

## 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)

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1. The complainant has requested communications about Swim England's decision to disaffiliate Ellesmere Titans Swimming Club. Sport England disclosed some information and withheld the remainder under sections 21, 36(2)(b)(ii) and 2(c), 40, 41 and 43 of FOIA. These exemptions concern information already accessible to the applicant, prejudice to the effective conduct of public affairs, personal data, information provided in confidence and commercially sensitive information respectively.
2. The Commissioner's decision is that the information to which Sport England has applied sections 36(2)(b)(ii) and 36(2)(c) is exempt from disclosure under those exemptions.
3. It's not necessary for Sport England to take any corrective steps.

#### Request and response

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4. The complainant made the following information request to Sport England on 25 May 2023:

"Communications between Sport England and Swim England, since 1/01/2023 which relate directly or indirectly to Ellesmere Titans

Swimming Club or Ellesmere College, including (but not limited to) those relating in any way to Swim England's decision to disaffiliate the club and not to review the position of the club"

5. Sport England disclosed some relevant information and withheld the remainder under sections 21, 40, 41 and 43.
6. In their request for an internal review, the complainant disputed a redaction made under section 40(2) relating to the sender of an email dated 8 March 2023, and the redactions made under sections 41 and 43(2).
7. In its internal review, Sport England first noted that the name of the sender of the 8 March 2023 email hadn't been redacted.
8. Sport England next upheld its application of sections 41 and 43 and confirmed that it also considered section 36(2)(b)(ii) and section 36(2)(c) were engaged in respect of that information.
9. In an email to Sport England on 25 August 2023 the complainant clarified that, with regard to the 8 March 2023 correspondence, they had meant to say, "letter of 8 March 2023" in their request for a review, not "email of...". Sport England then provided the name that had been redacted from that letter.

## **Reasons for decision**

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10. In line with the Commissioner's role, this reasoning focusses on Sport England's compliance with FOIA, or otherwise, in respect of a specific request. A broader concern the complainant has about Sport England is discussed under 'Other matters.'
11. Sport England has redacted some personal data under section 40(2) only, and some information is published on Sport England's website and is therefore exempt under section 21 of FOIA.
12. Based on the substantive complaint to the Commissioner, this reasoning covers Sports England's application of section 36 or section 41 or section 43, or any combination of these exemptions, to information within scope of the complainant's request.
13. In its submission to the Commissioner Sport England provided the following background and context.
14. 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 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 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.

15. 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.
16. In 2022, Swim England disaffiliated (ie 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 complaint handling 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'). This recommended a number of improvements that Swim England should make.
17. The complainant represents a group of parents who are unhappy with Swim England's decision to disaffiliate Ellesmere College Titans and who, Sport England believes, 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. Sport England says it's 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, don't consider that re-affiliation should take place.

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

18. Other than that being withheld under sections 21 and 40 of FOIA, Sport England has applied section 36(2)(b)(ii) and section 36(2)(c) to all of the remaining information it's withholding. This information is held in letters dated 17 January 2023 and 8 March 2023, an email from 18 January 2023 and a document named 'Sport Resolution Review'.
19. Under section 36(2)(b)(ii) 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.
20. Under section 36(2)(c) 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 effective conduct of public affairs.

21. As noted, the exemptions at section 36(2) can only be engaged on the basis of the reasonable opinion of a qualified person. Sport England's submission to its Qualified Person (QP) shows that the QP was Tim Hollingsworth, Sport England's Chief Executive. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
22. The submission to the QP also shows that the QP's opinion was sought on 14 August 2023 and given (signed) on the same day. This was after the request was submitted and before Sport England provided its internal review on 15 August 2023. The opinion was therefore sought at an appropriate time.
23. In the submission provided to them, the QP was given: a background and summary of the request and Sport England's response to it; a summary of the section 36 exemptions; arguments for why prejudice would or would be likely to occur if the information were to be disclosed and counter arguments. The QP's opinion was that the envisioned prejudice "would (or, in the very least, would be likely to) occur" through disclosing the information.
24. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
25. The Commissioner has reviewed the QP's submission. With regard to section 36(2)(b)(ii) the QP's opinion was that disclosing the withheld information would or could inhibit the exchange of views [about a live issue] in the short term.
26. With regard to section 36(2)(c) the QP considered that disclosure would or could undermine Sport England's relationship with Swim England in the shorter and longer term. This was because the information concerned an important ongoing issue and disclosing the information would or could undermine the trust between Swim England and Sport England. The relationship between the two bodies and Sport England's ability to continue with its work to improve governance standards would or could therefore be damaged.
27. The QP also agreed that releasing the information would or could undermine the public's trust in Sport England if it were to disclose sensitive, private information in order to resolve safeguarding, welfare and complaint handling issues in the sporting sector. Finally, the QP's opinion was that disclosure would or could undermine the trust of other funded partners. These partners may engage with Sport England staff

less freely given the perceived risk that any information shared with Sport England might be released to the public.

