

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

### **Decision notice**

**Date:** 9 May 2024

**Public Authority:** Sport England  
**Address:** SportPark  
3 Oakwood Drive  
Loughborough  
Leicestershire  
LE11 3QF

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

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1. The complainant submitted a request to Sport England for information relating to any conditions imposed or suggestions made to Swim England.
2. The Commissioner's decision is that section 36(2)(b)(ii) is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
3. The Commissioner does not require further steps as a result of this decision notice.

## Background

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4. Sport England is an arm's length body of government, with responsibility for helping people and communities get a sporting habit for life. It does this in many ways, but for the purpose of this case its key responsibilities are (i) conferring recognised status on sporting national governing bodies (ii) granting conditional funding to some of those national governing bodies (and other organisations) and (iii) operating a complaints process which includes, in very limited circumstances, the ability for the general public to complain to Sport England about organisations which it funds.
5. Swim England is a sporting national governing body which receives Sport England funding. That funding is governed by a funding agreement, which includes a requirement to comply with the Code for Sports Governance as well as numerous conditions.
6. In 2022, Swim England disaffiliated (i.e. no longer recognised) a swimming club called Ellesmere College Titans because of safeguarding concerns. Sport England received numerous complaints about this disaffiliation. As a result, Sport England commissioned an independent review of Swim England's processes (the 'Weston Report'). This recommended a number of improvements that Swim England should make.

## Request and response

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7. On 28 July 2023, the complainant wrote to Sport England and requested information in the following terms:
  - “1. Any conditions imposed or suggestions made by Sport England to Swim England regarding future recruitment of staff or board members of Swim England; and
  2. Any other conditions imposed, or suggestions made by Sport England to Swim England relating to Swim England's future conduct and culture that are not yet in the public domain.”
8. On 18 August 2023, Sport England disclosed a document with redactions made under sections 40(2), 41(1) and 43(2), and confirmed that the document contains all the information it holds within scope of the request.

9. Upon receiving this response, the complainant asked Sport England to conduct an internal review on 18 August 2023. On 16 October 2023, Sport England provided its internal review response and maintained its original position.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 23 October 2023 to complain about the way their request for information had been handled.
11. In their initial complaint to the Commissioner, the complainant explained that they only wished to challenge the redactions made under sections 41(1) and 43(2) of FOIA.
12. During the course of the Commissioner's investigation, Sport England provided a revised response in which it disclosed further paragraphs of the document provided in its initial response. It maintained its reliance on sections 40(2) and 43(2) of FOIA, but it also added the exemptions of 36(2)(b)(ii) and (36)(2)(c) and overturned its reliance on section 41(1) of FOIA.
13. The Commissioner considers that the scope of his investigation is to examine the application of sections 43(2) and 36(2)(b)(ii) and 36(2)(c) of FOIA to the withheld information.
14. However, as Sport England has applied all three exemptions to the withheld information, the Commissioner will firstly examine the application of section 36(2)(b)(ii) of FOIA.
15. Should the above exemption not apply to the withheld information, the Commissioner will go onto consider the application of sections 36(2)(C) and 43(2) of FOIA.

## **Reasons for decision**

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### **Section 36-prejudice to the effective conduct of public affairs**

16. Section 36(2) of FOIA provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information:
  - (b) would, or would likely to inhibit:
    - (ii) the free and frank exchange of views for the purposes of deliberation.

17. Under section 32(2)(b)(ii) of FOIA, information is exempt from disclosure if in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views for the purposes of deliberation.
18. For any part of the exemption at section 36 to be engaged, the qualified person (QP) within the public authority is required to give a reasonable opinion about the likelihood of prejudice or inhibition.
19. When determining whether the QP's opinion is a reasonable one, the Commissioner takes the approach that the opinion is in accordance with reason and not irrational or absurd; in short, if it is an opinion that a reasonable person could hold.
20. The Commissioner is satisfied that Tim Hollingsworth, Sport England's Chief Executive, is authorised as the QP under section 36(5) of FOIA.
21. Sport England has provided evidence that, after contact by the Commissioner and before it provided its revised response, it sought the advice of the QP, who was provided with a copy of the withheld information and advice on the application of section 36 to the request.
22. On 15 March 2024, the QP advised that, in their opinion, the inhibition, specified in sections 36(2)(b)(ii), 'would be likely' if the requested information were to be disclosed, for it "would undermine the trust between Swim England and Sport England and therefore damage the ongoing relationship between them."
23. The Commissioner's guidance<sup>1</sup> states that the exchange of views must be as part of a process of deliberation, which it defines as "the public authority's evaluation of competing arguments or considerations in order to make a decision."
24. Having inspected the withheld information, the Commissioner accepts that the QP's opinion is one that a reasonable person could hold, as the Commissioner considers that disclosure would be likely to prejudice free and frank deliberations between funded bodies, which allows Sport England to carry out its duties of investigating safeguarding and welfare complaints.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#free>

