

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to a swimming club. The above public authority ("the public authority") disclosed some information and eventually relied on sections 36 (prejudice to the effective conduct of public affairs), 41 (breach of confidence) and 40(2) of FOIA (third party personal data) to withhold the remainder.
2. The Commissioner's decision is that the public authority has correctly relied upon sections 40(2) and 41 of FOIA to withhold information. Section 36 of FOIA is engaged in respect of some of the withheld information and, where it is, the balance of the public interest favours maintaining the exemption. The public authority breached section 10 of FOIA as it failed to disclose non-exempt information within 20 working days.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 9 May 2022, the complainant wrote to the public authority and requested information in the following terms:

“Under the Freedom of Information Act, we would also like to request information that you hold with respect to Ellesmere College Titans Swimming Club and Ellesmere College.”

5. The public authority responded on 10 June 2022. It provided some information, but relied on sections 40(2), 41 and 43 (commercial interests) of FOIA to withhold the remainder.
6. Following an internal review the public authority wrote to the complainant on 23 August 2022. It upheld its reliance on the previous exemptions and now additionally relied upon sections 31 (law enforcement), 36 and 38 (health and safety) of FOIA to withhold information.

Scope of the case

7. The complainant contacted the Commissioner on 25 October 2022 to complain about the way her request for information had been handled.
8. On 29 November 2022, the public authority provided the Commissioner with its submission, a copy of the opinion of its Qualified Person and copies of the information it was withholding. The withheld information comprised of 84 separate documents and emails.
9. Having reviewed a sample of the withheld information, the Commissioner went back to the public authority on 15 December 2022. He noted that a number of the items were duplicates (because the same documents had been attached to multiple emails) and yet they had been redacted differently.
10. The Commissioner also highlighted a number of examples of information that he considered to have been redacted not just incorrectly, but inappropriately. These included redacting the name of the public authority's chief executive, applying prejudice-based exemptions to information that was highly generic and claiming that it might be breaching confidence by disclosing information that was already in the public domain.
11. The Commissioner provided some general guidance to the public authority on the stance that he would be likely to take in a decision notice. He asked the public authority to re-consider all the information it withheld, in light of that guidance and to provide him with a fresh version of the information it still wished to withhold.
12. The public authority responded on 3 February 2023 with a revised submission. It had removed the duplicated documents and compiled the

remaining information into a 148-page document. Having carried out this work, it had identified a large quantity of information that it now felt that it could disclose.

13. Having reviewed this revised version of the withheld information, the Commissioner was largely satisfied that the exemptions had been applied correctly. There was a small amount of additional information that he considered would fall within the scope of the request. Some of the redactions to protect personal data he considered to be slightly too cautious, but there were also instances where he considered additional information needed to be redacted to protect the identities of individuals.
14. The complainant also agreed to remove two spreadsheets, which contained accounts and cashflow projections from the swimming club, from the scope of the complaint.
15. Having agreed the scope of the redactions, the public authority disclosed the majority of the information on 10 March 2023. It continued to withhold a small quantity of information, relying on sections 40(2), 41 and 36 of FOIA in order to do so.
16. The Commissioner considers that the scope of his investigation is to determine whether the remaining exemptions have been correctly applied to the remaining withheld information.

Background

17. Ellesmere College Titans was a swimming club attached to an independent boarding school (Ellesmere College) based in Shropshire.
18. Swim England removed the club's affiliation status in 2022 – meaning that the club's swimmers would have been unable to compete in national competitions. The decision followed a safeguarding report which, according to excerpts leaked to the BBC, found:

“widespread failures to protect child members who had suffered eating disorders, bullying and serious mental health issues.”¹

¹ <https://www.bbc.co.uk/news/uk-england-shropshire-60232977>

19. One group of parents of club members is unhappy at the way Swim England handled the concerns. They believe that the concerns had been raised by parents whose children were not progressing as they hoped.
20. In 2022 a complaint was made to the public authority about the manner in which Swim England had dealt with the swimming club.

Reasons for decision

Scope

21. The Commissioner is satisfied that the public authority has identified all the information that it holds which falls within the scope of the request. This has now either been disclosed to the complainant or is covered by the public authority's refusal notice.
22. The request only sought information relating to the swimming club and the attached college. Several of the documents within the chain made reference to this swimming club, or the College, as one of several issues being discussed. The Commissioner has seen the unredacted versions of these documents and is satisfied that all the information relating to either the swimming club or the college has been either provided or withheld under an exemption. The remaining information has been correctly redacted because it falls outside the scope of the request.

Section 40(2) – third party personal data

23. Section 40 of FOIA allows a public authority to withhold information that is the personal data of third parties where there would be no lawful basis, under data protection law, for the information to be published.
24. The public authority has relied on this exemption to withhold: contact information, names of junior members of staff, names of parents, names of children, health-related material about children and some criminal allegations about identifiable individuals.
25. Where the information is either criminal offence or special category data (related to physical or mental health), the Commissioner is satisfied that the data subjects have neither consented to this information being published nor made it public themselves. As such there is no lawful basis for publishing it and so section 40(2) would apply.
26. The remaining information all identifies particular individuals. The legitimate interest in knowing what the involvement of senior officials at the public authority was is already met because the public authority has

disclosed the names of these individuals where they appear. The Commissioner does not consider there to be a legitimate interest in publishing the names of parents or children for the purpose of understanding whether the public authority dealt with the matter appropriately.

