

## Freedom of Information Act 2000<sup>1</sup>

### Decision notice

**Date:** 26 March 2012

**Public Authority:** Department for Culture, Media and Sport (Sport England)<sup>2</sup>

**Address:** 3<sup>rd</sup> Floor Victoria House  
Bloomsbury Square  
London  
WC1B 4SE

### Decision (including any steps ordered)

---

1. The complainant requested information relating to discussions between Sport England and the British Judo Association (the BJA) in light of his disagreement with the BJA over its policy in connection with judo coaches from non-affiliate judo centres obtaining a UKCC<sup>3</sup> qualification.
2. The Commissioner's decision is that the requested information engaged sections 36(2) (b) and (c) but in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
3. The Commissioner requires Sport England to take the following steps to ensure compliance with the legislation.
  - Disclose all of the information withheld on the basis of the exemptions at sections 36(2)(b) and 36(2)(c) of the Act.

---

<sup>1</sup> Referred to in this Notice as 'the Act'.

<sup>2</sup> The complaint was made against Sport England, an agency of the Department for Culture, Media and Sport (DCMS). The DCMS is therefore named as the public authority for that reason. However, to avoid confusion, Sport England is directly referred to in the main body of the notice.

<sup>3</sup> UK Coaching Certificate issued by Sports Coach UK. Sports Coach UK is a registered charity with the primary objective of developing & supporting coaching programmes.

4. Sport England 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

---

5. On 27 June 2011 the complainant wrote to Sport England to request information under the Act. The request was worded as follows:

*'.....all documents, emails or otherwise, relating to dialogue between Sport England and the BJA [British Judo Association] following our meeting with you of January 28 2011, and your letter of June 24 2011.'*

6. Sport England responded on 8 August 2011. It disclosed some information within the scope of the request but withheld the remaining information (the disputed information) on the basis of the exemptions at sections 36(2) (b), (c) and 43(2) of the Act.
7. Following an internal review Sport England wrote to the complainant on 19 August 2011. It upheld the original decision to withhold the disputed information.

## **Scope of the case**

---

8. On 22 August 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The complainant specifically asked the Commissioner to rule on Sport England's decision to withhold the disputed information and questioned the motives for not disclosing it.
10. He also questioned why the Chief Executive Officer was the 'qualified person' and requested that an 'external qualified person' should re-consider the request.
11. During the investigation, Sport England disclosed some of the information it had previously withheld under section 36(2) and all of the information withheld under 43(2). It consequently withdrew its reliance on the exemption at section 43(2).
12. The investigation was therefore restricted to the remaining information withheld on the basis of the exemptions at sections 36(2)(b) and 36(2)(c) of the Act.

## Reasons for decision

---

### Disputed information

13. Sport England provided the Commissioner with copies of the disputed information for the purposes of his investigation.
14. A list of the documents which constitute the disputed information can be found in the confidential annex to be disclosed to Sport England only.

### Section 36(2)(c) – Prejudice to the effective conduct of public affairs

15. All of the disputed information was withheld on the basis of the above exemption.
16. Information is exempt on the basis of section 36(2)(c) if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

### Qualified Person

17. The Chief Executive Office (CEO) for Sport England, Jennie Price issued the opinion that both sections 36(2)(b) and 36(2)(c) were engaged. Qualified Persons are listed at section 36(5) of the Act. Section 36(5)(o)(iii) specifically states that any officer or employee of a public authority may be designated a Qualified Person by a Minister of the Crown. The Commissioner is satisfied that Jenni Price was the designated Qualified Person at the time of the request.<sup>4</sup>
18. The Commissioner understands the Qualified Person considered the following information before providing her opinion:
  - The request,
  - The Commissioner's guidance on section 36,
  - The Ministry of Justice's guidance on section 36, and

---

<sup>4</sup> The Secretary of State (i.e. Minister of the Crown) has designated persons in charge of non-ministerial government departments as qualified persons for the purposes of section 36 of the Act. Sport England is a non – ministerial government department. A list of qualified persons for public authorities can be found at; <http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/index.htm>

