

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2013

Public Authority: UK Anti-Doping
Address: Fleetbank House
2-6 Salisbury Square
London
EC4Y 8AE

Decision (including any steps ordered)

1. The complainant requested details of drug tests carried out on competitive British Olympic weightlifters over a 24 month period.
2. The Commissioner's decision is that the public authority was not entitled to withhold the information requested on the basis of the exemptions at sections 36(2)(c) and 40(2) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested, i.e. the information referred to as 'the disputed information' throughout this notice.
4. The public authority must take these steps within 35 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.

Request and response

5. On 1 August 2012 the complainant wrote to the public authority and requested information in the following terms:

'...I would like the details of all tests carried out on competitive British Olympic Weightlifters over the last 24 months as well as details of all missed tests...'

6. On 28 August 2012 the public authority responded. It withheld some of the information on the basis of the exemption at section 36(2)(c) FOIA and the remainder on the basis of the exemption at section 40(2) FOIA.
7. On 4 September 2012 the complainant requested an internal review.
8. On 5 October 2012 the public authority wrote to the complainant with details of the outcome of the review. It upheld the decision above of 28 August.

Scope of the case

9. On 12 November 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He challenged the application of sections 36(2)(c) and 40(2) on a number of grounds. The scope of the investigation therefore was determine whether the public authority was entitled to withhold the disputed information (i.e. the athletes' names, dates they were tested, whether the test was in or out of competition, and the outcome, positive, negative or missed) on the basis of the exemptions at sections 36(2)(c) and 40(2) FOIA. The reasons provided by the complainant for challenging the application of the exemptions are addressed further below.
10. UK Anti-Doping is a public authority for the purposes of FOIA as a non-departmental public body of the Department of Culture Media and Sport.

Reasons for decision

Section 36(2)(c)

11. The public authority did not apply section 36(2)(c) to the names of the athletes. Section 36(2)(c) was applied to the following categories of information only: *test type* (i.e. in or out of competition), *date of test* and *outcome*. Section 40(2) was applied to the disputed information in full.¹ However, for reasons outlined below, the Commissioner nevertheless considered whether the exemption at section 36(2)(c) was engaged in respect of all the disputed information.
12. The request was for *details* of all tests carried out on British Olympic weightlifters over a 24 month period. The complainant specified the details in question as names of athletes, dates they were tested, test type and outcome. It is evident from the public authority's submissions that the arguments for engaging section 36(2)(c) would equally apply to the athletes' names together with the rest of the disputed information. Indeed, from the minutes of the meeting (supplied by the public authority) where the decision was made to engage the exemption, it does not appear that the qualified person similarly distinguished the different sets of information. The Commissioner has therefore considered the application of section 36(2)(c) in relation to all the disputed information.
13. Information is exempt from disclosure on the basis of section 36(2)(c) if in the reasonable opinion of a qualified person, disclosure of the information would prejudice, or would be likely to prejudice, the effective conduct of public affairs.

Was the qualified person's opinion reasonable?

14. The decision to engage section 36(2)(c) must be made by a *qualified person*. Section 36(5) FOIA describes a qualified person for the purposes of FOIA. The public authority explained that its Chief Executive, , has been authorised as the qualified person by the Secretary of State for

¹ Although at the time of the request, the public authority stated that it only applied to some of the disputed information.

Culture, Media and Sport pursuant to section 36(5)(o)(iii).² The Commissioner accepts that the Chief Executive of the public authority was the qualified person at the time of the request.

15. As mentioned, the exemption at section 36(2)(c) can only be engaged on the basis of the *reasonable* opinion of the qualified person. Therefore, the Commissioner must consider whether the Chief Executive's opinion was reasonable or not. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The most relevant definition of *reasonable* in the *Shorter Oxford English Dictionary* is '*In accordance with reason; not irrational or absurd.*'
16. At a meeting on 28 August 2012, the qualified person decided that the disputed information engaged the exemption. He took the view that disclosing the disputed information would be likely to prejudice the ability of the public authority to be able to conduct testing in an effective manner, in particular in the build-up to a major event such as the Olympic and Paralympic games. The consequence of disclosure would therefore be likely prejudice to the effective conduct of public affairs. The public authority expanded on this position in its submissions to the Commissioner. It explained that a fundamental principle of a successful anti-doping programme is that testing is unpredictable and conducted with no advance notice to the athlete. This is mandated in the World Anti-Doping Association (WADA) codes and the supplemental International Standard Testing with which it is bound to comply by virtue of the United Kingdom's (UK) National Anti-Doping Policy.
17. The disputed information would be likely to assist athletes, support personnel or other relevant parties in predicting the public authority's test planning and adjusting their doping activities in order to escape detection from sample collection or avoid sample collection altogether. Such an outcome would certainly damage the effectiveness of the testing programme, and therefore would be likely to prejudice the effective conduct of public affairs, namely the proper administration of an effective anti-doping programme mandated by the UK government through the UK National Anti-Doping Policy.
18. In the Commissioner's view, the complainant's submissions of relevance as to whether the exemption was correctly engaged are the fact that

