

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

### **Decision notice**

**Date:** 12 December 2023

**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 has requested all correspondence between Sport England and Swim England relating to the draft Weston Report. Sport England disclosed some information and withheld the remainder under sections 21, 36(2), 40(2), 41 and 43(2) of FOIA.
2. The Commissioner's decision is that the withheld information engages sections 36(2)(b)(ii) and (c) of FOIA and the public interest favours maintaining the exemption. However, the Commissioner has recorded a procedural breach of sections 1 and section 10 of FOIA.
3. The Commissioner requires Sport England to take the following steps to ensure compliance with the legislation.
  - If it hasn't already done so, Sport England must disclose to the complainant documents 15, 25, and 32 as described in its internal review decision.
4. 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.

## Request and response

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5. On 13 February 2023, the complainant made the following request for information:

“I would like to make a FOI request for all correspondence between Sport England and Swim England relating to the draft Weston Report (commissioned by Sport England from Sport Resolutions) from the time that the decision to undertake the report was made.”

6. Sport England responded on 13 April 2023 and provided some information within the scope of the request but refused to provide the remainder. It cited sections 21 (information accessible to applicant by other means), 40(2) (third party personal information), 41 (information provided in confidence) and 43(2) (commercial interests) of FOIA as its basis for withholding this information.
7. The complainant wrote to Sport England again on 13 April 2023, requesting that it carry out an internal review of its decision to withhold information under sections 41 and 43 of FOIA.
8. Sport England provided the outcome of its internal review on 7 June 2023. It maintained its position that sections 41 and 43(2) of FOIA applied to documents 5, 9, 10, 19, 30 and 31. It stated that section 36(2) (prejudice to effective conduct of public affairs) of FOIA also applied to these documents.
9. However, it revised its position in relation to documents 15, 25, and 32, stating that the exemptions under sections 41 and 43(2) of FOIA did not apply to these documents and that they should be released in full, subject to the redaction of personal information relating to non-senior staff.

## Scope of the case

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10. The complainant contacted the Commissioner on 14 June 2023 to complain about the way their request for information had been handled. Specifically, the complainant raised concerns about the redactions Sport England made in documents 5, 9, 10, 11 and 31, other than those made under the section 40 (third party personal information).
11. In its submission to the Commissioner, Sport England confirmed that the only information redacted from document 11 was personal information.

The Commissioner has reviewed the information redacted from document 11 and is satisfied that it consists of personal information.

12. The Commissioner therefore considers that the scope of his investigation is to consider whether Sport England was entitled to rely on sections 36(2), 41 or 43(2) of FOIA to make the redactions from documents 5, 9, 10 and 31.

## **Background information**

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13. In its submission to the Commissioner, Sport England provided the following background.

“Sport England is an arms length body of government, with responsibility for helping people and communities get a sporting habit for life. It does so in many ways, but for the purposes of this case its key responsibilities are (i) conferring recognised status on sporting national governing bodies; (ii) granting conditional funding to those national governing bodies (and other organisations), and; (iii) operating a complaints process which includes the ability for the general public to complain to Sport England about organisations it funds. Swim England is a sporting national governing body which receives Sport England funding and that funding is conditional upon Swim England satisfying the terms of its funding agreement with Sport England, including complying with the Code for Sports Governance.

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 and other complaints regarding Swim England’s judicial and decision making processes. As a result, Sport England commissioned an independent review of Swim England’s processes (the report of which became known as the Weston Report), which recommended a number of improvements which Swim England should make.

The complainant represents a group of parents who are unhappy with the Swim England’s decision to disaffiliate Ellesmere College Titans and who, we believe, are taking steps to have Swim England reverse/reconsider its decision. Sport England has no powers to require Swim England to take any such steps and, indeed, is entirely neutral in that respect - it is important to understand that there are other parents who consider that their children were exposed to bullying and other poor treatment at Ellesmere College

Titans and who, therefore, do not consider that reaffiliation should take place.”

## Reasons for decision

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### Section 36 – prejudice to effective conduct of public affairs

14. Section 36(2)(b) says that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would prejudice, or would be likely to prejudice:
  - i. the free and frank provision of advice, or
  - ii. the free and frank exchange of views for the purposes of deliberation.
15. Section 36(2)(c) says that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs.
16. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised qualified person for that public authority. The qualified person’s opinion must also be a “reasonable” opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if he finds that the opinion given is not reasonable.
17. To determine whether Sport England correctly applied the exemption, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning that informed the opinion. Therefore, in order to establish that the section 36 exemption has been applied correctly, the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.

### The qualified person

18. In deciding whether Sport England has correctly engaged the exemption, the Commissioner has first considered who within Sport England is the “qualified person” for the purposes of the exemption.

19. The relevant qualified person is defined by section 36(5) of FOIA.
20. The responsibility of the qualified person to give an opinion on whether disclosure would, or would be likely to cause prejudice cannot be delegated to another person. The reason for asking who gave the opinion is to ensure that the decision was taken by the correct person. If the person who gives the opinion is not the qualified person, then section 36 cannot apply.
21. In this case, Sport England has confirmed that the qualified person for the purposes of the exemption is its Chief Executive Officer, Tim Hollingsworth. The Commissioner accepts that Sport England has identified the appropriate person for the purpose of providing a reasonable opinion and has therefore gone on to consider whether the qualified person has provided an opinion and when the opinion was provided.

