regulation under the White Paper.

Many of the members of the APPG receive hospitality from the gambling sector, and it must be considered that such MPs, whatever their own personal views, face an element of conflict as a result, which increases the public interest in transparency about what they tell ministers in private.

As a group, the APPG for Betting and Gaming promotes the interests of the gambling sector, and whilst it would argue this is due to the sector being a big part of the UK economy, given the concerns about that sector's work to prevent gambling related harm, the interests of the sector may not always chime with the general public interest. A recent report by the group accused the regulator, the Gambling Commission, of overstepping its responsibilities. It is therefore in the public interest to see what arguments are being made in private".

36. The complainant referenced the First-Tier Tribunal decision in *Corderoy v Information Commissioner & Department for Exiting the European Union* (EA/2019/0109 & 0111), in support of his contention that the APPG could have no reasonable expectation that its lobbying interactions would be kept secret. He noted that the Tribunal had made clear in that case that:

"Organisations which seek to influence policy formulation can, under normal circumstances, expect to see their contributions summarised and publicly disclosed or disclosed by the organisations themselves as part of their own direct engagement with the public or their own widespread stakeholders from which it readily moves into the public domain".

37. In addition, the complainant contended that, "it is important to see how the minister was briefed to handle questions from the MPs, given the concerns about how the sector had acted in relation to gambling related harm. There is a clear public interest in transparency, and it is not clear why a civil servant would advise a minister differently in this specific case given the importance of the issues at hand".
38. As noted, since DCMS failed to provide the complainant with the requested internal review, they did not address or respond to the complainant's above points/arguments. Nor did DCMS refer to or

address the complainant's position in their submissions to the Commissioner.

Commissioner's position

39. As the Upper Tribunal confirmed in *Montague v The Information Commissioner and the Department of Trade* (UA-2020-00034 & UA-2020-000325) [13 April 2022], the time for judging the competing public interests in a request is at the date of the public authority's decision on the request under Part 1 of the FOIA and prior to any internal review of the initial decision.
40. In relation to DCMS's public interest arguments to withhold the briefing paper, and in particular the language used to support those arguments (both in their original request response and subsequent submissions to the Commissioner), the Commissioner considers it is important to explain his interpretation of the term 'safe space'. In the Commissioner's view, safe space refers to the need to develop ideas, debate live issues and reach decisions away from external interference and distraction. The need for a safe space is strongest when the issue is still live. Once a decision(s) has been made such an argument will carry little weight.
41. In their original response to the request, DCMS contended that officials should be able to provide advice to ministers in confidence "where it relates to active policy development or ongoing legal proceedings" but did not specify which policy or policies the requested information related to or which particular ongoing legal proceedings. Similarly, in their submissions to the Commissioner, DCMS provided no further specificity but contended that, "when briefing Ministers for meetings, officials need to alert the Minister to all issues relevant to the discussion as failing to do so may leave Ministers unprepared. As such, officials should be able to provide advice to ministers in confidence".
42. Having considered DCMS's arguments, although they refer to the concept of a safe space they more accurately relate to what is commonly understood as the risk of a 'chilling effect'. Chilling effect arguments are different to safe space arguments and focus and relate instead to the view that disclosure of internal advice or discussions inhibits the free and frank provision of advice or the free and frank exchange of views and that loss of frankness and candour damages the quality of advice or discussions, leading to poorer decision-making. Consequently, chilling effect arguments are most often advanced in cases involving the section 36 exemption (prejudice to effective conduct of public affairs) but can have application and relevance in section 35 cases.