² The pertinent part of section 36(5)(o)(iii) states that any officer or employee of a public authority is a qualified person for the purposes of section 36 if so authorised by a Minister of the Crown.

athletes know testing occurs and the precedent already set by the disclosure of positive test results including the publication of full test results by the IWF³. The complainant's submissions are summarised below.

19. He specifically questioned whether disclosure would breach the Data Protection Act 1998 (making the information exempt under section 40(2)) given that he is only interested in; athletes' names, dates they were tested, whether the test was in or out of competition and the result of the test, positive, negative or missed. It is public knowledge that the athletes can be, and are tested. Positive test results are made public so it is contradictory not to disclose negative test results also.
20. There exists precedent for disclosing similar information to the disputed information and there is no evidence that this has negatively affected drug testing programmes. He claimed that in Powerlifting, (a non-Olympic sport) the governing bodies have long published results of tests carried out. Furthermore, the International Weightlifting Federation (IWF) publishes results of tests carried out under their auspices.⁴ The IWF is bound by exactly the same (WADA) codes that the public authority and British weightlifters are, and they clearly feel that there is no issue with being open and transparent about who has been tested and when.
21. A body funded with public money must be transparent. The public authority cannot expect the public to consider it beyond reproach simply because it says it is, it has to prove it. Its actions must be open to media and public examination. It is only through such transparency that procedures can be reviewed, suggestions made and protocols improved. The argument that disclosure could allow unscrupulous individuals to determine a 'testing pattern' is exactly the kind of reason why the disputed information should be disclosed so that any shortcoming in the system can be identified. If predictable test patterns exist, then the system is already flawed. If there is nothing in the testing protocol which would cause embarrassment then there is no reason not to disclose the disputed information.

³ The international governing body for Olympic weightlifting

⁴ For the latest results, see, <http://www.iwf.net/anti-doping/testing-statistics/> Last viewed on 4 April 2013.

22. He also claimed that the German Weightlifting Federation (BVDG) had called for the resignation of the President of the IWF on the grounds that he has presided over a sub-standard drug testing system. The BVDG also claim approximately 67% of the men's weightlifting medallists at the London 2012 Olympics had either zero or one test from January to July 2012, a critical period in terms of preparation for the Olympics. This, he argued should be enough justification for the need to investigate the British drug testing system.

Commissioner's assessment

23. The Commissioner accepts that the administration of an effective anti-doping programme mandated by the UK government is within the purview of the *effective conduct of public affairs* envisaged by the exemption at section 36(2)(c).
24. Therefore, his task is to decide whether the opinion that the disclosure of the disputed information *would be likely* to assist athletes, support personnel or relevant parties in circumventing the public authority's testing programme is one that, in all the circumstances is *reasonable* (in the plain meaning of the word).
25. In the Commissioner's view, the term '*would be likely to prejudice*' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
26. The Commissioner accepts that the disputed information would be likely to assist athletes, support personnel or other relevant parties in making deductions about the public authority's testing programme in relation to weightlifting. It is conceivable that those deductions could assist athletes so inclined to plan their doping activities accordingly to avoid detection. The Commissioner therefore accepts that the likelihood of prejudice to the ability of the public authority to conduct effective testing on competitive British weightlifters in the event of disclosure is real and significant. The qualified person's opinion was therefore reasonable in substance.
27. The Commissioner is mindful of the complainant's quite powerful argument regarding the precedent set by the IWF and he has addressed this in detail below under the public interest considerations. However, in terms of engaging the exemption, the Commissioner is satisfied that in light of the *likelihood* that the testing programme would become less effective if the disputed information was disclosed, irrespective of the precedent set by the IWF, the opinion to engage the exemption was not irrational or absurd. Furthermore, the fact that athletes know testing

occurs would not make the disputed information any less useful to those seeking to circumvent the testing programme.

