

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

### **Decision notice**

**Date:** 21 November 2017

**Public Authority:** Big Lottery Fund

**Address:** 1 Plough Place  
London  
EC4A 1DE

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

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1. The complainant submitted two requests to the Big Lottery Fund (BLF) seeking details of any concerns it had received or investigations it had undertaken in respect of Melness and Tongue Community Development Trust. The BLF refused to confirm or deny whether it held any information falling within the scope of the requests on the basis of section 31(3), by virtue of section 31(1)(a) (prevention and detection of crime). The Commissioner has concluded that section 31(3) is engaged in respect of these requests and that the public interest favours maintaining this exemption.

#### **Request and response**

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##### Request of 3 April 2017 – BLF reference FOI008-0002

2. On 3 April 2017 the complainant submitted a request to the BLF seeking information about the Melness and Tongue Community Development Trust (MTCDT). In submitting the request the complainant noted that the Office of the Scottish Charity Regulator (OSCR) had released information about a concern it had received about the MTCDT in 2011. The complainant therefore asked for *'copies of all Documents and letters*

*with regard to this complaint/investigation. I would also like to have viability of any subsequent complaints as per my original Request.<sup>1</sup>*

3. The BLF responded on 25 April 2017. It explained that the period of this present request was taken to cover 6 August 2015 to 3 April 2017 and only in respect of MTCDT along with any detail it held regarding a concern received by OSCR about that organisation. This was on the basis that the BLF's response to the previous request covered the period up to 5 August 2015. In its response, the BLF explained that it did not hold any details of the OSCR's investigation because prior to the complainant's contact of 3 April 2017 it was not aware of the concern being considered by OSCR. Furthermore, the BLF refused to confirm or deny, on the basis of section 31(3) whether it held any details of any complaints, the number of them, or if any formal investigations were held and the summary of them in respect of MTCDT for the period 6 August 2015 to 3 April 2017.
4. The complainant contacted the BLF on 27 April 2017 and asked it to conduct an internal review of this decision.
5. The BLF informed the complainant of the outcome of the internal review on 19 May 2017. The review upheld the position adopted by the BLF in its refusal notice.

Request of 2 May 2017 – BLF reference FOI008-0019

6. The complainant sent emails to the BLF on 27 April and 2 May 2017 in which he requested the following information:

*'all information from all time periods, on Complaints or Investigations into Melness and Tongue Community Development Trust and any Associated Entities, such as Melness and Tongue Community Development Trust Company Ltd or any other known to Big Lottery or any organisation associated with the Big Lottery Fund that you have information stored on.'*

7. In a further email of 3 May 2017 the complainant confirmed that he also wished the BLF to consider:

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<sup>1</sup> The original request, BLF ref FOI006-0099 was submitted on 11 September 2015 and sought information about details of complaints the BLF had received about MTCDT. The request covered the period up to 5 August 2015. The BLF refused to confirm whether any information was held on the basis of section 31(3).

*'Melness and Tongue Community Energy Company Ltd and any other related to the Prime [ie MTCDT]'*

8. The BLF responded on 1 June 2017 and explained that based on the overlap with previous requests it had interpreted these emails as seeking the following information:
  - Information on any complaints or investigations between 4 April 2017 until 3 May 2017 into MTCDT.
  - Information on any complaints or investigations into Melness and Tongue Community Energy Company Ltd up to 3 May 2017.
9. The BLF also explained that it was refusing to confirm or deny whether it held any information falling within the scope of this request on the basis of section 31(3) of FOIA by virtue of section 31(1)(a).
10. The complainant contacted the BLF on the same day and asked it to conduct an internal review of this request.
11. The BLF informed him of the outcome of the internal review on 13 June 2017. The review upheld the decision to refuse to confirm or deny whether any information was held on the basis of section 31(3) of FOIA.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 27 June 2017 in order to complain about the BLF's decision to cite section 31(3) in response to his requests FOI008-0002 and FOI008-0019. The complainant provided the Commissioner with a number of arguments to support his complaint and these are referred to in the analysis below.
13. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
14. As explained above, the BLF is seeking to rely on section 31(3) to refuse to confirm or deny whether it holds information falling within the scope of the requests. Therefore, this notice only considers whether the BLF is entitled, on the basis of this exemption, to refuse to confirm or deny whether or it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

## Reasons for decision

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### Section 31 – law enforcement

15. Section 31(3) of FOIA states that:

*'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).'*

16. In the circumstances of these requests the BLF believes that complying with section 1(1)(a) would prejudice the purpose specified in section 31(1)(a), ie the prevention and detection of crime.