43. With regards to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not be easily deterred from providing such advice by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make more convincing arguments about a generalised chilling effect on all future advice provision.
44. The Commissioner considers that the public interest arguments advanced by DCMS in this case for maintaining the exemption are unsatisfactorily generic and somewhat confused. However, having had sight of the information contained in the briefing paper, the Commissioner is satisfied that safe space arguments (and to a lesser degree the chilling effect) do apply to the same.
45. The Commissioner accepts that significant weight should be given to safe space arguments, the concept that government needs a safe space to develop ideas, debate live issues and reach decisions, away from external interference and distraction, where the policy making process is live and the requested information relates to that policy making.
46. The Commissioner's guidance on section 35 recognises the importance of the timing of a request when considering the public interest balance. The Commissioner considers that, "if the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight".
47. There is a strong public interest in not revealing discussions on yet to be finalised policy options as it may distract Ministers and officials from focusing on the actual task of formulating and developing the relevant policy or policies. As the Information Tribunal noted in *Department for Business, Enterprise and Regulatory Reform v The Information Commissioner* [EA/2007/0072] "there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken".
48. At the time of the complainant's request (August 2022) and DCMS's refusal notice (18 October 2022) the Government's policy concerning the Gambling Review and the associated White Paper was at the

development stage and had yet to be implemented. Consequently, the Commissioner considers that there was a strong public interest in protecting the safe space of Ministers and officials to develop and finalise the Government's policy towards the Gambling Review and associated issues. The Commissioner considers that this public interest outweighed the public interest in disclosure of most, but by no means all, of the information contained in the briefing paper.

49. Having considered the information contained in the briefing paper, the Commissioner is satisfied that a significant amount of the information was information which was already in the public domain at the time of the request, or which reflected such information and was therefore of little, if any, sensitivity. In respect of this information, which the Commissioner sets out in a Confidential Annex, the Commissioner finds neither the safe space nor chilling effect arguments to have any weight and consequently the public interest balance favours disclosure of this specific information.
50. The Commissioner notes that the previously published (now no longer available because the APBGG website is no longer active) minutes of the meeting of the APBGG which form part of the subject of the complainant's request record as follows:
 - '1. The Minister provided un-specific information about the forthcoming White Paper and answered questions from Group members.
 2. The meeting ended at 10am as planned'.
51. As the complainant correctly noted, the minutes do not provide any appreciable information about what was actually discussed, and therefore cannot be considered to provide due transparency or accountability. The minutes do note those MPs who attended the meeting with the then Minister for Tech and the Digital Economy, Chris Philp, including the Chair of the APBGG, Scott Benton MP.
52. The Commissioner notes that on 15 November 2021, the Guardian newspaper reported that 28 MPs (19 Conservative and 9 Labour) had taken almost £225,000 'in wages and freebies' from the gambling industry⁷. One of those MPs was Mr Benton, the Conservative MP for Blackpool South. The Guardian reported that on 7 July 2021, Mr Benton had been given a paid seat at Wembley to watch England play Denmark in the semi-final of Euro 2020, by the Ladbrokes Coral owner, Entain (which the newspaper stated amounted to £3,457). The article noted

⁷ [Almost £225,000 in wages and freebies taken from gambling industry by 28 MPs | Gambling | The Guardian](#)

that only hours earlier, Mr Benton had warned Parliament that a review of betting laws, widely expected to result in tougher regulation, must not be driven by anti-gambling "ideology". Mr Benton had called for casinos to be allowed more slot machines, adding that many people would be concerned about the Gambling Commission's plans for affordability checks on people betting online and in person, a measure intended to prevent ruinous losses.

53. The newspaper reported other MPs who had received such 'freebies' and noted that, "the gambling sector's charm offensive comes in the run-up to the publication of a white paper on gambling reform, expected early next year, that could significantly curb the profitability of bookmakers and online casinos. One peer described the industry's charm offensive as a "pretty obvious" attempt to influence the outcome of the reforms".
54. Lord Foster of Bath, Chair of Peers for Gambling Reform, said that it was "pretty obvious why the industry is giving largesse to parliamentarians", calling the flurry of consultancy roles and hospitality freebies an attempt to "try and influence the outcome to the advantage of gambling companies. With millions of people impacted by problem gambling and more than one gambling-related suicide every day, I suspect they will find themselves on the wrong side of public opinion".
55. The Commissioner notes that in a speech at the Gambling Reform Rally organised by the Gambling Related Harm APPG and Peers for Gambling Reform on 8 March 2022, Minister Philp said that reform of the gambling sector was 'undoubtedly long overdue'⁸. Mr Philp said as follows:

"As you will appreciate, I cannot pre-announce the policies in our White Paper which we are in the process of finalising. But what I can say is that we know that the gambling landscape does need reform – significant reforms – as it is now significantly different from the last time our gambling laws were comprehensively reviewed some 17 years ago. Internet gambling didn't really exist in 2005. We now have evidence, including a Public Health England report, which identified 409 gambling suicides a year. It is imperative that we respond to that. Change is certainly needed.

