

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 3 December 2009

**Public Authority:** UK Sports Council  
**Address:** 40 Bernard Street  
London  
WC1N 1ST

### Summary

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The complainant requested information about the incidents listed on the public authority's website in which individuals subject to the Football Association's rules were found to have taken drugs in out-of-competition testing. He requested the name of the club the player was registered to, and the name of the club he was playing for at the time, if he was out on loan. The public authority refused to disclose information, citing the exemption at section 40 of the Freedom of Information Act 2000 (the Act): that the name of the player's club could lead to his subsequent identification and this therefore constituted his personal data; and also the exemption provided by section 41 of the Act: that the information had been provided to the public authority in confidence. The Commissioner finds that the information constitutes sensitive personal data of the player and therefore should not be disclosed. It has therefore not been necessary to consider the exemption provided by section 41 of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. In its role as the national anti-doping organisation, the UK Sports Council (UK Sport) publishes quarterly information about the outcome of drugs testing on sportspersons. These are conducted in-competition (tests conducted under protocols designed to uncover doping offences during competitive events) and

out-of-competition (tests to uncover doping or drugs misuse not associated with competitive events).

3. Positive in-competition test outcomes indicating the use of performance-enhancing drugs constitute an offence under the World Anti Doping Code (the Code) and in the case of footballers, offenders are named by the Football Association and published on the UK Sport website. Positive out-of-competition test results for non-performance-enhancing drugs (for example, the use of 'recreational' drugs) do not constitute an offence under the Code and the names of individuals are not published.

## The Request

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4. On 2 February 2009 the complainant made the following request to UK Sport:

*“For all the references on your website relating to incidents where individuals subject to the Football Association’s rules from 1 January 2006 were found to have taken drugs please state the name of the club that the player was registered to, and the club he was playing for at the time if he was out on loan.”*

5. UK Sport responded to the complainant on 26 February 2009, refusing to disclose this information and citing section 40 of the Act (personal information) on the grounds that it could provide information which could lead to identification of the individual, if combined with other information already available. It also refused the information on the grounds of section 41 of the Act, that the information had been provided by the Football Association in confidence.
6. The complainant wrote to the public authority on 23 March 2009, requesting that it review its response. He did not accept that the information constituted personal data, because the name of the player’s club represented a large enough group that the individual could not be identified. He also challenged the public authority’s use of the exemption provided by section 41 of the Act.
7. The public authority responded on 17 April 2009, upholding its previous decision. It explained its view that it would be possible to identify a player from the name of his club because a review of those players who did not play during the time of a player’s suspension for drugs offences would be a much smaller number of individuals. Coupled with other information available to, for example, a journalist, this could lead to identification of an individual.

## The Investigation

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### Scope of the case

8. On 24 April 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:
  - He did not believe that the level of data he had requested would breach section 40 or section 41 of the Act.

### Chronology

9. On 11 May 2009 the Commissioner wrote to UK Sport requesting the public authority's arguments for its application of the exemptions provided by section 40 and section 41 of the Act.
10. UK Sport sent in its detailed response on 6 August 2009, making the following points:
  - The Football Association (FA) conducts its own testing regime which contains certain additional requirements and offences which are outside the Code. As these are not covered by the requirements of the Code, they are reported to UK Sport outside the reporting requirements of the Code and in the expectation that they will remain confidential.
  - The taking of non-performance-enhancing drugs in out-of-competition testing is not an offence under the Code.
  - The identification of players found guilty of in-competition doping offences under the Code is expressly provided for in the rules, and these offenders are named on the UK Sport website other than in very extreme cases. As this identification is expressly provided for in the rules, it follows that there is no expectation of identification in other circumstances.
  - Providing the name of the player's club could lead to identification of an individual because that, combined with knowledge of which players did not play during the relevant period of suspension associated with such an offence, could permit a determined individual (for example a journalist) to target his enquiries and thereby isolate an individual player.
  - Disclosure of an individual player's identity in the circumstances would be unfair under the first Data Protection Principle.
  - The FA's decision not to disclose names in these circumstances is focused on the need to work with players in the circumstances, for example through rehabilitation, treatment and counselling and their identification may adversely impact this process and have a negative effect on the player's ability to continue with his career.
  - Confidentiality is necessary to ensure co-operation of the players in the context of social, out-of-competition drugs testing. Any media attention associated with disclosure would severely undermine the work.

11. On 1 October 2009 the Commissioner wrote to the complainant, observing that the circumstances were similar to those described in a Decision Notice published in case reference FS50133250, in which the Commissioner upheld the public authority's decision to withhold the names of schools from which pupils had been excluded due to the possession of drugs. He referred the complainant to the Commissioner's guidance<sup>1</sup> which also suggests that it is necessary to consider what means may be available to "*a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists [...]*"
12. The complainant responded on 5 October 2009, he argued that in the case cited by the Commissioner the individuals were children, in the circumstances of his complaint the individuals might be considered to be role models to children. Therefore there was a strong public interest argument in favour of their identification: the Act was not intended to allow sports stars taking drugs to shield behind a level of anonymity designed to protect people who were ill.

