

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2024

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

Decision (including any steps ordered)

1. The complainant submitted a request to Sport England for information on the final terms of reference/remit of Swim England's Heart of Aquatics programme.
2. The Commissioner's decision is that, in respect of the information withheld under section 40(2) (personal data) and pages 1-3 withheld under 41(1) (information provided in confidence), Sport England was entitled to withhold the information. However, in respect of the information withheld on pages 17,18 and 20, under section 41(1), and the remainder of the information withheld under section 43(2) (commercial interests), Sport England was not entitled to withhold the information.
3. The Commissioner requires Sport England to take the following steps to ensure compliance with the legislation.

- Disclose the withheld information on pages 7,10,11, 13, 17,18 and 20, with any personal data redacted in accordance with his guidance¹.
4. The public authority must take these steps within 30 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.

Background

5. 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 purpose 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.
6. 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.
7. 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 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.

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/>

Request and response

8. On 1 August 2023, the complainant wrote to Sport England and requested information in the following terms:

“This is a request under the Freedom of Information Act for all information held by Sport England on the following. If the amount of information held exceeds the statutory limit please prioritise in the order set out below:

1. Information on the final terms of reference/remit of Swim England's Heart of Aquatics programme, including but not limited to any limits on what type of recommendations can be made

2. Information on any discussions leading up to the setting of the above terms of reference/remit that relate to reopening decisions made prior to March 2023.”

9. On 18 August 2023, Sport England disclosed two documents and confirmed that it held the rest of the information but that it is exempt from disclosure under sections 40(2), 41(1) and 43(2) of FOIA.
10. Upon receiving this response, the complainant asked Sport England to conduct an internal review on 23 August 2023. On 17 October 2023, Sport England provided its internal review response and maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner on 23 October 2023 to complain about the way their request for information had been handled.
12. During the course of the Commissioner's investigation, Sport England provided a revised response in which it disclosed further information. However, it maintained its reliance on sections 40(2), 41(1), 43(2) and it also added the exemption of 36(2)(b)(ii) and (c) of FOIA to pages 1-3 of the withheld information.
13. The Commissioner notes that the withheld information has been collated into one pdf document by Sport England. Reference to page numbers in this notice link to the actual page number in the pdf (which run from 1-36), and not those shown on some of the merged documents.
14. As section 43(2) has been applied to all of the withheld information, the Commissioner will examine this exemption first.

15. Should section 43(2) of FOIA not apply, the Commissioner will go onto consider the application of further exemptions cited by Sport England.

Reasons for decision

Section 43(2) – commercial interests

16. Section 43(2) of FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it.
17. The Commissioner's guidance² states that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
18. In order for section 43(2) to be engaged, three criteria must be met:
 - The harm which the public authority envisages must relate to someone's commercial interests;
 - The public authority must be able to demonstrate a causal relationship between disclosure and prejudice to those commercial interests. The resultant prejudice must be real, actual or of substance; and
 - The level of likelihood of prejudice being relied upon by the public authority must be met (i.e. it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
19. In relation to the first criteria, the information being withheld in this case relates to details concerning the budget for the listening report, club membership numbers and the names of companies who were invited to tender bids for the listening programme. The information therefore relates to the commercial interests of Sport England, Swim England and other third parties.
20. Looking at the second criteria, Sport England explained that disclosure of the information relating to the budget would harm Swim England's commercial interests, when commissioning any future pieces of work.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

21. Sport England further explained that disclosure of the withheld information about those who tendered for the programme “may cause unwarranted reputational damage” to those organisations, and that this could limit Sport England’s ability to work with organisations within the sports sector and consequently “impact its ability to deliver its strategy.”
22. In disclosing its membership figures, Sport England states that this would prejudice its own commercial interests for making their market share public would result in “a significant advantage for our competitors.”
23. In relation to the third criteria, Sport England believes that disclosure of the withheld information, “would be likely to prejudice its ability, or the ability of the funding recipient (Swim England) to operate in a commercial environment.”
24. The complainant argues that it is not clear how disclosure of the requested information would cause “unwarranted damage.”

The Commissioner’s decision

25. The Commissioner has considered Sport England’s arguments on the application of section 43(2) and specifically the claimed prejudice.
26. The Commissioner accepts that the withheld information relates to the commercial interests of Sport England, Swim England and the third parties invited to tender bids. However, he does not consider that Sport England has sufficiently demonstrated that there will be a causal link between disclosure of the withheld information and commercial prejudice.
27. Furthermore, in the Commissioner’s guidance on section 43(2), it states that if an organisation proposes to withhold information because it would prejudice a third party’s commercial interests, then the public authority must have evidence that this accurately reflects the third party’s concerns. The Commissioner has not received this information from Sport England.
28. Having considered the above, the Commissioner has concluded that Sport England was not entitled to apply section 43(2) to the withheld information. As the exemption is not engaged, the Commissioner does not need to consider the associated public interest test.
29. As at paragraph 3 above, Sport England is now required to disclose the withheld information on pages 7, 10, 11 and 13, subject to the redaction of personal data (see below).