We've heard too many cases of operators failing to meet their duties to protect people. Just last week, the Gambling Commission levied a huge fine against an online gambling company for breaches of their responsibilities to prevent harmful gambling and investigate their customers' source of funds. In that particular case, the gambling firm

⁸ [Gambling Reform Rally speech - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/speeches/gambling-reform-rally-speech)

was fined £9.4 million by the Gambling Commission because they allowed an NHS worker who was only earning £1,400 a month to set a deposit cap at £1,300 a month. That's over 90% of their monthly income. In addition to that, they allowed another customer to lose £37,000 in an extremely short period of time with no checks whatsoever".

56. The Commissioner agrees with the complainant that there is a strong and very specific public interest (one which it appears DCMS failed to recognise or appreciate) in transparency and accountability around interactions between MPs in the APBGG and the Government. There has been widespread reporting in recent years of the issue of problem gambling and the devastating effects of gambling addiction. The complainant has noted that, as a group, the APBGG promotes the interests of the gambling sector, and given concerns about the sector's work and commitment to prevent gambling related harm, the interests of the sector may not always support the public interest in reducing and preventing such harms.
57. In his request for an internal review the complainant specifically highlighted a recent report (January 2022) by the APBGG, which accused the regulator, The Gambling Commission, of overstepping its responsibilities and branded it as 'incompetent'⁹. Co-Chair of the APBGG, Scott Benton MP, stated that:
- "I am truly shocked to reveal so much evidence of the bad practice by the Gambling Commission over the years. To do nothing, to ignore the contents of our report, is to sentence the British gambling industry to certain demise and thousands of people into the trauma of being pushed into the black market".
58. Reporting on the contents of a draft copy of the report on 23 January 2022, the Guardian newspaper noted that the APBGG report accused the regulator, "which has adopted a tougher stance amid rising public concern about gambling addiction, of displaying a "bullying attitude that has caused mental harm within the industry" and calls on the government to take it into "special measures" while determining whether it can "continue as it is"¹⁰.

⁹ [APBGG: Gambling Commission in "urgent need" of change - Regulation - iGB \(igamingbusiness.com\)](#)

¹⁰ [MPs criticise UK gambling regulator for trying to reduce addiction | Gambling | The Guardian](#)

59. Commenting on the APBGG report, the director of the campaign group, Clean Up Gambling, Matt Zarb-Cousin, said:

“It is astonishing that in the middle of a gambling review, industry friendly MPs want to publish this ludicrous report complaining about regulation. The growth of online gambling, and the harm associated with it, has increased exponentially under the Gambling Commission’s watch. If anything, the operators should be thanking the regulator. What we need is an overhaul of regulation that empowers the Gambling Commission to ensure far more prescriptive rules, more comprehensive oversight of licences and penalties for non-compliance”.

60. The Commissioner notes that the highly critical APBGG report was issued four months prior to the date of the APBGG’s meeting with the Minister which forms the subject of the complainant’s request.
61. In the above context, where the APBGG, some of whose members, including the Co-Chair, Mr Scott Benton MP¹¹, have personally benefited in hospitality from their links to the gambling industry, and have issued a report attacking the regulator, the Commissioner considers that there is a strong and important public interest in information which would provide transparency and accountability as to the group’s interactions with government ministers. That public interest is particularly powerful in this case, given the concerns about effective regulation of the gambling industry and the societal harm caused by gambling addiction.
62. In the absence of detailed published minutes recording what was discussed at the meeting of 25 May 2022, the Commissioner considers that the information contained in page 1 of the briefing paper would provide some necessary transparency and accountability of the APBGG’s interactions with government. The Commissioner is satisfied that the public interest in disclosure of the information contained in page 1 of the briefing paper (subject to very minor redactions) comfortably outweighs the public interest in maintaining the exemption as the information is not particularly sensitive and indeed some of it reflects or refers to information in the public domain at the time of the request.
63. Therefore, to be clear, and for reasons which he expands upon in the Confidential Annex, the Commissioner is satisfied that section 35(1)(a)

