

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **11 January 2018**

Public Authority: UK Sport
Address: 21 Bloomsbury Street
London
WC1B 3HF

Decision (including any steps ordered)

1. The complainant requested copies of all emails sent and received by the Chief Executive of the public authority which relate in any way to British Cycling. The public authority withheld the requested information on the basis of the exemptions at sections 36(2)(b)(i) and (ii), 40(2) and 41 FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at section 36(2)(b) FOIA to withhold the information held within the scope of the complainant's request.
3. No steps are required.

Request and response

4. On 15 June 2017, the complainant wrote to the public authority and submitted a request for information in the following terms:

"Please provide copies of all emails sent and received by Liz Nicholls between June 12, 2017 and the time of this email which relate in any way to British Cycling. Please include all attachments and copied in emails."¹
5. On 7 July 2017 Ms Nicholl responded on behalf of the public authority in her capacity as the qualified person.² She explained in her letter that she considered the information within the scope of the complainant's request exempt from disclosure by virtue of the provisions in section 36(2)(b)(i) and (ii) FOIA.
6. The complainant requested an internal review of the public authority's decision on 10 July 2017.
7. The public authority wrote to the complainant on 31 July 2017 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 10 August 2017 to complain about the public authority's decision to withhold the information within the scope of his request. The Commissioner has referred to his submissions at the relevant parts of her analysis below.
9. In its submission to the Commissioner, the public authority sought to additionally rely on the exemptions at sections 41 and 40(2) FOIA.
10. The scope of Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 36(2)(b)(i) and (ii), 41 and 40(2)³ FOIA.

¹ The public authority correctly dealt with it as a request pertaining to **Liz Nicholl** CBE, Chief Executive of UK Sport.

² By virtue of section 36(5) FOIA

³ The public authority did not provide the Commissioner with submissions in support of the application of sections 41 and 40(2) save a very brief explanation in support of its reliance

Reasons for decision

11. The Commissioner first considered whether the public authority was entitled to withhold the information within the scope of the complainant's request on the basis of the exemptions at section 36(2)(b)(i) and (ii).

12. Section 36(2)(b) states:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the 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..."

13. Section 36(5) FOIA specifies who may act as a *qualified person* for various categories of public authorities for the purposes of section 36(2) FOIA⁴. The Commissioner is satisfied that Liz Nicholl the Chief Executive of UK Sport, who issued the opinion engaging the exemptions on 7 July 2017, was the appropriate qualified person by virtue of section 36(5)(c) FOIA.⁵

14. In determining whether these exemptions are engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

on section 40(2) and a description of the information withheld on that basis (ie section 40). The Commissioner expects a public authority to provide its full and final submissions with respect to the application of each section of the FOIA it has relied on at the outset of an investigation.

⁴ A full text of section 36 FOIA can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

⁵ A qualified person in relation to information held by any other government department, means the commissioners or other person in charge of that department.

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
15. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
16. The public authority supplied the Commissioner with a copy of the qualified person's opinion, which is effectively the refusal notice issued to the complainant on 7 July 2017. The copy of the opinion provided to the complainant mentions that the qualified person reviewed the information within the scope of the request⁶ on 6 July 2017. During the course of the investigation, the public authority clarified that this review actually took place on 29 June 2017 as mentioned in the version of the opinion supplied to the Commissioner. For the avoidance of doubt, there is no material difference between the copies of the qualified person's opinion issued to the complainant and to the Commissioner.
17. The qualified person explained that the withheld information relates to free and frank discussions around media handling of the independent review into British Cycling. She determined that the exemptions should apply on two grounds. Firstly, there was a need for a safe space for staff to express themselves openly, honestly and completely in order for decisions to be made on how the report should be communicated to UK Sport staff, British Cycling staff and the wider public. Secondly,

⁶ Interchangeably referred to as "the withheld information" in this notice.

disclosing the withheld information would result in a 'chilling effect' on staff which would impair their decision making processes and significantly impair the public authority's ability to work together to respond to similar cases in future. The qualified person added that the report produced following the independent review had been published along with supplementary reports, specifically the "King Report" and the "Moore Stephens special review".