28. It isn't quite clear whether the QP considers the level of likelihood of the envisioned prejudice occurring to be that it would happen or that it would be likely to happen. It can't be both. In the absence of clarity or compelling arguments that the prejudice would be more likely to happen than not, the Commissioner will accept the lower threshold – that prejudice would be likely to happen – as a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
29. The Commissioner considers that the QP had sufficient information in order to form an opinion on whether section 36 was engaged. He finds that the QP's opinion is therefore a reasonable opinion and that sections 36(2)(b)(ii) and 36(2)(c) of FOIA are engaged in respect of the information to which Sport England has applied those exemptions. He's gone on to consider the associated public interest test.

### **Public interest test**

30. In their request for an internal review and complaint to the Commissioner, the complainant has argued that there's a strong public interest in transparency about the safeguarding matters in question, and Swim England's response to potential miscarriages of justice about safeguarding. The complainant has a particular interest in what Swim England has said to Sport England about the disaffiliation in question, which is what the withheld information concerns. The complainant considers that Swim England may have provided information to Sport England that was factually incorrect or that was misleading. They consider that there shouldn't be any "secrecy" about the reforms necessary following the Weston Report. Rather, there's an extremely strong public interest in disclosing the information to allow stakeholders to determine whether Sport England has been misled.
31. Sport England accepts that transparency and openness is important and that organisations that receive public money should be open to a level of scrutiny.
32. However, Sport England argues that it's more important that funded bodies are prepared to fully engage in resolving concerns about safeguarding, welfare and complaints handling. Sport England's ability to collaborate freely with funded bodies puts it in the best position to assess governance standards and put in place action plans to improve standards where necessary. An additional benefit is that, as governance standards are improved, Sport England's investments are better protected.

## The Commissioner's conclusion

33. The Commissioner's decided that the QP's opinion that disclosing the information being withheld under section 36(2)(b)(ii) and 36(2)(c) would be likely to prejudice the effective conduct of public affairs is a reasonable opinion.
34. The Commissioner appreciates the complainant's concerns about Ellesmere Titans Swimming Club and has noted that the matter has generated articles in the media and other requests for information. However, he considers that the published Weston Report<sup>1</sup> and the information Sport England provided in response to this request [and in response to separate requests] address the interest in transparency about matters associated with Ellesmere Titans to an adequate degree.
35. 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 a live issue 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's 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.
36. Because the Commissioner has found that the information engages the two exemptions under section 36 of FOIA and the public interest favours maintaining the exemptions, it hasn't been necessary to consider Sport England's application of section 41 and 43 to the same information.

## Other matters

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37. In correspondence to the Commissioner on 3 October 2023 the complainant expressed dissatisfaction with certain procedural aspects of Sport England's handling of their request. They provided the

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<sup>1</sup> <https://www.sportengland.org/news/report-published-handling-complaints-swim-england>

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024696/ic-198977-d3b9.pdf>

Commissioner with a copy of further correspondence they'd had with Sport England.

38. That email correspondence shows that, having received the internal review, on 25 August 2023 the complainant asked Sport England to address two matters. The first was the matter of the 8 March 2023 correspondence which has been discussed above. In their 25 August 2023 email the complainant also submitted a separate complaint under Sport England's "complaints process" about what the complainant considered was Sport England's failure to take into account advice it had received from the Commissioner about redacting information.
39. The complainant is dissatisfied because Sport England had advised them that because it had already carried out an internal review of the way it had handled the information request, it couldn't consider another complaint about the matter.
40. The Commissioner put the complainant's concern to Sport England. Sport England advised that, essentially, the complainant had asked it to consider a complaint about the internal review decision and it had declined to do so. This is because it has no process for this under its complaint's procedure.
41. The Commissioner has considered Sport England's handling of the complainant's communications. Like the majority of public authorities, Sport England has a particular process it follows in respect of requests for information under FOIA. That process is generally the most efficient way for a public authority to handle a request and avoids protracted correspondence and duplicate processes eg carrying out both an internal review and then separately considering a separate complaint about the internal review.
42. If an applicant is dissatisfied with a response Sport England provides to an information request, they can request an internal review. If the applicant remains dissatisfied following the review, they have the option of submitting a complaint to the Commissioner.
43. In this case, in its internal review response Sport England advised the complainant that they could submit a complaint to the Commissioner if they remained dissatisfied and it provided the Commissioner's contact details. That approach was entirely reasonable in the Commissioner's view and in line with Sport England's process for handling information requests.
44. This decision must focus solely on whether or not Sport England complied with FOIA in its handling of the complainant's request. The Commissioner has found that Sport England was entitled to rely on section 36 of FOIA and, as such, complied with Act. It's not within scope of his investigation to consider whether, in relation to the current

request, Sport England had or hadn't acted on particular advice he'd given to it in relation to the separate FOIA complaint referred to elsewhere in this notice, brought to him by a different complainant. However, if a general pattern of non-compliance with FOIA or poor request-handling by Sport England were to emerge, the Commissioner would consider regulatory action as appropriate.



## **Right of appeal**

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45. 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)

46. 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.
47. 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**

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