

24 December 2015

Mr Ben Fairless

By email: foi+request-1351-06c0c1d9@righttoknow.org.au

ACMA file reference: ACMA2015/758

Dear Mr Fairless

Request for access to documents under the *Freedom of Information Act 1982*

I refer to your *Freedom of Information Act 1982* (FOI Act) request dated, and received, 5 November 2015, in which you sought access to "any complaint made in relation to Click to Call, BetCall or any other service offered in 2015 by Australian licensed online betting operators that the ACMA referred or declined to refer to the AFP in the last 12 months" (your FOI request).

By email dated 6 November 2015, you advised that your request related only to click-to-call type services offered by Australian licensed operators.

I am authorised, pursuant to subsection 23(1) of the FOI Act, to make decisions in respect of requests for access to documents.

A number of documents falls within the terms of your FOI request that contain information about the business or professional affairs of a person or organisation (section 47G). I undertook third-party consultation in accordance with section 27 of the FOI Act by inviting these relevant third parties to make any submission to support a claim for conditional exemption (business information) as set out in section 47G of the FOI Act. I contacted you by letter dated 6 November 2015, when I advised you that as a result of the necessary third-party consultation connected with your FOI request, the time for processing your FOI request had been extended by a further 30 days pursuant to subsection 15(6) of the FOI Act.

The documents which I consider to fall within the terms of your FOI request are listed in the attached schedule of documents (schedule). You will note that a number of the documents listed in the schedule are marked "Partial Release". These are documents which will be released to you subject to the deletion of information which I consider to be exempt or irrelevant. The deletion of this information is in accordance with section 22 of the FOI Act. I have specified in the schedule the sections of the FOI Act upon which I rely to claim the relevant exemption(s). The remaining documents are marked "Exempt". The sections of the FOI Act upon which I rely to claim that the document is exempt in its entirety are specified in the schedule. Each document and the applicable grounds for exemption is discussed below.

Material taken into account

I have taken the following material into account in making my decision on access:

- the FOI Act;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act;

- your FOI request;
- the views of the third parties consulted under section 27 of the FOI Act in relation to business information contained in documents 1 to 12 (inclusive); and
- the views of the third party consultation with the Australian Federal Police.

References to provisions are references to the FOI Act, unless otherwise indicated. References to "the Guidelines" are references to the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (available at: <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/>), which I must have regard to in making my decision (section 11B(5)).

Decision on access and reasons

I have decided:

- that documents 1, 2, 4, 7, 8, 10 and 12 are wholly exempt under paragraph 37(2)(b) of the FOI Act;
- alternatively that documents 1, 2, 4, 7, 8, 10 and 12 are wholly conditionally exempt under section 47E of the FOI Act and it would be contrary to the public interest to release these documents under subsection 11A(5) of the FOI Act;
- that documents 3, 5, 6, 9 and 11 are conditionally exempt under section 47G of the FOI Act and it would be contrary to the public interest to release those parts under subsection 11A(5) of the FOI Act; and
- to apply section 22 of the FOI Act to delete the irrelevant or exempt material in documents 3, 5, 6, 9 and 11 to facilitate the release of the remainder of those documents.

Documents exempt under paragraph 37(2)(b) of the FOI Act

Paragraph 37(2)(b) of the FOI Act provides that:

- (1) *A document is an exempt document if its disclosure under the Act would, or could reasonably be expected to: [...]*
 - (b) *disclose lawful methods or procedures for preventing detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would reasonably be likely to, prejudice the effectiveness of those methods or procedures; [...]*

Documents 1, 2, 4, 7, 8, 10 and 12 disclose details of the lawful methods or procedures undertaken by the ACMA for the detecting, investigating and dealing with potential breaches of the *Interactive Gambling Act 2001* (IGA). I consider that the release of those documents would reasonably be likely to prejudice the effectiveness of those methods or procedures, as:

- the documents discuss the protocol of response, including procedures that are not known to the public;
- there is a reasonable expectation that disclosing the information will disclose these methods or procedures;
- there is a reasonable expectation or a real risk of prejudice to the effectiveness of those responses and investigative methods or procedures if those documents are disclosed, as the information could be used to compromise the ability of law enforcement agencies in effectively responding to certain events; and
- those documents contain information relating to the policy of a law enforcement agency regarding the use of certain powers that, if it became public, could influence the conduct of persons engaged in certain types of crime, to the detriment of the effectiveness of the agency concerned.

Accordingly, I find that the whole of documents 1, 2, 4, 7, 8, 10 and 12 are exempt under paragraph 37(2)(b) of the FOI Act.

Documents exempt under section 47E of the FOI Act

Section 47E of the FOI Act provides that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;*
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;*
- (d) have substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

Documents 1, 2, 4, 7, 8, 10, and 12 contain certain information relevant to the ACMA's investigation activities under the IGA, including detailed investigation and technical reports, which would reveal significant operational information about the ACMA's processes and is reasonably likely to prejudice the effectiveness of the ACMA's future operations regarding its activities under the IGA. Therefore, in relation to documents 1, 2, 4, 7, 8, 10 and 12, on an alternative basis, I consider that those documents are wholly conditionally exempt under subsection 47E(4) of the FOI Act.