18. The public authority elaborated on the qualified person's opinion in its letter of 31 July 2017 to the complainant following the internal review of its response to the request. It explained that the exemptions had been applied in order to protect the provision of free and frank exchange between staff, and in offering advice to the Chief Executive, ahead of the publication of an independent review. The exemptions were engaged to avoid a chilling effect that would inhibit free and frank discussions in the future damaging the quality of advice to the Chief Executive, thus making the organisation less effective and impairing the internal decision making process. It submitted that staff must have confidence in their ability to share their views and advise the Chief Executive "over email (given that many of UK Sport's staff work away from the office and having unpredictable office hours and locations) without fear or prejudice of these deliberations being aired in the public domain."
19. The Commissioner considers that the higher level of prejudice (ie "would inhibit") has been relied on this case. She considers that a public authority relying on the higher level of prejudice/inhibition should demonstrate that the occurrence of the prejudice/inhibition to the specified interest is more probable than not.⁷
20. Therefore, the Commissioner has considered whether it was reasonable for the qualified person to conclude that releasing the withheld information would inhibit free and frank provision of advice or the exchange of views for the purposes of deliberation.
21. In the Commissioner's view, information may be exempt under sections 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to, inhibit the ability of officials and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.

⁷ Adopting the Information Tribunal's view in Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030).

22. The withheld information which the Commissioner has inspected comprise of free and frank discussions mostly between the public authority's staff, and limitedly between staff and external individuals focusing substantively on the public authority's response to the "Report of the Independent Review Panel into the Climate and Culture of the World Class Programme in British Cycling"⁸ (climate and culture review) including media handling.
23. The report was published on 14 June 2017⁹ alongside slightly redacted versions of an internal British Cycling review report - "CEO GB Cycling Team Review" produced in November 2012 by Peter A King CBE, then Executive Director at British Cycling, and a UK Sport report - "UK Sport Special review - British Cycling" produced on 7 June 2017 by Moore Stephens.
24. Attached to some of the withheld emails are the published reports above and a media briefing released on 14 June 2017. Although these documents were clearly in the public domain at the time of the request on 15 June 2017, the Commissioner considers that the public authority was entitled to apply exemptions to them in view of the context in which they were/are held - ie attachments to some of the emails considered exempt on the basis that they contain free and frank advice and discussions.
25. Having inspected the withheld information, the Commissioner accepts it was reasonable for the qualified person to conclude it was more probable than not that its disclosure would lead to a chilling effect on free and frank discussions and provision of advice in similar circumstances in the future. In arriving at this conclusion, the Commissioner has given weight to the candid nature of the discussions, the sensitivity and seriousness of the some of the cultural and behavioural issues considered by the climate and culture review, and the timing of the request. In the circumstances, staff and others having expressed themselves completely and candidly in the context of a decision making process in relation to publishing and responding to the report by the climate and culture review would be less likely to do same in future should their comments be made public a day after the report was published. This resultant chilling effect on free and frank discussions on staff would clearly inhibit similar frank deliberations in the future to

⁸ Chaired by Annamarie Phelps CBE

⁹ <https://www.britishcycling.org.uk/about/article/20170614-about-bc-news-British-Cycling-publishes-the-cycling-independent-review-0>

the detriment of the public authority's ability to make fully informed decisions.

26. The Commissioner does not accept the suggested inference that staff are constrained by the fact that communications with the Chief Executive have to be mostly in writing via email. The Commissioner does not expect a public authority to endorse or permit a loss of detail in its records especially in relation to an issue of particular significance. Apart from the fact that this goes against the spirit of the FOIA, it would be difficult for such an authority to argue that the loss of detail it has condoned is harmful.
27. The Commissioner considers that the "safe space" opinion by the qualified person are in effect chilling effect arguments. As mentioned, section 36(2)(b) is designed primarily to prevent a chilling effect on free and frank discussions. In the Commissioner's view, a safe space will generally be necessary in order to debate and discuss issues away from external interference. In most cases, it would be applicable while discussions are ongoing and a decision has yet to be made.
28. Nevertheless, the Commissioner finds that it was reasonable for the qualified person to engage section 36(2)(b) on the basis that it was more probable than not that disclosing the withheld information in the circumstances would lead to a chilling effect on the free and frank provision of advice or on the free and frank exchange of views for the purposes of deliberation.