28. The Commissioner consequently finds that the exemption at section 36(2)(c) was correctly engaged.

Public Interest Test

29. The exemption at section 36(2)(c) is qualified. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.

Public authority's arguments

30. In favour of disclosure, the public authority recognised the public interest in upholding the transparency of public administration and use of public funding. It specifically recognised the public's right to be satisfied that it is using public funding properly and effectively and is conducting sufficient numbers of tests and appropriately pursuing those tests that indicate an athlete is contravening the anti-doping rules. It further acknowledged the public's right to have confidence that the athletes representing the United Kingdom are doing so drug-free, especially where those athletes are in receipt of public funding.
31. However, it argued that sharing information in order to evidence the effectiveness of its testing programme would be counter-productive if sharing the information would also be detrimental to the effectiveness of the programme. That would not be in the public interest.
32. The public authority also argued that there was a risk that disclosing the disputed information could result in National Governing Bodies of sport (NGB), athletes and support personnel and other anti-doping organisations ceasing to share information with it for fear of the information being disclosed to the public. Such a breakdown of communication would weaken its ability to perform its functions properly and that would not be in the public interest.
33. It explained that crucial to its ability properly to detect and prosecute is the receipt of information from participants of sport and the general public. This is facilitated through a hotline that averages 200 tip-offs a year. Callers are assured that the information they provide would be kept securely and in the strictest confidence. There was a risk that disclosing the disputed information would result in individuals becoming less willing to share information with the public authority for fear that

information they have provided in confidence could be made available to the public. That would not be in the public interest as it would affect the public authority's ability to carry out its functions properly.

34. The public authority was, however, keen to stress that it recognised the need to strike a balance between the public interest in transparency and the public interest in being able to function effectively. That is why it publishes testing statistics quarterly which detail the spread of test attempts per governing body, the spread of tests between in-competition (random/placed), out of competition (random) and targeted (both in and out of competition) and the details (including names) of recent anti-doping rule violations.⁵ It also publishes the outcome and decisions of all anti-doping rule violations committed by UK athletes.⁶ Such publication only occurs after a final determination has been made (either a first instance decision that has not been appealed, or the appellate decision).
35. Additionally, in relation to Team GB⁷ athletes at the London 2012 Olympic and Paralympic Games, the public authority submitted that it was open about the scope and outcomes of its pre-Games testing programme, reporting that each and every Team GB Olympic and Paralympic athlete was tested at least once in the run up to the Games, with many tested more than once. It provided the Commissioner with copies of news bulletins showing that this had been widely reported in the media.
36. The public authority submitted that the disclosures referred to above strike the right balance between being accountable to the public for the expense of taxpayers' money on an effective anti-doping programme and ensuring the confidentiality of its work.

Balance of the public interest

37. The Commissioner agrees that there is a strong public interest in the public authority being transparent about its testing programmes for athletes in general. He accepts that publication of testing statistics and

⁵ See, <http://www.ukad.org.uk/anti-doping-rule-violations/facts-and-figures/> for details going back to 2009/2010.

⁶ <http://www.ukad.org.uk/anti-doping-rule-violations/current-violations>

⁷ The official name of the British Olympic Team at London 2012.

anti-doping violations by UK athletes demonstrates the public authority's commitment to transparency and accountability.

38. The Commissioner is however not persuaded that there is sufficient evidence in support of the argument that disclosure could result in the breakdown of communications between the public authority, NGBs, athletes, support personnel and other anti-doping organisations. According to the public authority, information sharing by an NGB is mandated by the UK Government's National Anti-Doping Policy. Information sharing is also provided for in the WADA code, a global document that harmonises anti-doping testing procedures and compliance. In the Commissioner's view, NGBs that do not cooperate risk damage to their reputation in relation to anti-doping and the possibility of sanction by the public authority. Athletes also face the possibility of being sanctioned if they refuse to cooperate. The Commissioner is not suggesting that in future, cooperation might not prove difficult or that there is no possibility that it could even be withdrawn completely in some cases. However, he is satisfied in the circumstances that those cases are likely to be rare and he takes the view that, even if or when they did occur, the public authority would be well placed to require the cooperation needed to effectively carry out its functions.
39. On the other hand, the Commissioner considers that the severity, extent and frequency of the anticipated harm to the ability of the public authority to carry out its functions effectively has to be seen in light of the fact that the IWF (which is also bound by the WADA code) routinely publishes information which is similar to the disputed information. Article 14.4 of the WADA code provides:
- 'Statistical Reporting*
- Anti-Doping Organizations shall, at least annually, publish publicly a general statistical report of their Doping Control activities with a copy provided to WADA. Anti-Doping organizations may also publish reports showing the name of each Athlete tested and the date of each Testing.'*
40. The public authority explained that it does not provide the optional publication referred to in Article 14.4 above because it did not consider it had any basis for publishing the information and that it would not be a reasonable and appropriate use of the information. Furthermore, even if it redacted the names of the athletes, the remaining information (i.e. date of testing, type of testing and outcome/result of the test) would still be useful to individuals seeking to circumvent the testing programme.