27. The Commissioner is therefore satisfied that the public authority is entitled to rely on section 40(2) of FOIA in the manner that it has done.

Section 41 – breach of confidence

28. The public authority relied on section 41 of FOIA to withhold information that related to a specific matter and the manner in which Swim England had dealt with it.
29. The Commissioner is satisfied that this information was provided to the public authority by a third party (Swim England). It is clearly not trivial and the email states explicitly that the information is to be treated in confidence.
30. The Commissioner considers that breaching Swim England's confidence would be detrimental to Swim England as it would cause unwarranted reputational damage to that organisation as well as breaching the confidence of the party that had originally provided the information to Swim England.
31. The Commissioner is satisfied that there is no overriding public interest that could serve as a defence to breaching Swim England's confidence and therefore any breach would be an actionable one. Section 41 of FOIA is thus engaged.

Section 36 – prejudice to the effective conduct of public affairs

32. Section 36 of FOIA can be applied to any information whose disclosure could, in the opinion of a very senior member of the public authority ("the Qualified Person"), harm the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation.
33. The public authority has applied this exemption to withhold a small number of emails and documents which record an internal deliberation amongst staff as to how it would deal with the complaints made by some of the parents involved with the swimming club.
34. The public authority provided a copy of a memo, signed by Tim Hollingworth, its Chief Executive and dated 3 February 2023. The memo sets out why, in Mr Hollingworth's opinion, disclosure would be likely to be harmful.

35. The Commissioner is satisfied that Mr Hollingworth is entitled to act as the Qualified Person for the purpose of this exemption and that he provided an opinion on 3 February 2023.
36. In the Qualified Person's opinion, disclosure would be harmful because:
 - "if every draft and iterative comment made were required to be disclosed it would undermine Sport England employees' ability to develop policy on important matters and potentially prevent the fullness, effectiveness and candour in ultimate documents/decisions which are produced and published.
 - "Further, if Sport England employees are not able to deliberate matters pertaining to National Governing Bodies in a space free from prospective censure, it is likely to have a chilling effect on such discussions and the ability to find the correct resolution."
37. An opinion will not be reasonable if it is irrational, absurd or if it is not relevant to the exemption.
38. The Commissioner does not consider it irrational or absurd to believe that staff (particularly more junior staff) may be less forthright in putting forward their views if they believe that those views are likely to be made public. Therefore the Qualified Person's opinion is reasonable and the exemption is engaged.

Public interest test

39. Unlike the previous two exemptions, section 36 is subject to a public interest test. In the Commissioner's view, the public interest favours maintaining this exemption.
40. The information being withheld does not itself have to contain particularly "free and frank" views or advice in order to engage the exemption. However the Commissioner notes in this case that the withheld information does include candid assessments of the public authority's role as well as options for responding to the complaints.
41. The Commissioner recognises that there is a public interest in allowing officials to debate such matters – especially where they relate to controversial or sensitive matters such as child safeguarding – privately before reaching a decision.
42. 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. There is a public interest in ensuring that options are robustly deliberated and challenged – even where some of the views

exchanged are likely to be unpopular – as this leads to better overall policymaking.

43. Disclosure is also likely to affect the public authority's relationship with Swim England as it is important that the two organisations are able to discuss sensitive matters candidly, but privately.
44. The Commissioner is satisfied that the public authority has already set out an adequate justification for the decision it took in relation to the complaints when responding to those complaints. Whether those that made the complaints agree with that justification is not a matter for the Commissioner. The withheld information would reveal little about the way that Swim England conducted its own investigation or the substance of the complaints that prompted it.
45. In the circumstances the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.

Procedural matters

46. The public authority breached section 10 of FOIA as it provided some non-exempt information outside of the 20 working day timeframe.

Other matters

47. The complainant was unhappy that the public authority had failed to disclose information at the first time of asking and suggested to the Commissioner that this was a wider issue.
48. The Commissioner would prefer every public authority to respond to information correctly at the first time of asking (or at least by the time they have completed an internal review), but realistically this is not always the case.
49. As set out above, the Commissioner does consider that some of the original reliance on exemptions was inappropriate – although this was a complex case involving a large volume of information. The public authority has informed the Commissioner that it receives relatively few requests and he notes that this is the first decision notice he has issued to the public authority for eight years – and only the fifth in total.
50. The Commissioner does not consider that he has been provided with evidence of more widespread problems than those outlined above. However, the concerns have been noted and the Commissioner would expect to see the lessons learned during the course of this investigation being used to improve the public authority's handling of any currently open requests or complaints - as well as any future requests it might receive.

Right of appeal

51. 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

52. 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.
53. 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

Roger Cawthorne
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