Public interest test

29. The exemptions are however qualified by the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemptions at section 36(2)(b) outweighs the public interest in disclosing the withheld information.
30. If the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure. If the qualified person has decided that disclosure "would" prejudice or inhibit (ie the higher threshold of prejudice/inhibition), this will carry a greater weight than if they said disclosure would be likely to prejudice or inhibit.
31. The complainant provided the following submissions in support of his view that the withheld information ought to be disclosed.

"There is a compelling public interest in transparency surrounding the communications sent and received by the head of UK Sport about a report in which her organisation was severely criticised. The public must have confidence that in cases such as this, bodies like UK Sport are not concerned solely with image but with addressing shortfalls and failings. Not releasing Liz Nicholls' communications surrounding this matter does little to improve public confidence."

"There is simply no evidence that transparency surrounding this one, extremely troubling case would inhibit free and frank provision of advice. It must also be pointed that the FOIA has been in use for 12 years and officials should be well aware that their actions, even on internal mail, may be open to scrutiny by both members of the public and MPs."

32. The public authority acknowledged that the disclosure of information is itself of value as to promote transparency and accountability in relation to activities of public authorities. It further acknowledged that there is a public interest in demonstrating that its work is fair and effective in dealing with the investigation and report into allegations concerning British Cycling and the public authority's role in those allegations.
33. In support of maintaining the exemptions the public authority submitted that there was a clear public interest in staff being able to have free and frank deliberations to ensure the effective publication of the climate and culture review's work and reports.
34. It further argued that there was a public interest in not undermining the public authority's ability to conduct similar reviews, debate live issues and reach decisions.
35. It submitted that it had demonstrated its commitment to transparency by releasing the climate and culture review report in full alongside slightly redacted versions of the King report and the Moore Stephens special review.
36. However, it had to balance the public interest in transparency with, it argued, the greater public interest in preserving the ability of staff to have free and frank discussions internally to both advise and ensure the effectiveness of the organisation when responding to sensitive issues.

Balance of the public interest

37. The Commissioner has set out her position below on where the balance of the public lies in the circumstances of this case.
38. With regards to the complainant's second point, she has concluded that the qualified person's opinion was a reasonable one in the circumstances.

39. In terms of the first point, the Commissioner accepts the public must have confidence that in cases such as that which led to the climate and culture review, the public authority is not concerned solely with image but with addressing shortfalls and failings. The Commissioner has not seen any evidence to suggest that the public authority was more interested in preserving its image than implementing the recommendations in the climate and culture review report. On the contrary, all of the recommendations were accepted and an action plan has been in put place to ensure that the lessons learned are taken on board.¹⁰ The report itself has been disclosed in full along with slightly redacted versions of the King report and Moore Stephens special review. These are not the actions of a body more concerned with its image or that of one treating with levity the serious issues uncovered by the review. The public interest in this case is not about revealing information in order to generate a headline. There is no particularly compelling public interest in disclosing the withheld information merely on the basis that the public authority was criticised in the report. Public confidence in the public authority will be improved primarily on the basis of the statements made and more importantly the steps taken by the public authority pursuant to the findings and recommendations of the climate and culture review.
40. The public interest in full transparency should of course not be underestimated in the circumstances of this case. However, that must be balanced against the fact that the substantive issues have been aired publicly in an independent report along with two other reports following previous reviews of British Cycling. The fact that the public authority has also accepted the recommendations of the independent climate and culture review in full is significant in the circumstances. It is difficult to see how any more substantive the withheld emails are in that respect. Against this backdrop, there is a strong public interest in not disclosing information which would lead to staff of the public authority being less open and candid in future when deliberating on how to respond to a similar report. Balanced against the fact that there has been a great degree of transparency with regards to the substantive findings in relation to the climate and culture review of the World Class Programme in British Cycling, there is a strong public interest in not damaging the quality of advice to the Chief Executive in future as a result of a chilling effect on deliberations by staff. A chilling effect on free and frank discussions would lead to less, not more, transparency.

¹⁰ <http://www.uksport.gov.uk/news/2017/06/14/british-cycling>

41. Having weighed the factors for and against disclosure against the backdrop of the information in the public domain regarding the serious allegations against British Cycling and the public authority's role in those allegations, the Commissioner has concluded that the public interest in maintaining the exemptions at section 36(2)(b) outweighs the public interest in disclosing the withheld information.
42. The Commissioner has not considered the applicability of the remaining exemptions in view of her decision that the public authority was entitled to rely on section 36(2)(b).

Right of appeal

43. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

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