#### *The complainant's position*

17. The complainant explained that in a response to a FOI request, the OSCR informed him that a complaint had been received by them in 2011 regarding MTCDT. In the complainant's view this made the BLF's stance to neither confirm nor deny (NCND) whether any information falling within the scope of his requests unsustainable.

#### *The BLF's position*

18. The BLF explained that it takes its duty to protect public funds seriously and it therefore investigated all concerns that are raised with it. However, it was of the view that confirming or denying whether information is held in response to these requests would be likely to prejudice its ability to protect public funds and take appropriate action where necessary. This was because the BLF believed that confirming whether it held the requested information could undermine its processes not only for any specific investigations in the past, current or future against this organisation, but also for other organisations under review now or in the future.

19. In support of this position, the BLF made the following points:

- If an organisation is unaware that it was conducting an investigation as a result of a concern received, then providing confirmation of the investigation could create a risk that records could be amended, deleted or withheld which in turn could affect any remedial or other action that the BLF would otherwise be able to take.
- A FOIA response becomes public information. Therefore an organisation could become aware of investigations that the BLF have conducted within the time period that the request relates to. A further FOIA request (even if details of the nature of investigations were

withheld) would then narrow down the time frame involved for any new investigation. The organisation could then infer what any concern or investigation related to which in turn would be likely to prejudice any investigation that the BLF conducts.

- Releasing details of complaints received and investigations conducted would be likely to undermine the BLF's ability to protect public funds and could lead to increased attempts in fraud. This is because releasing the details of the concerns and nature of the investigations means that any organisation could access this information. They would have a greater understanding of the BLF's actions in relation to particular types of concerns received. They may then be able to consider ways to circumvent the BLF's investigative processes potentially reducing the action that it could take.
  - Providing information about concerns the BLF had received may affect public confidence in the integrity of its processes. The BLF explained that in many cases, when it receives a concern from a member of the public, they are known to the organisations that they are raising concerns about. Therefore even by withholding personal information from its releases, the organisations in question may be able to identify the individual simply from the concern itself. Therefore if the public were aware that their concern could be released through a FOIA request, it may prevent them from contacting the BLF in the first place. As a result the BLF explained that it would not receive the concern to investigate which in turn would be likely to prejudice its ability to protect public funds.
20. Finally, in response to the complainant's argument in relation to the disclosure made by the OSCR, the BLF explained that although the complainant has previously advised it of his enquiries with the OSCR, this does not affect the response that it had issued to these requests. The BLF noted that the OSCR has different functions; the latter is as a regulator whereas its role was as a grant funder. Therefore, the BLF suggested that the OSCR was likely to have different considerations when reviewing FOI requests, albeit that it could not comment on why OSCR had taken a different approach.

#### The Commissioner's position

21. In order for a prejudice based exemption, such as section 31(3), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed - or in this case confirmation as to whether or not the requested

information is held - has to relate to the applicable interests within the relevant exemption;

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld – or the confirmation as to whether or not the requested information is held - and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirming or denying whether information is held disclosure 'would be likely' to result in prejudice or confirming or denying whether information is held 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
22. With regard to the first limb, the BLF believes that complying with section 1(1)(a) would be likely to result in prejudice to the prevention and/or detection of crime in respect of grants it has awarded. The Commissioner is satisfied that the first limb is therefore met as the nature of prejudice envisaged by the BLF is clearly one that falls within the scope of the exemption contained at section 31(1)(a).
23. With regard to the second limb, the Commissioner notes that whilst the BLF does not have the power to enforce the law, she understands that it does share information about its investigations with the police and other agencies in order to prevent fraud and money laundering. The Commissioner is therefore satisfied that there is a direct connection between prejudice occurring to the BLF's investigative procedures and prejudice occurring to the prevention and/or detection of crime even if the enforcement of the law is ultimately undertaken by a different body. Furthermore, the Commissioner is satisfied that the resultant prejudice which is alleged is clearly one that is of substance.
24. With regards to the third limb, the Commissioner is persuaded that this is also met. She has reached this finding given that complying with section 1(1)(a) could undermine the BLF's investigatory procedures not just in one way but in a number of different ways, ie the various consequences described at the bullet points at paragraph 19 above. In the Commissioner's view the potential for prejudice occurring in a number of different ways, rather than simply one way, increases the likelihood of the BLF's investigatory processes being undermined.

Furthermore, the Commissioner believes that the ways in which the BLF considers its investigatory processes could be undermined if it confirmed whether or not it held the requested information are all logical and plausible. Moreover, the Commissioner is satisfied that the prejudice to the BLF's investigatory methods could have a direct impact on its ability to detect or prevent the fraudulent use of the funds it has allocated, and as a consequence undermine its ability to share information of such activities with the police or other law enforcement agencies.

