

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2023

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Weston report. Sports England ("SE") disclosed some information and withheld the remainder under section 36 (prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the withheld information can be withheld under section 36. Also, on the balance of probabilities, SE has identified all of the information that falls within the scope of the request.
3. The Commissioner does not require further steps.

Background information

4. In 2022, SE received several complaints about Swim England's complaint handling and decision making processes. As a result, SE

commissioned an independent review of Swim England's processes and a report ('the Weston report'¹) was produced.

5. The Weston report made a number of recommendations for Swim England to implement but it did not recommend that Swim England should reopen or re-investigate any historic concerns.

Request and response

6. On 18 May 2023, the complainant wrote to SE and requested:

"I recently complained to Sport England about Swim England's actions over City of Oxford SC. I have just seen that despite the report you commissioned there is not going to be a new examination of the issues so that justice can be done and that despite its dreadful treatment of us and others, Sport England is going to continue to provide funding for Swim England.

So we need to use other channels to get justice (further complaints to you, media, our MPs, legal action etc) and for that we need access to all the information on our case., Therefore I am making this Freedom of Information request for all the information you hold on anything relating directly to City of Oxford SC, including all your discussions about the club with Swim England."

7. On 8 June 2023 SE responded and refused to comply with the request, citing section 12 (cost of compliance exceeds appropriate limit).
8. SE and the complainant corresponded about how the request could be refined and on 15 June 2023 the complainant submitted a new request:

"i) what Sport England wrote to Swim England about the complaints after receiving them

ii) what Swim England replied to Sport England to explain itself and what Sport England responded to Swim England, and also

iii) what has happened about reopening the specific issues at the club to get them fairly looked at since Sports England received the draft

¹ [REVIEW OF THREE CASES OF COMPLAINTS RELATING TO SWIM ENGLAND \(sportengland-production-files.s3.eu-west-2.amazonaws.com\)](https://www.production-files.s3.eu-west-2.amazonaws.com/REVIEW_OF_THREE_CASES_OF_COMPLAINTS_RELATING_TO_SWIM_ENGLAND)

Weston report² (what Sport England has said to Swim England about that).”

9. SE responded to the refined request on 13 July 2023 and disclosed information in response to the request. However, it made redactions under section 40(2) (personal information), section 21 (information reasonably accessible to applicant via other means), section 41 (information provided in confidence) and section 43(2) (commercial interests).
10. The complainant requested an internal review on 14 July 2023. They raised concerns about SE’s application of section 41 and section 43(2) and also that SE had failed to identify all of the information that would fall within the scope of the refined request.
11. At internal review, SE upheld its previous position in relation to section 41 and section 43(2). It also introduced a reliance on section 36 (prejudice to the effective conduct of public affairs).
12. The Commissioner considers that the scope of his investigation is to consider whether the outstanding information can be withheld and whether SE identified all of the information within scope of the request.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. Section 36(2) of FOIA states that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

(b) would, or would be likely to inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

14. Section 36 differs from all other exemptions in that the judgement about the prejudice must be made by the legally authorised, qualified person ('QP') for that public authority.
15. It's not necessary for the Commissioner to agree with the opinion of the QP for the exemption to apply. Furthermore, the opinion does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that it's an opinion that a reasonable person could hold.

Who is the qualified person and how was their opinion sought?

16. The public authority provided a copy of a memo, signed by Tim Hollingworth, its Chief Executive and dated 6 September 2023. The memo sets out why, in Tim Hollingworth's opinion, disclosure would be likely to be harmful.
17. The Commissioner is satisfied that Tim Hollingworth is entitled to act as the QP for the purposes of section 36.
18. In the QP's opinion, disclosure would be likely to prejudice SE's work because:

“In order to effectively monitor funded bodies, Sport England needs to establish relationships with relevant stakeholders. This includes the open exchange and expression of views on the funded bodies' governing and complaints procedures. The issues discussed in this case are still live and Swim England is currently implementing various measures to address the complaints raised.”

19. The QP has gone on to say:

“Release of the information would be likely to undermine the public's trust in Sport England when considering disclosing sensitive, private information with a view to resolving complaints handling, safeguarding and welfare issues in the sporting sector. The release of this information would be likely to undermine the ongoing relationship between Sport England and Swim England, and Sport England's ability to continue its work to improve governance standards in the sector.