25. The Commissioner further considers that the views, contained within the withheld information, were expressed as part of a process of deliberation (an evaluation of competing arguments or considerations in order to make a decision), and that if released would prejudice Sport England's ability to put into place action plans to improve standards, where necessary.
26. The Commissioner notes the complainant's frustration at Sport England's reliance on section 36, only after the Commissioner had begun his investigation, and after their internal review response was provided. However, as the complainant acknowledges themselves, a public authority can introduce exemptions right up to Tribunal stage.
27. The Commissioner therefore finds that section 36(2)(b)(ii) is engaged. He has therefore gone on to consider the public interest.

### **Public interest test**

28. As section 36(2) is a qualified exemption, the Commissioner will consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Factors in favour of disclosure**

29. The complainant argues that there is "widespread public interest in transparency" as confidence in Sport England has been "damaged and that disclosure would help restore trust."
30. Sport England accepts that "transparency and openness are key to the effective conduct of public affairs" and that public authorities in receipt of public money should be "open to a level of scrutiny."

### **Factors in favour of maintaining the exemption**

31. Sport England argues that disclosure of the information would not be in the public interest as it would prejudice and disrupt the free and frank exchange of information between Sport England and Swim England.
32. Sport England further argued that this disclosure would likely "undermine the trust of other funded partners who may collaborate less freely given the perceived risk that any information shared with Sport England might be released to the public."

33. Sport England also stated that disclosure of the withheld information would not be in the public interest as it would “undermine the public’s trust in Sport England” if it were to disclose sensitive and private information regarding complaints handling, safeguarding and welfare issues.

### **The balance of the public interest test**

34. Where the Commissioner finds that the qualified person’s opinion was reasonable, and that the prejudice expressed would or would be likely to occur, he will consider the weight of that prejudice and the severity and frequency of it, in balancing the public interest test.

35. The Commissioner appreciates the complainant’s concerns about the need for transparency regarding any measures introduced by Sport England, in order to “reform Swim England.”

36. However, as the Commissioner has noted in separate but similar decisions<sup>2</sup>, in order to monitor funded bodies effectively, Sport England needs to establish good relationships with relevant stakeholders. Disclosing the information could have a “chilling effect” on the views that bodies are willing to share complaints.

37. Furthermore, these arguments are likely to be strongest when the issue in question is still live and ongoing, as it is in this instance, as various measures are being implemented to address the complaints raised.

38. Disclosure is also likely to affect Sport England’s relationship with Swim England, as it is important that the two organisations are able to discuss sensitive matters candidly, but privately.

39. In the circumstances of this case, the Commissioner is satisfied that there is greater public interest in Sport England being able to carry out its role robustly, in order to improve sporting bodies’ governance.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027763/ic-238437-r1w4.pdf>  
<https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027704/ic-255535-g3s3.pdf>  
<https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027708/ic-259335-p8p4.pdf>  
<https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024696/ic-198977-d3b9.pdf>

40. The Commissioner therefore concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure, and that Sport England was entitled to rely on section 36(2)(b)(ii) to withhold parts of the requested information.
41. As the Commissioner has found that section 36(2)(b)(ii) of FOIA applies to the withheld information, it has not been necessary for the Commissioner to consider the application of sections 36(2)(c) and 43(2) in this case.

## **Right of appeal**

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42. 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](mailto:grc@justice.gov.uk)

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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Joanna Marshall**  
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