25. The Commissioner appreciates that the approach taken by the BLF to adopt a NCND response to this request is in many ways a generic one; namely that the regardless of the nature of request – and unless there are particular case specific circumstances – it would refuse to confirm or deny whether it had received a concern or was conducting an investigation into a particular grant recipient. In other words, as the BLF has argued, the prejudice which could arise from complying with this request is not limited to any impact on possible investigations regarding the MTCDDT, but risks undermining all of investigations the BLF may be conducting, or will conduct in the future. The Commissioner agrees that in order for a NCND exemption to operate effectively, public authorities need to adopt to a consistent approach to requests and to consistently refuse to confirm or deny whether information of a particular type is held.
26. The Commissioner has given careful consideration to the complainant's argument in respect of the disclosure about the MTCDDT made by the OSCR. However, she is not persuaded that simply because it has confirmed that it received a complaint about the MTCDDT then this undermines the BLF's position. This is because although the OSCR has confirmed it has received such a complaint this does not imply, let alone confirm, whether or not the BLF have also received a complaint about the organisation.
27. The Commissioner has therefore concluded that section 31(3) is engaged.

### **Public interest test**

28. Section 31(3) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.
29. The complainant acknowledged that whilst it might be appropriate for the BLF to refuse to disclose details of the individuals who made a complaint about a particular organisation, it was not in the public

interest for it to refuse to disclose all information about concerns it may have received, in particular concerns about MTCDT. More specifically, the complainant argued that as the OSCR had appeared to fail to inform the BLF about the concerns about MTCDT which had been raised with it, he believed that communications between these organisations may be lacking. Furthermore, the complainant argued that there was no evidence in the public domain that either the BLF or OSCR have monitored MTCDT effectively or in any way that would give the public confidence that money has not been wasted, or indeed well spent.

30. The BLF acknowledged that there was a strong public interest in confirming whether it held any information falling within the scope of the requests. This is because it could improve public confidence that it conducts appropriate investigations when concerns are raised and it would also assist public debate in relation to concerns potentially received against a specific organisation.
31. However, the BLF argued that there was a stronger public interest in it ensuring that it has strong and robust investigative procedures that are free from prejudicial influences that may affect potential outcomes. In particular, the BLF emphasised that the public interest favoured upholding the exemption given that the consequences of confirmation or denial could undermine not only specific investigations in the past, current, or future in relation to MTCDT but also more broadly undermine the current or future investigations in relation to other organisations.
32. In relation to the specific public interest arguments advanced by the complainant, the BLF explained that it communicates with OSCR on individual cases as it deemed necessary. The BLF was unable to comment on why OSCR may not have contacted it as this decision was taken by the OSCR.
33. The BLF noted that details of monitoring information were not part of the complainant's request, albeit that it did not routinely publish information on the monitoring of individual grants and therefore the detail referred to is not in the public domain. The BLF suggested that if the complainant felt that there is a concern with the organisations in question then the details within its 'Raising a concern' guide are available to him. However, the BLF did explain that it was prepared to confirm that its grant to MTCDT ended approximately two years ago.
34. The Commissioner acknowledges that the complainant has genuine concerns about how the MTCDT used the grant awarded to it by the BLF. It is not for the Commissioner to comment on the validity or otherwise of these concerns. However, she agrees that by confirming whether it held information falling within this request the BLF would, as it suggests, inform the public, and therefore the complainant, as to whether any



concerns had been formally raised with it about the MTCDT. The Commissioner agrees that there is a public interest in the BLF being open and transparent about how it monitors the bodies it grants awards to, specifically in respect of organisations such as this one where - the complainant at least - has concerns about how a grant has been used. Confirmation that the BLF had received a concern and had undertaken an investigation - if indeed that is the situation - could reassure the public about the effectiveness of the BLF's procedures. The public interest in the BLF confirming whether it holds information falling within the scope of these requests should not be ignored.

35. However, the Commissioner believes that there is a very significant public interest in ensuring that the prevention and detection of crime is not prejudiced. In the circumstances of this case, she considers this to attract particular weight given that complying with section 1(1)(a) in response to these requests risks having a much broader impact on the BLF's ability to conduct effective investigations into the grants it has awarded where this is deemed necessary. The Commissioner is also conscious of the significant amount of funds which the BLF awards. Whilst presumably the vast majority are not subject to concerns or investigations, given the numbers involved even if a small percentage were subject to investigation then a considerable amount of public money is still involved.
36. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 31(3).

## Right of appeal

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37. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

38. 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.
39. 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 .....**

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