- The disputed information.
19. The opinion is dated 21 September 2011. It was therefore provided after Sport England had refused the request in August 2011.
  20. The opinion appears to have been documented after the request was refused. However, there is nothing to suggest that factors other those existing at the time of the request were taken into account by the Qualified Person.
  21. Nevertheless, the Commissioner would like to stress that it is important for the opinion of a Qualified Person to be documented before a refusal notice under section 36(2) is issued to an applicant.
  22. The opinion was specifically that disclosing the disputed information would result in Sport England having to divert resources from its core functions and consequently prejudice 'the effective conduct of public affairs'.
  23. The Qualified Person explained that the request is part of an ongoing complaint by the complainant against the British Judo Association (the BJA). The complainant owns a number of judo centres in Devon which are not affiliated to the BJA. The judo centres however run coach training courses and the complainant would like the coaches to obtain UKCC qualifications on the same terms as BJA members. At the time of the request, the coaches could only obtain the UKCC qualification following a 'technical assessment' by the BJA for which they would have been charged £200.
  24. Additional details of the opinion can be found in the confidential annex (to be disclosed to Sport England only) because, in Sport England's view, to reproduce that part of the opinion in the main body of this notice would reveal parts of the disputed information and therefore defeat the purpose of the exemptions.
  25. It is sufficient to mention however that the Qualified Person was broadly of the opinion that disclosing the disputed information would not make the ongoing dispute any easier to resolve. According to the Qualified Person, this would be detrimental to Sport England's participation targets and divert resources from promoting sport to further resolving the ongoing dispute. The Qualified Person therefore submitted that such an outcome would be prejudicial to the effective conduct of public affairs.
  26. The Commissioner is of the view that the substance of a qualified person's opinion must be objectively reasonable.

27. Furthermore, in the Commissioner's opinion, the term 'would prejudice' places a significant evidential burden on a public authority and must be at least more probable than not.
28. Given the nature of the disputed information and more importantly, in light of the ongoing disagreement between the complainant and the BJA at the time of the request, the Commissioner finds that the Qualified Person's opinion was objectively reasonable. The disputed information broadly consists of candid exchanges between Sport England and the BJA on the best way to resolve the disagreement between the complainant and the BJA. The Commissioner agrees it was reasonable to conclude in the circumstances that, disclosing candid exchanges in the middle of ongoing negotiations would not have made the resolution of the dispute any easier and consequently divert resources from Sport England's core functions. The Commissioner therefore agrees that disclosure would have been prejudicial to the effective conduct of public affairs.
29. The Commissioner therefore finds that the exemption at section 36(2)(c) was engaged.

#### Public Interest Test

30. Section 36(2)(c) is a qualified exemption and therefore subject to a public interest test.
31. Sport England acknowledged the general public interest in disclosure – to promote transparency and accountability. Specifically, it pointed out the disputed information 'has some bearing' on its accountability and the seriousness with which it regards issues which do not promote its aims. It further acknowledged that the disputed information 'may encourage public debate about a matter of public interest'.
32. Sport England however argued that the balance of the public interest weighed in favour of withholding the disputed information for the following reasons:
33. Disclosure would result in actions that would impede maximum participation in the sport of judo.
34. The dispute is a matter the public finds interesting rather than a matter '*which is truly a matter of public interest and debate*'
35. The information already disclosed goes a long way to making Sport England's position clear as to the seriousness with which it regards issues which do not promote its aims.

36. Disclosure would result in reluctance by Sport England and other public bodies to deliver robust advice to publicly funded bodies who are not meeting expectations.