Under subsections 11A(5) and 11B of the FOI Act where certain documents, or information within those documents, are identified as being conditionally exempt under subsection 47E(4) of the FOI Act, access to those documents must be given, unless in the circumstances, access at that time would, on balance, be contrary to the public interest. In considering whether, on balance, it would be contrary to the public interest to give access to those documents, I have taken into account the relevant factors favouring disclosure in subsection 11B(3) of the FOI Act, and have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act. I have also taken into account the considerable public detriment that would occur if the ACMA were not able to effectively detect, investigate or deal with potential breaches of the law. I further consider that it is not unreasonable to expect that the tools the ACMA uses and its investigative methods are to be kept confidential. Furthermore, release of this information would not inform debate on the matter. It could, however, reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the ACMA, as it may result in the compromising of the ACMA's ability to use certain tools and processes to investigate IGA complaints.

Following the consideration of the above factors, I have decided that in the circumstances of this particular matter, and at this particular time, the public interest in disclosing the information in the documents is outweighed by the public interest against disclosure. This is primarily because, on balance, only a limited public interest would be served by releasing this information, whereas its disclosure would likely have a substantial adverse effect on the proper and efficient conduct of the operations of the ACMA.

Accordingly, I have decided that it would be contrary to the public interest to give access to documents 1, 2, 4, 7, 8, 10, 12, and the whole of those documents are exempt under subsection 47E(4) of the FOI Act.

Documents exempt under section 47G of the FOI Act

Section 47G of the FOI Act provides that:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*
- (a) *would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or*
 - (b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

Documents 1 to 12 (inclusive) contain detailed information about third-party organisations that have been complainants or subjects of complaints or investigations conducted under the IGA. These documents include memos that contain, for example, screen-shots of a third-party organisation's website, and IP addresses or location traces for the relevant electronic devices.

This information is not widely known nor publicly available. If this information came into the hands of a competitor, there is a risk that the information could be used in a manner that is adverse to the third parties' business, commercial or financial interests and put them in a position of financial or competitive disadvantage that may potentially lead to a decrease in their customer base. I am further satisfied that when these third parties provided the relevant business information to the ACMA, they did so on the reasonable expectation of a mutual understanding that such information would not be publicly disclosed.

Accordingly, I consider that documents 1 to 12 (inclusive) contain business information that is conditionally exempt under section 47G of the FOI Act. Under subsection 11A(5) of the FOI Act where certain documents, or information within those documents, are identified as being conditionally exempt under section 47G of the FOI Act, access to the document must be given, unless in the circumstances, access at that time would, on balance, be contrary to the public interest. In considering whether, on balance, it would be contrary to the public interest to give access to this information, I have taken into account the relevant factors favouring disclosure in subsection 11B(3) of the FOI Act, and have not taken into account any of the irrelevant factors in subsection 11B(4) of the FOI Act. I accept that releasing the documents may further the objects of the FOI Act. I consider that the business information contained in documents 1 to 12 (inclusive) would not provide any additional information to inform public debate about the ACMA's activities under the IGA. In addition, disclosing this information is likely to impact upon the reputations of the businesses concerned in situations where the relevant investigations may result in no finding of a contravention of the law, and could prejudice any enforcement action that may be considered to address any investigations that might result in a finding of a contravention of the law.

Following the consideration of the above factors, I have decided that in the circumstances of this particular matter, and at this particular time, the public interest in disclosing the information in the document is outweighed by the public interest against disclosure. This is primarily because, on balance, only a limited public interest would be served by releasing the business information contained in documents 1 to 12 (inclusive), whereas significant harm to the interests of the third parties is likely to result from the disclosure.

Accordingly, I have decided that it would be contrary to the public interest to give access to the business information contained in documents 1 to 12 (inclusive).

Deletion of irrelevant or exempt information

Section 22 of the FOI Act provides that if the ACMA decides that granting access to a document would disclose information that would be exempt or reasonably be regarded as irrelevant to the request, then, where it is reasonably practicable to prepare a copy with deletions of exempt or irrelevant material, such a copy should be provided.

For the reasons noted above, I have found that documents 3, 5, 6, 9 and 11 contain business information that are exempt under section 47G of the FOI Act. Therefore, I have decided to apply section 22 of the FOI Act to delete the exempt material from those documents, to facilitate their release.

By email dated 6 November 2015, you advised the ACMA to "exempt personally identifiable information of individuals, employees of businesses (e.g. names, telephone numbers, email addresses and physical addresses)". Documents 3, 5, 6, 9 and 11 contain information that is outside the scope of your FOI request, for example, personal information. Such information is considered to be irrelevant material that is outside the scope of your FOI request. Accordingly, I have also decided to apply section 22 of the FOI Act to delete the irrelevant material from documents 3, 5, 6, 9 and 11 to facilitate their release.

Final assessment of charges

As you know, the ACMA is able to charge for the processing of your request. I confirm that on this occasion, owing to the number of documents that fall within the scope of your request, the ACMA has decided not to impose any charges in relation to the processing of your FOI request.

Access to documents

A copy of the documents which I have decided may be released to you are attached to this letter.

Your rights of review

Please find enclosed the ACMA's Information Sheet entitled Freedom of Information Act 1982 - Rights of Review of Applicants.

If you have any questions in this regard, please contact me on 02 9334 7831 or at phyllis.fong@acma.gov.au.

Yours sincerely,



Phyllis Fong
Manager
Community Broadcasting and Safeguards Section

Authorised decision maker pursuant to section 23(1) of the FOI Act

Attachments: Schedule of documents

ACMA's Information Sheet entitled Freedom of Information Act 1982 - Rights of Review of Applicants.