### Findings of fact

13. Penalties imposed by the Football Association for doping offences vary, commonly they range from formal warnings to playing bans, which may often be of several months' duration. The UK Sport website lists these penalties, and the quarter in which the finding of the offence occurred.
14. Other information on players' activities may be located in a variety of sources, including club websites' team or fixture lists and websites of media organisations which cover football, for example, the BBC, Sky Sports and ESPN. From these it may be possible to ascertain which players were inactive during a given period.

## Analysis

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### Exemptions

#### Section 40

15. The Commissioner notes that in the circumstances the exemption provided at section 40(2) of the Act is an absolute exemption, that is, the application of the exemption does not depend on the outcome of a public interest test. Consequently, the complainant's argument that the individuals should be treated differently if they are "*sports stars taking drugs*" rather than children has no basis when considering the applicability of the exemption. It may, however, have relevance in determining whether disclosure would breach the first data protection principle.

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<sup>1</sup> Available online at

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)

16. The Commissioner has also considered the arguments developed in his Decision Notice in case reference FS50122432. In that case, it was decided that the information to be disclosed was sufficiently anonymous that there was not considered to be any “*significant risk of direct or indirect identification*” (paragraph 81). This decision was appealed to the Information Tribunal in *the Department of Health* (EA/2008/0074) which considered the Commissioner’s arguments at paragraphs 32-43. While the Tribunal disagreed with that specific aspect of the Commissioner’s findings it nevertheless upheld the decision to release the information. If the arguments were considered to be applicable to the circumstances of the current complaint, this would support the complainant’s position that the information should be disclosed, albeit not for the reasons he suggests.
17. In case reference FS50122432 the risk of identification was to hospital doctors, and certain of their patients. It was considered negligible because the circumstances which had previously led to an incident of the identification of an individual were unusual, complex, and the individual concerned had only been positively identified when they had confirmed it themselves. The public authority in that case had failed to suggest any alternative scenarios in which identification might be possible. The Commissioner considered that the large geographical area, the large population figures and the number of possible locations would prevent identification unless other information was available. The public authority had been unable to suggest what other information might be available to facilitate the identification and therefore the anonymised information requested did not constitute personal data and should be disclosed.
18. In the case under investigation, the public authority has made the point that, while the number of players employed by a club may be sufficiently large that an individual would not be identified from that base alone, the number of players in the squad who do not play at any given time is considerably smaller.
19. The Commissioner agrees that it would be possible to draw correlations between players who do not play and the timings of playing bans given to individuals to produce a ‘shortlist’ of suspects. If the ‘ban’ extends over several games, the list might be smaller still and could be further reduced by removing the names of players known to be injured, or not playing for other reasons already in the public domain, for example playing bans imposed after a ‘sending-off’.
20. This then constitutes a significant amount of other information, already in the public domain, which would assist a determined or motivated individual in identifying a small number of possible players suspected of drugs offences.
21. It is not a significant step to consider that information, not perhaps as widely known but nevertheless easily available to, for example, a sports journalist with regular access to club officials and staff, might then lead to the identification of an individual player. This is a scenario envisaged by the Commissioner’s guidance, referenced above.
22. The public authority has also provided the Commissioner with an example in which the naming of a player’s club, taken together with the knowledge of the

likely timing and known duration of a playing ban, would lead directly to the identification of an individual. The case cited involved a player whose name was published at the time, however had his name been withheld and the name of the player's club been substituted, it would still have been possible to identify the player because the timing of the offence and length of the ban would eliminate the other players at that particular club, all of whom played at least once during the period of interest.

23. The significant difference, therefore, between this case and the circumstances described by case reference FS50122432 is the amount of supporting data already in the public domain, and the availability of routes to obtaining further corroborative evidence from sources reasonably accessible to a motivated individual. The Commissioner therefore agrees with the public authority that the name of the player's club in the circumstances constitutes his personal data. It is then necessary to consider whether the information should nevertheless be disclosed under the Data Protection Principles. The relevant principle here is the first:

**The First Data Protection Principle** provides that –

*'1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

24. The complainant has argued, in effect, that the players' status as role models would make such disclosure fair, even where it might be considered unfair in other circumstances, for example those described in case reference FS50133250 relating to children excluded from school for possession of drugs.
25. Even if the Commissioner were to accept that argument, it would still be necessary to fulfil one of the criteria in subsection (a) to the first data protection principle, above, and in the case of sensitive personal data also to satisfy subsection (b).
26. The Data Protection Act 1998 defines 'sensitive personal data' at section 2, as:
- a) the racial or ethnic origin of the data subject*
  - b) his political opinions*
  - c) his religious beliefs or other beliefs of a similar nature*
  - d) whether he is a member of a trade union*
  - e) his physical or mental health or condition*
  - f) his sexual life*
  - g) the commission or alleged commission by him of any offence, or*
  - h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.*

27. The Commissioner considers that an allegation of the commission of an offence of taking drugs makes the information in question sensitive personal data by virtue of item (g) above, and further that item (e) is also relevant. The Commissioner therefore considers that disclosure (even if it were to be considered fair under the first data protection principle, and satisfied at least one condition in schedule 2) would still require that the disclosure satisfied one of the conditions set out at schedule 3 of the Data Protection Act 1998. Those conditions are set out in the legal annex to this Decision Notice.