¹¹ Although it post-dates the date of the complainant’s request, the Commissioner notes that Mr Benton had the Conservative Party whip suspended in April 2023 after he was allegedly caught in a newspaper ‘sting’ reportedly offering to lobby on behalf of the gambling industry and leak a confidential policy document for up to £4,000 a month. In December 2023 the Commons Standards Committee recommended that Mr Benton be suspended from Parliament for 35 days, having found that his actions were an ‘extremely serious breach of the rules’.

applies to the information contained in the briefing paper but that the public interest balance favours disclosure of most of page 1, approximately half of page 4 and most of page 5. The Commissioner considers that in respect of the information contained in pages 2 and 3 of the briefing paper, which contains the most policy sensitive information, the public interest balance favours maintaining the exemption to almost all the information.

Critique of Muggleton Report

64. In submissions to the Commissioner, DCMS advised that they initially 'incorrectly' withheld the critique of the Muggleton report under section 36(2)(b)(i) 'whereas it should have actually been withheld under Section 36(2)(c)'. As noted, later in the Commissioner's investigation DCMS advised that they were withdrawing reliance on section 36. Consequently, the Commissioner has gone on to consider DCMS's application of section 41(1) to this information.

Section 41 – Information provided in confidence

65. Section 41(1) 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".

66. 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** disclosure of that information has to constitute an actionable breach of confidence.
67. 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 judgement 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.

68. 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.
69. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided by DCMS.

Was the information obtained from another person?

70. In submissions to the Commissioner DCMS confirmed that the critique of the Muggleton report was provided by an important gambling stakeholder. The Commissioner is therefore satisfied that section 41(1)(a) has been met.

Does the information have the necessary quality of confidence?

71. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
72. DCMS advised that the report was shared in confidence, with clear confidential markings on the report itself and an explicit request that it not be disseminated externally. The Commissioner notes that the report is specifically marked as confidential and he notes that at the time of the request the information contained in the report was not otherwise accessible and was not trivial in nature. The Commissioner therefore accepts that the information clearly has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

73. As noted above, the report was specifically marked as confidential and was a draft report and not a final version. Based on the content of the information and the manner in which it was shared with DCMS, the Commissioner is satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

74. In submissions to the Commissioner, DCMS advised that were the Government to release the draft report, it would significantly damage the stakeholder relationship, and make the stakeholder in question much less likely to engage constructively with the policy making process in future. DCMS stated that disclosure of the information would be "very damaging to DCMS' relationships with non-governmental bodies, as it would have a detrimental effect to the trust business' have in the government, and with what information they entrust to keep private".

75. The Commissioner considers that where the effect of disclosure would be to damage the stakeholder relationship, and make the confider much less likely to engage with government, then the disclosure would be of detriment to the confider as they would not benefit from any future work from the government as a client. The Commissioner also considers that the disclosure would be of detriment to DCMS, as it would damage the trust which stakeholders have in the department treating appropriate information as confidential.

Is there a public interest defence to the disclosure of the information?

76. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). UK courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
77. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidence. The Commissioner is therefore required to consider whether DCMS could successfully rely on such a public interest defence to an action for breach of confidence in this case.
78. In submissions to the Commissioner, DCMS provided no arguments on the public interest element of this exemption. Although section 41(1) had not been applied by DCMS at the time that the complainant put forward his public interest arguments for disclosure in his request for an internal review, the Commissioner considers that his arguments have some relevance and application to the question of whether DCMS would have a public interest defence to an action for breach of confidence.
79. However, in the Commissioner's view, the strongest part of the complainant's public interest arguments for disclosure in this case is the need for maximum transparency and accountability of the APBGG's interactions with government, given the close links to the gambling industry of some members and the APBGG's highly critical report into the regulator (Gambling Commission). That public interest consideration does not attach to the critique of the Muggleton report, which does not concern or relate to the APBGG.
80. The Commissioner considers that the information contained in the critique of the Muggleton report does carry some public interest weight and value, since it would provide an insight into the strengths and weaknesses of a report about an issue of wide social relevance and

concern (gambling). However, the Commissioner does not consider that this is sufficient to provide or support a public interest defence against an action for breach of confidence, especially given the strong and well established public interest in maintaining a duty of confidence. Consequently, the Commissioner is satisfied that this withheld information is exempt from disclosure on the basis of section 41(1) of FOIA.

Procedural matters

81. Section 10(1) of FOIA states that responses to requests made under the Act must be provided 'promptly and in any event not later than the twentieth working day following the date of receipt'. The complainant submitted his original request on 16 August 2022 and did not receive a substantive response until 18 October 2022, almost two months later. DCMS therefore breached section 10(1) of FOIA.

Other matters

82. Although not subject to statutory time limits under the FOIA, the Commissioner's guidance as regards internal reviews is clear and well established in that he expects public authorities to provide most internal reviews within 20 working days. In exceptional cases, such as where the public interest issues are particularly complex or the public authority needs to consult with external or third parties, a maximum of 40 working days is permissible.
83. In this case the complainant requested an internal review on 20 October 2022 but by 28 March 2023, over five months later, he had not received a review from DCMS and so complained to the Commissioner. In submissions to the Commissioner, DCMS advised that "unfortunately due to pressures and changes within the FOI team, the internal review was missed and this caused delays to our answering the review request". The failure by DCMS to provide an internal review in this matter was clearly unsatisfactory and the Commissioner expects DCMS to put in place systems to ensure that such review requests are not overlooked in future.
84. The Commissioner has significant concerns and criticism of DCMS's approach to some of the exemptions in this case. It should have been readily apparent from a careful review of the briefing paper that the information contained within the same related to the formulation and development of government policy and as such was exempt under section 35(1)(a). However, this was not recognised by DCMS, who instead applied section 36 to the information requested, involving the

seeking and obtaining of the reasonable opinion of the qualified person, the then Parliamentary Under-Secretary of State for Tech and the Digital Economy, Damian Collins MP. As section 36 could not apply to the withheld information, this internal procedure/process was wholly misconceived and of no assistance to DCMS's position. This significant and time-consuming (for the officials involved) error, indicates that insufficient care and attention was given to reviewing the request when it was first received.

85. As the complainant correctly noted in his request for an internal review, the blanket approach to withholding the information taken by DCMS in this case was not appropriate or proportionate. It should have been clear from a careful reading of the briefing paper that some of the information contained within the same was not so sensitive such as to provide a strong public interest argument for maintaining the section 35(1)(a) exemption. The Commissioner would remind DCMS of the need to consider, where appropriate, a redacted approach to disclosure of requested information.
86. The Commissioner was also disappointed by the poor quality and quantity of the DCMS submissions in this case, which amounted to little over a page and which failed to recognise or acknowledge any public interest factors favouring disclosure of the *specific* information requested by the complainant. Indeed, had the policy sensitivity of much of the briefing paper not been clear from the contents, and the background context and circumstances at the time of the request, it is likely that DCMS's arguments would have been insufficient to establish a sufficiently strong public interest case for withholding the information.
87. In addition to ensuring that they provide internal reviews within a reasonable timeframe where these are requested, DCMS would be well advised to ensure that future submissions to the Commissioner are clear, cogent and provide **information specific** arguments rather than arguments which are generic in nature.

Right of appeal

88. 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

89. 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.

90. 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

**Gerrard Tracey
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Wycliffe House
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SK9 5AF**