### **Did the qualified person give an opinion and when was it given?**

22. Sport England's record of the qualified person's opinion was sought on 1 June 2023. It stated that the opinion was given verbally following a meeting in which the issues were discussed in detail.
23. The Commissioner is therefore satisfied that the qualified person gave an opinion and has therefore gone on to consider whether the opinion given was a reasonable one.

### **Was the opinion reasonable?**

24. The Commissioner has issued guidance on the application of section 36<sup>1</sup>. With regard to what can be considered a "reasonable opinion", it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If 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 – then it is reasonable."

25. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner

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<sup>1</sup> [https://ico.org.uk/media/fororganisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

must consider whether the inhibition or prejudice claimed relates to the specific subsection of section 36(2) that Sport England is relying upon.

26. In this case, Sport England has stated that it is relying on section 36(2)(b)(ii) and (c).
27. As part of the Commissioner's investigation, Sport England provided the Commissioner with a copy of the record of the qualified person's opinion.
28. The qualified person is of the opinion:

"...that the full engagement by funded bodies in resolving safeguarding, welfare and complaints handling concerns is key. The ability to collaborate freely with funded bodies puts Sport England in the best position to assess governance standards and put in place action plans to improve those standards where necessary. An ancillary benefit is that, as governance standards are improved, Sport England's investments are better protected."
29. The qualified person was also of the view that:

"...the release of the requested information detracts from Sport England's ability to effectively review and improve governance standards for both Swim England and the wider group of funded bodies."
30. The Commissioner has considered Sport England's arguments in relation to sections 36(2)(b)(ii) and (c) being engaged and has reviewed the withheld information.
31. It is important to note that the question of whether the exemption is engaged is not determined by whether the Commissioner agrees with the qualified person's opinion, but by whether he considers the opinion to be in accordance with reason. In other words, the Commissioner must consider whether the qualified person's opinion is one that a reasonable person could hold. This only requires that it is a reasonable opinion, not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
32. Having reviewed the withheld information, the Commissioner is satisfied that it is information that Swim England would not have expected to be disclosed to the public. Disclosing the information could therefore make Swim England more reluctant to disclose such information to Sport England in the future, thereby potentially prejudicing the free and frank exchange of views between the two organisations (section 36(2)(b)(ii)).

33. This in turn could also result in damage to the relationship between Sport England and Swim England and therefore potentially further prejudice Sport England's ability to discharge its functions in relation to Swim England (section 36(2)(c)).
34. The Commissioner therefore accepts that it was reasonable for the qualified person to hold the opinion that disclosure of the requested information would be likely to result in prejudice to the effective conduct of public affairs. In particular, the Commissioner accepts the qualified person's reasoning that disclosure of information would be likely to undermine the trust between Swim England and Sport England. This could, in turn, make it more difficult for Sport England to discharge its functions in the future.
35. In view of this, the Commissioner is satisfied that a reasonable opinion has been given and therefore he finds that the exemption is engaged.

### **Public interest test**

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36. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in disclosing the information**

37. Sport England argued that there is an inherent public interest in the openness and transparency of the work of public bodies. It stated that there is a presumption that openness and transparency is the best means of ensuring that a public body carries out its functions appropriately.

### **Public interest in maintaining the exemption**

38. Sport England also stated that there is a further a strong public interest in Sport England maintaining strong and trusted relationships with its funded partners, to enable full and frank conversations to take place. If funded partners cannot trust that their dialogue with Sport England on important matters of internal governance will be protected, there will be an inevitable chilling effect on those conversations.

### **Balance of the public interest**

39. When considering complaints regarding the application of the exemption at sections 36(2)(b)(ii) and (c), where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of



that opinion in applying the public interest test. This means that whilst the Commissioner accepts that a reasonable opinion that prejudice would, or would be likely to, occur has been expressed, he will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.

40. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.
41. As the Commissioner noted in a separate but similar decision<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 about complaints and could make bodies less willing to collaborate with Sport England’s complaints process – with regard to the specific complaint about this swimming club at the time of the request, and generally in the future. 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 including that related to safeguarding matters.
42. As the Commissioner has found that sections 36(2)(b)(ii) and (c) apply to the redactions in documents 5, 9, 10 and 31, and that the public interest favours maintaining exemption, it has not been necessary for the Commissioner to consider Sport England’s application of sections 41 and 43(2) in this case.

## **Procedural matters**

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43. Section 1(1)(a) of FOIA states that a person who asks for information is entitled to be informed whether the information is held. If it is held, section 1(1)(b) states that the person is entitled to have that information communicated to them.
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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024696/ic-198977-d3b9.pdf>



44. Section 10(1) of FOIA states a public authority must comply with section 1(1)(a) and section 1(1)(b) within 20 working days upon receipt of the request.
45. In failing to disclose the non-exempt information during the statutory timeframe, Sport England breached section 1 and section 10.

## Right of appeal

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46. 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)

47. 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.
48. 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 .....**

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