#### Balance of the Public Interest

37. The Commissioner agrees with the public interest arguments in favour of disclosure recognised by Sport England.
38. The Commissioner also considers there is a significant public interest in disclosing the disputed information because, although in the short term, it was more likely than not to aggravate the situation in light of the ongoing disagreement, it would have also enhanced the chances of a resolution in the long term. There had clearly been a breakdown in the negotiations between the complainant and the BJA at the time of the request. However, in the Commissioner's opinion, disclosing the disputed information would not have made the situation any worse in terms of the breakdown in the negotiations and fractured relations between both parties. On the other hand, withholding the disputed information would certainly not have resolved the conflict either and was more likely to aggravate the situation. Given the strong perception (rightly or wrongly)<sup>5</sup> by the complainant that Sport England had colluded with the BJA, there was a significant public interest in disclosing the disputed information notwithstanding the likely short term disadvantage of doing so.
39. Further fuelling that perception by withholding the disputed information would not have helped resolve the disagreement and arguably be more likely to make each party become entrenched in their views about each other. It is not in the public interest for the disagreement to drag on indefinitely on the basis of the complainant's suspicions about the credibility of the BJA and Sport England in their handling of the matter. As Sport England explained, it had already made significant disclosures to the complainant in order to be transparent about the dialogue it had with the BJA. The Commissioner considers that disclosing the disputed information would have further enhanced the transparency and accountability of Sport England regarding its handling of the matter.
40. The Commissioner disagrees with Sport England that the disclosure would result in actions that would impede maximum participation in the sport of judo. The complainant is clearly a devoted supporter of the

---

<sup>5</sup> There is no evidence to back the complainant's allegation and the Commissioner's statement should not be construed as either in support of, or against it.

sport and it is unclear what actions he or others would have taken to decrease participation in judo.

41. The Commissioner also disagrees that the matter is not one of public interest. It is clearly in the public interest that it is resolved as quickly as possible to allow Sport England concentrate its resources on its core functions. It is also in the public interest for Sport England to be as open as possible regarding the matter to negate any allegations of collusion with the BJA against individuals or groups who are not members of the BJA.
42. The Commissioner also disagrees that disclosing the disputed information would result in officials of Sport England and 'other public bodies' being less robust in the advice or recommendations they make to publicly funded bodies failing to meet their obligations. In the Commissioner's view, the public is entitled to expect civil servants to provide advice without fear that their views could one day be made public. He does not agree that officials would provide less constructive or robust advice for fear of public disclosure. In summary, the Commissioner does not consider that the severity of the chilling effect anticipated by Sport England in the event of disclosure would materially affect the quality of advice provided by officials in the future.
43. Whilst the Commissioner accepts that, in the short term, the likelihood of prejudice was more probable than not, he finds that on balance, in all the circumstances, there was a significant public interest in the disclosure of the disputed information.

#### Section 36(2)(b)

##### Disputed Information

44. Sport England also withheld the emails marked 12 and 13 in the confidential annex on the basis of the exemption at section 36(2)(b).
45. Information is exempt on the basis of section 36(2)(b) if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
46. The qualified person's opinion was issued in the same document dated 21 September 2011. Specifically in relation to the information withheld on the basis of 36(2)(b), the Qualified Person considered disclosure would inhibit Sport England from taking a robust line when it came to criticising organisations or individuals in situations where such information was likely to inflame a dispute. The Qualified Person therefore gave her opinion that the relevant information should be withheld on the basis that it would inhibit the free and frank provision of advice (i.e. section 36(2)(b)(i) ).

47. For broadly the same reasons he found the Qualified Person's opinion was objectively reasonable in relation to section 36(2)(c), the Commissioner agrees that in the circumstances, disclosure would have inhibited free and frank exchanges between Sport England's officials about the complainant's ongoing disagreement with the BJA. He therefore finds that the exemption at section 36(2)(b)(i) was engaged in respect of the emails marked 12 and 13 in the confidential annex.

#### Public Interest Test

48. Section 36(2)(b) is also subject to a public interest test.
49. The Commissioner finds the public interest in disclosure outweighed the public interest in maintaining the exemption for broadly the same reasons in relation to the section 36(2)(c) exemption.
50. Specifically, the Commissioner finds that the severity of the inhibition resulting from the disclosure would not materially affect the quality of advice provided by officials in relation to the ongoing disagreement or indeed in the future. The Commissioner considers significant, the public interest in a negotiated settlement between the public authority and the complainant and he is therefore strongly of the view that disclosing the disputed information enhances, rather than diminishes that prospect.
51. The Commissioner finds that in all the circumstances of the case, the public interest in disclosure outweighed the public interest in maintaining the exemption at section 36(2)(b).



## Right of appeal

---

52. 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: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

53. 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.
54. 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  
Principal Policy Advisor  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**