30. As the Commissioner has considered that section 43(2) of FOIA does not apply to the withheld information, he will go on to consider the information to which Sport England has applied section 41(1).

Section 41 - information provided in confidence

31. Section 41(1) of FOIA states that information is exempt from disclosure if it was obtained by a public authority from any other person (including another public authority) and that disclosure of the information would constitute a breach of confidence.

32. In order for section 41 to be engaged, the following criteria must be fulfilled:

- The authority must have obtained the information from another person,
- Its disclosure must constitute a breach of confidence,
- A legal person must be able to bring an action for the breach of confidence to court, and
- That court action must be likely to succeed.

Was the withheld information obtained from another person?

33. In its revised response to the complainant, Sport England confirmed that the requested information was provided to it by Swim England.

34. Having viewed the withheld information, the Commissioner is satisfied that the information has been obtained from another individual and so this requirement of section 41(1) is met.

Would disclosure constitute an actionable breach of confidence?

35. For a breach of confidence to occur the Commissioner must consider a three-step test:

- The information must have the necessary quality of confidence.
- It must have been imparted in circumstances importing an obligation of confidence, and
- There must have been an unauthorised use of the information to the detriment of the confider.

36. Information will have the necessary quality of confidence if it is not otherwise accessible, and it is more than trivial.

37. In this case the information being withheld on pages 1-3, under this exemption, is related to ongoing discussions regarding specific swimming clubs. The Commissioner accepts that the content of the information request was not in the public domain when the request was made, and that the information was not otherwise accessible. Consequently, the Commissioner is satisfied that this information has the necessary quality of confidence.
38. Furthermore, after applying the reasonable person test, as detailed in the Commissioner's guidance³, and having viewed Swim England's comments in relation to the request, the Commissioner is satisfied that the criterion is met, and that the information had been provided in circumstances imparting confidentiality.
39. The third part of the test concerns detriment to the confider by an unauthorised disclosure. With regards to the information being withheld on pages 1-3, the Commissioner recognises that disclosure of this information would result in the disclosure of private matters, which he accepts could be detrimental to the individuals concerned.
40. However, the Commissioner does not accept that disclosure of the information withheld under this exemption on pages 17, 18 and 20 would constitute an actionable breach of confidence. Having looked at this information, the Commissioner feels that Sport England has not demonstrated how disclosure of the information would be to the detriment of the confider and affect Swim England's commercial interests, as Sport England have argued.
41. Therefore, as at paragraph 3 above, Sport England is now required to disclose the withheld information on pages 17, 18, and 20, with personal data redacted.
42. The Commissioner will now examine if there is a public interest in disclosure of the withheld information on pages 1-3.

Is there a public interest defence for disclosure?

43. The exemption at section 41 is not subject to the public interest at section 2(2) of FOIA. However, the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure.

³ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

44. With regards to the public interest in disclosure, Sport England recognises that “there is a presumption of transparency and openness in the work of a public body.”
45. However, it also confirms that individuals and organisations may be discouraged from confiding in Sport England “if they are not assured of a degree of certainty that this trust will be respected.”
46. The complainant argues that their “club and others have complained about a possible lack of integrity and incompetence in Swim England...and that confidence in Sport England is being damaged by secrecy.”

The Commissioner’s decision

47. Following the disaffiliation of the swimming club in 2022, the Commissioner recognises that there is a public interest in Sport England’s funding and governance of Swim England. He also recognises that this is an emotive subject for the complainant.
48. However, he considers that great weight must be applied to the reasoning in paragraph 45. There is a significant expectation of confidentiality in relation to private and personal issues: the people who had confided in Swim England would not expect these discussions to be released into the public domain.
49. The Commissioner therefore considers that in this case, the public interest lies in maintaining the obligation of confidence, and so finds that Sport England was entitled to rely on section 41(1) of FOIA to refuse to disclose the withheld information on pages 1-3.
50. As the Commissioner has found that section 41(1) applies to the withheld information on pages 1-3, there is no need for him to consider the application of section 36(2)(b)(ii) and (c) as this had been applied to the same information.

Section 40(2) – personal data

51. Section 40(2) of FOIA provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
52. The Commissioner has viewed the withheld information and notes that the information consists of the names and contact details of non-senior staff who either work for Sport England or Swim England.

53. The Commissioner further notes that senior staff names have been disclosed, however, their personal contact details, such as mobile phone numbers, have been withheld.
54. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance⁴
55. Therefore, in this case, the Commissioner adopts the reasoning set out in these previous decision notices⁵ which found that the names of junior officials were exempt from disclosure on the basis of section 40(2). As a result he upholds the application of section 40(2) by Sport England.

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62 and <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> paragraphs 49-71

Right of appeal

56. 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

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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