Release of the information would also be likely to 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.”

20. The Commissioner doesn't consider it irrational or absurd that disclosure of information relating to live issues would be likely to undermine the trust between Swim England and SE, who are investigating these issues.
21. Furthermore, it's also not irrational or absurd that staff from either Swim England, in reporting the issues) or SE (in investigating the issues) may be less forthright in putting forward their views if they believe that those views are likely to be made public.
22. Ultimately, the Commissioner is satisfied that the QP's opinion is reasonable and therefore exemption is engaged. As section 36(2) is a qualified exemption, it's subject to the public interest test.

Public interest test

Factors in favour of disclosure

23. There's always a public interest in public authorities being transparent about their work and accountable.
24. Disclosure of the withheld information would shed light on how SE communicated with Swim England throughout its investigation.
25. Disclosure would also meet the complainant's specific public interest in the club in question, as well as other clubs which the Weston report investigated. Another such club is Ellesmere College Titans Swimming Club and the Commissioner has previously considered a request about the Ellesmere club.³

Factors in favour of maintaining the exemption

26. There is a public interest in allowing SE to carry out its role effectively. Information doesn't need to be particularly sensitive in order to engage section 36. However, the Commissioner notes the information being withheld in this case does include candid assessments of Swim England's processes and how it previously handled complaints.
27. Were the withheld information to be disclosed, it would be likely to have a "chilling effect" on the willingness of staff to provide forthright and candid views in future. This is especially true given that, at the time that the request was made, SE and Swim England were still working together to address the complaints.

³ [ic-198977-d3b9.pdf \(ico.org.uk\)](#)

The balance of the public interest

28. In the Commissioner's opinion, the balance of the public interest lies in maintaining the exemption.
29. It's in the public interest to allow SE to perform its role robustly, especially when it comes to matters of child welfare. If information relating to live matters became public, this might deter organisations from cooperating with, or reporting concerns, to SE in the future.
30. Furthermore, the Commissioner has considered the information that's been disclosed in response to the request and what's been withheld. The information that's been disclosed goes a long way to meeting the public interest in the Weston report and SE's communications with Swim England. However, to disclose the remainder would be likely to impede the SE's work and therefore, it must be withheld.

Section 1 – information held/not held

31. In its refusal notice of 13 July 2023, SE explained to the complainant that it was disclosing all of the information it held that fell within the scope of the request, albeit with redactions.
32. The complainant disputes this and believes more information is held. In their internal review they stated:

“I also expected to receive all communications that Sport England sent to Swim England that contain discussion of the specific complaints made by people from City of Oxford, and Swim England's replies to those communications - not just very general communications about the Weston report.”
33. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority has identified all of the information that would fall within the scope of the request.
34. SE has explained:

“(Redacted)'s view that we have failed to identify all relevant information within the scope of the request stems from a misunderstanding of our remit. As we are not an Ombudsman or Regulator, we do not have the power to review the substance of complaints made about our Funded Partners neither can we question the decision maker. We can only consider complaints about our Funded

Partners where there is evidence that they have breached the terms of their funding agreement with us or the Code for Sports Governance – breaches would tend to involve systemic issues rather than individual incidents. As explained above, because we don't have the power to compel Swim England to reinvestigate or reopen historical complaints, our correspondence with Swim England about this was quite limited."

35. It makes sense that Swim England will have received specific complaints about City of Oxford SC, not SE. The withheld information does contain reference to City of Oxford SC, but this is limited to discussing Swim England's handling of those complaints – not details of the complaints themselves.

36. SE also confirmed that:

"Since January 2022, Sports England has spent a considerable amount of time responding to Swim England related FOI requests and complaints from various individuals including the complainant. The Information Governance team therefore has a very clear view of the officers that are likely to hold any Swim England related information requested...

In order to identify and collate the information that (Redacted) had requested, relevant staff (especially our Chief Executive, Executive Director-Partnerships, Director for Welfare & Integrity, Relationship Lead for Swim England, members of our Communications and Legal teams) were asked to undertake an email search of their respective Outlook accounts within the scope of (Redacted)'s request and provide those emails to our Information Governance team."

37. On the balance of probabilities, the Commissioner is satisfied that SE has identified all of the information that falls within the scope of the request.

Right of appeal

38. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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
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SK9 5AF