41. In the Commissioner's view, the fact that the international governing body for professional weightlifting does not appear to consider that the publication of information very similar to the disputed information would be likely to have a significant effect on its ability to carry out effective drug testing on athletes cannot be ignored. The reasons the public authority has provided for not doing the same do not address the vital question, which is: how would the publication of the disputed information make it any easier for British weightlifters to circumvent its testing programme given that the IWF does not appear to consider that it would in relation to its own anti-doping measures? It is not sufficient to simply argue that it would not be a reasonable and appropriate use of the disputed information. It is also insufficient to reiterate that a redacted version of the information would still be useful to those seeking to circumvent its testing programme. It is already established that the disputed information is likely to assist those who may want to use it to deduce testing patterns in British weightlifting. In the Commissioner's view, although it is reasonable to form the opinion that the disputed information is likely to prejudice the public authority's effectiveness in drug testing professional weightlifters, he does not accept that such prejudice would be severe or widespread in light of the precedent set by the routine disclosure of very similar information by the IWF.
42. The Commissioner is also not persuaded that disclosing the disputed information would be likely to prevent individuals from providing intelligence to the public authority in relation to doping activities in weightlifting. No specific evidence has been provided to support this assertion. The disputed information does not include information which could identify individuals who may have provided information to the public authority with an expectation of confidence. In view of the above, the Commissioner is not satisfied that the severity, extent and frequency with which the prejudice to the ability of the public authority to effectively carry out its functions is likely to occur is significant enough to justify non-disclosure. There is a public interest in disclosing the disputed information to enhance transparency and accountability in relation to the public authority's anti-doping measures in British weightlifting. Any prejudice to the effectiveness of the regime would, in the Commissioner's opinion, be minor and the public interest in avoiding such prejudice does not outweigh the public interest in disclosure.
43. The Commissioner therefore finds that, on balance, in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Section 40(2)

44. The public authority withheld all of the disputed information on the basis of the exemption at section 40(2). As the Commissioner has found that the public authority was not entitled to withhold the disputed information on the basis of section 36(2)(c), he has gone on to consider whether section 40(2) was engaged.
45. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (i.e. the personal data of an individual other than the person making the request) and either the first or second condition at section 40(3) is satisfied.

Is the disputed information personal data?

46. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as:

'.....data which relate to a living individual who can identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

47. The public authority submitted that the testing details combined with the athlete's name constitute personal data within the meaning of the DPA. It explained that if the names of athletes were redacted, details of the *out of competition testing* on their own could be meaningless as it would be difficult to identify an athlete who was tested out of competition. On the other hand, the dates of tests and details of *in competition testing* combined with other information in the public domain would identify athletes even if their names were redacted. However, redacting the fact that a test was *in competition* would make it obvious that it was in fact not *out of competition* if the *out of competition tests* were still identified.
48. The Commissioner accepts that the disputed information is personal data. It is information from which the tested athletes could be identified. He accepts that combining details of the type of test (specifically *in competition testing*) and the dates of tests with other publicly available information could identify the athletes even if their names were redacted. It is however worth mentioning that the public authority had already revealed that British Olympians were tested at least once in the run up to the London 2012 Olympics.

49. The Commissioner agrees that the athletes could still be identified even if the fact that they were tested *in competition* was redacted without also redacting details of the *out of competition testing*. He does not consider a redacted version of the disputed information excluding the names of the athletes, the type of testing and the dates of the tests would meet the terms of the request.

Would the disclosure of the disputed information contravene any of the data protection principles?

50. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
51. The first data protection principle states:
- 'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-*
- At least one of the conditions in schedule 2 [DPA] is met...'*
52. The public authority submitted disclosure would contravene the first data protection principle because none of the conditions in Schedule 2 are met.
53. In determining whether disclosure would be fair in this case, the Commissioner has principally considered the reasonable expectations of the data subjects (in this case, the athletes) in light of the circumstances in which their personal data was obtained and the consequences of disclosure.
54. Given that the IWF routinely publishes its test results, it is the Commissioner's view that the British Olympic weightlifters who were tested in the period requested would have expected that their names could be published. Athletes generally expect that details of their test results could be made public as part of measures to prevent doping and/or to reassure the public that a competition was free of doping or that a particular sport is subject to rigorous anti-doping measures. In the circumstances of this case where there is already a clear precedent for similar disclosures by the international governing body for weightlifting, the Commissioner is of the view that the athletes would have been under no illusion when they provided samples for testing that details of the tests could be made public. Given the athletes' expectations in relation to drug testing, the Commissioner is satisfied that disclosure would not constitute a significant intrusion on their

private lives. As mentioned, the public authority had also revealed that British Olympians were tested at least once in the run up to London 2012.

55. The Commissioner therefore finds that disclosing the disputed information would not be unfair to the athletes concerned and therefore not in contravention of the first data protection principle.

Would disclosure meet any of the conditions in Schedule 2?

56. As mentioned, the first data protection principle also stipulates that personal data shall not be processed unless at least one of the conditions in schedule 2 is met.
57. The Commissioner considers the relevant condition in the circumstances of this case is at paragraph 6(1). It states:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

58. The sixth condition therefore establishes a three part test which must be satisfied. There must be legitimate interests in disclosing the information, the disclosure must be necessary for a legitimate interest of the public and, it must not cause unwarranted interference to the rights, freedoms and legitimate interests of the data subject.
59. The Commissioner has already noted that disclosing the disputed information would enhance the transparency and accountability of the public authority in relation to its anti-doping measures in British weightlifting. That is a legitimate public interest. In the circumstances, the athletes would have expected that details of the tests conducted could be disclosed by the public authority to reassure the public of the steps it took to ensure that the British weightlifters were clean at the London 2012 Olympics. The practice adopted by the IWF would have increased that expectation of disclosure. The Commissioner is therefore satisfied that in the circumstances, disclosure would not have caused unwarranted interference to the rights, freedoms and legitimate interests of the athletes.

60. The final requirement to satisfy Schedule 2 Condition 6(1) is that the disclosure of the disputed information must be *necessary* for a legitimate interest of the public. The Commissioner shares the Information Tribunal's view in *Guardian Newspapers v IC*⁸ that the presumption of disclosure under FOIA alone will not satisfy the requirement of necessity in condition 6(1). However, it is also his view that disclosure could be still be *necessary* under Schedule 2 Condition 6(1) to meet the general public interest in transparency;
- where the information is fairly anodyne,
 - where there is no significant interference with the data subject's privacy, and
 - even where there is no significant public interest in disclosure.
61. As mentioned, it was widely reported in the media that the public authority was embarking on a comprehensive drug testing programme in the run up to the London 2012 Olympic Games and that every British Olympic athlete would be tested at least once before the Games. Therefore, at the time of the request, it was public knowledge that every British Olympic athlete had been drug tested. The public may not have been aware of the actual dates that the tests were carried out and/or the type of tests but they would have known the identities of the athletes tested given that those athletes were part of Team GB. In the Commissioner's view, this, coupled with the fact that the IWF routinely publishes details of the tests it carries out on professional weightlifters, means that disclosing the disputed information would be unlikely to significantly interfere with the athletes' right to privacy and that it could also be characterised as fairly anodyne. The Commissioner has already explained why he does not consider that there is a sufficiently strong public interest in protecting the disputed information from disclosure. He believes that disclosure would enhance transparency in relation to the public authority's anti-doping measures in British weightlifting. He is satisfied that in the circumstances, disclosure was necessary to meet the legitimate public interest in transparency.
62. The Commissioner therefore finds that disclosure would meet condition 6(1), the relevant Schedule 2 condition in the circumstances of this case.

⁸ EA/2010/0070 at paragraph 36

Would the disclosure be lawful?

63. As mentioned, the first data protection principle states that '*Personal data shall be processed fairly and lawfully.....*' The Commissioner must therefore also consider whether disclosing the disputed information would be lawful.
64. In the Commissioner's view, it is likely that disclosure would be unlawful under FOIA if it can be established that the disclosure would be a breach of statutory bar, an enforceable contractual agreement or an obligation of confidence. In the circumstances of this case, the Commissioner is satisfied that none of these would apply. Therefore, he has no reason to consider that disclosing the disputed information would not be lawful.
65. The Commissioner therefore finds that the public authority was also not entitled to withhold the disputed information on the basis of section 40(2).

Right of appeal

66. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

67. 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.
68. 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

Graham Smith
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