28. The Commissioner has considered these conditions:

- 1) The data subject has not given his explicit consent. This may reasonably be assumed because in some circumstances the player has been named, for example the case cited at paragraph 22 above. Furthermore, UK Sport has given arguments, summarised in paragraph 10, as to why the expectation of confidentiality is important to the effectiveness of the scheme.
- 2) The disclosure is not necessary or imposed by law on UK Sport.
- 3) The disclosure is not necessary to protect the vital interests of the player or another person.
- 4) UK Sport is not considered to be a body or association covered by this condition, furthermore there is no consent from players.
- 5) The players have not deliberately made the information public.
- 6) The disclosure is not necessary for the purpose of any legal proceedings.
- 7) The disclosure is not necessary for the administration of justice, or for the functions conferred on UK Sport by any enactment.
- 8) The disclosure is not necessary for medical purposes and undertaken by a health professional.
- 9) The information does not relate to the racial or ethnic origin of the players.
- 10) There is no order made by the Secretary of State.

The Commissioner therefore does not find that any of the conditions would be satisfied by the disclosure of the withheld information.

29. The Commissioner therefore agrees that the withheld information constitutes the sensitive personal data of the players, that no schedule 3 condition would be satisfied in order to permit the release of the data and therefore the information has been correctly withheld by UK Sport.

## **Section 41**

30. As the Commissioner agrees that the exemption provided by section 40(2) of the Act has been correctly applied by the public authority, it has not been necessary to proceed to the exemption provided by section 41 of the Act and that exemption has not been considered further.

## **The Decision**

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31. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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32. The Commissioner requires no steps to be taken.



## Right of Appeal

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33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 3<sup>rd</sup> day of December 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### **S.1 General right of access**

**Section 1(1)** provides that -

*'Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.'*

**Section 1(2)** provides that -

*'Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'*

### **S.2 Effect of Exemptions**

**Section 2(2)** provides that –

*'In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*

*(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*

*(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'*

**Section 2(3)** provides that –

*'For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –*

*(a) section 21*

*(b) section 23*

*(c) section 32*

*(d) section 34*

*(e) section 36 so far as relating to information held by the House of Commons or the House of Lords*

(f) *in section 40 –*

(i) *subsection (1), and*

(ii) *subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,*

(g) *section 41, and*

(h) *section 44'*

### **S.40 Personal information**

**Section 40(1)** provides that –

*'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'*

**Section 40(2)** provides that –

*'Any information to which a request for information relates is also exempt information if-*

- (a) *it constitutes personal data which do not fall within subsection (1), and*
- (b) *either the first or the second condition below is satisfied.'*

**Section 40(3)** provides that –

*'The first condition is-*

- (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
  - (i) *any of the data protection principles, or*
  - (ii) *section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- (b) *in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.'*

**Section 40(4)** provides that –

*'The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).'*

**Section 40(5)** provides that –

*'The duty to confirm or deny-*

- (a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) *does not arise in relation to other information if or to the extent that either-*
  - (i) *he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
  - (ii) *by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'*

**Section 40(6)** provides that –

*'In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.'*

**Section 40(7)** provides that –

*'In this section-*

*"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;*

*"data subject" has the same meaning as in section 1(1) of that Act;*

*"personal data" has the same meaning as in section 1(1) of that Act.'*

## **SCHEDULE 3 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF SENSITIVE PERSONAL DATA**

**SCHEDULE 3** provides that –

*'1 The data subject has given his explicit consent to the processing of the personal data.*

*2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.*

*(2) The Secretary of State may by order—*

*(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or*

*(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.*

*3 The processing is necessary—*

*(a) in order to protect the vital interests of the data subject or another person, in a case where—*

*(i) consent cannot be given by or on behalf of the data subject, or*

*(ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or*

*(b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.*

*4 The processing—*

*(a) is carried out in the course of its legitimate activities by any body or association which—*

*(i) is not established or conducted for profit, and*

*(ii) exists for political, philosophical, religious or trade-union purposes,*

*(b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,*

*(c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and*

*(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.*

*5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.*

*6 The processing—*

*(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),*

*(b) is necessary for the purpose of obtaining legal advice, or*

*(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*

*7 (1) The processing is necessary—*

*(a) for the administration of justice,*

*(b) for the exercise of any functions conferred on any person by or under an enactment, or*

*(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.*

*(2) The Secretary of State may by order—*

*(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or*

*(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.*

*8 (1) The processing is necessary for medical purposes and is undertaken by—*

*(a) a health professional, or*

*(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.*

*(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.*

9 (1) *The processing—*

*(a) is of sensitive personal data consisting of information as to racial or ethnic origin,*

*(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and*

*(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.*

*(2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.*

*10 The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.'*

#### **S.41 Information provided in confidence**

**Section 41(1)** provides that –

*'Information is exempt information if-*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*

**Section 41(2)** provides that –

*'The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.'*