

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 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 a copy of a British Equestrian Federation report relating to details of drug tests carried out in British show jumping in 2011/12.
2. The Commissioner's decision is that the public authority was entitled to withhold the report on the basis of the exemption at section 41 FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 11 July 2012 the complainant wrote to the public authority requesting answers to a number of questions in relation to anti-doping testing in British show jumping, an equestrian sport. The public authority's response was provided in an email on 27 July 2012. On the same day, 27 July 2012, the complainant wrote back with follow up questions. He wrote back again on 30 July 2012 and this time, amongst other questions, the complainant requested a copy of a '*BEF* (British Equestrian Federation) *report*' under the FOIA.
5. The public authority's initial response on 1 August 2012 was that it did not hold the BEF report.
6. On 21 September 2012 the complainant requested an internal review in which he posed a number of questions to the public authority. However,

of relevance in terms of the application of the FOIA is that he queried the claim that the BEF report was not held.

7. On 19 October 2012 the public authority wrote to the complainant with details of the outcome of the review. It addressed all of the complainant's queries and confirmed that it was in possession of a BEF report received on 13 March 2012. The public authority explained that the report details tests carried out in British show jumping in the first two quarters of the 2011/12 testing year. It stated that eleven tests were conducted in the relevant period, of which ten were negative and one was positive for a controlled medication. It however considered a copy of the report exempt from disclosure on the basis of sections 36(2)(c) and 40(2) FOIA.

Scope of the case

8. On 25 October 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically queried the decision to withhold the BEF report of 13 March 2012. He also complained about other matters which the Commissioner explained he could not consider either because they were outside his remit or had not been properly addressed under the terms of the FOIA.
9. In terms of the BEF report, the complainant explained that he would be content to receive a redacted version excluding the names of horses, owners and riders only. The Commissioner understands from the exchanges between the complainant and the public authority that he considers the anti-doping measures (specifically drug testing) in British show jumping inadequate and has reservations in relation to how the British Equestrian Federation manages the funding it receives from the public authority.
10. In view of the terms on which the complainant was willing to accept a redacted version of the report, the public authority withdrew the exemption at section 40(2) and introduced the exemption at section 41 FOIA instead.
11. The complainant subsequently questioned the application of section 41. He submitted that the British Equestrian Federation is accountable to the public authority because of the funding it receives in relation to anti-doping. He claimed that he had been provided with expenditure reports compiled by the BEF from Sports England and UK Sport, bodies which also fund the BEF. The Commissioner understands this to mean that the

complainant does not believe the public authority would be subject to confidentiality obligations by a body accountable to it.

12. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold the BEF report of 13 March 2012 on the basis of sections 36(2)(c) and 41 FOIA.

Reasons for decision

Section 41

13. The Commissioner first considered the applicability of section 41, an absolute exemption under the FOIA.
14. Information is exempt from disclosure on the basis of section 41 if it was obtained by the public authority holding it from any other person including another public authority, and the disclosure of the information to the public by the public authority holding it would constitute an actionable breach of confidence.
15. To engage the exemption therefore, the relevant information must meet the following two criteria:
 - Was the information obtained by the public authority from a third party?; and
 - Would the disclosure of the information constitute an actionable breach of confidence?

Was the BEF report obtained from a third party?

16. The public authority supplied the Commissioner with a copy of an email which clearly indicates that it received the report from the British Equestrian Federation on 13 March 2012. The Commissioner therefore finds that the first criterion is met.

Would the disclosure of the BEF report constitute an actionable breach of confidence?

17. In the Commissioner's opinion, an actionable breach is not just one that is arguable but one that would, on the balance of probabilities, succeed. For the purposes of section 41, he considers that a breach of confidence will always be actionable if:
 - The information has the necessary quality of confidence;

- The information was imparted in circumstances importing an obligation of confidence; and
- There was an unauthorised use of the information to the detriment of the confider.¹

Does the BEF report have the necessary quality of confidence?

18. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
19. The public authority explained that the full contents of the report is not accessible or in the public domain and is only known to the public authority and the British Equestrian Federation. It also submitted that far from being trivial, the report is considered confidential and its disclosure would have an adverse impact on anti-doping practices.
20. The Commissioner has not found any evidence to suggest that BEF report is in the public domain or accessible by the public. He accepts that the report is clearly important in relation to anti-doping practices in equestrian sport and cannot be considered trivial. He therefore finds that the report has the necessary quality of confidence.

Was the BEF report provided in circumstances importing an obligation of confidence?

21. An obligation of confidentiality may be expressed explicitly or implicitly. The public authority pointed out that, in its email of 13 March 2012, the British Equestrian Federation explicitly imposed an obligation of confidence on the public authority in relation to the report. The Commissioner therefore finds that the BEF report was provided in circumstances importing an obligation of confidence as is plainly evident from the email of 13 March.
22. Whether or not the report was provided by a body accountable to the public authority does not affect the fact that it was provided in confidence. The relevant test is whether the information in question was provided by a third party (regardless of whether or not it is accountable to the public authority) in circumstances importing an obligation of

¹ In the Commissioner's view, showing that the confider will suffer a 'detriment' is not necessarily a prerequisite of an actionable breach in all cases.

confidence. In addition, every case must be decided on its own merits. Therefore, the claim that similar reports compiled by the BEF have been disclosed by other authorities is not a relevant consideration in the circumstances of this case.

Would an unauthorised use of the BEF report cause detriment to the confider?

23. The public authority explained that the British Equestrian Federation is strongly of the view that the disclosing the report could be detrimental to the effectiveness of its testing programme. An individual with knowledge of the British show jumping competition schedule would be able to determine (using the report) the level at which testing is conducted. Furthermore, an individual engaging in doping activity could use this information to avoid detection. The public authority further argued that disclosure could set a precedent for future disclosures. It submitted that disclosure of similar reports over a lengthier period of time would assist individuals seeking to avoid testing at future competitions.
24. The Commissioner accepts the public authority's detailed explanation (summarised above) that unauthorised disclosure would be detrimental to the British Equestrian Federation.

Public interest in confidence

25. As mentioned, section 41 is an absolute exemption and consequently does not require a public interest test to be applied. However, disclosure in the public interest is a defence to a breach of confidentiality. Therefore, the Commissioner must also consider whether the public authority could successfully rely on a public interest defence against a breach of confidence in this case.
26. Unlike the public interest test for qualified exemptions, the duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.²

² This is commonly referred to as an inverse public interest test because the public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemptions exceeds the public interest in disclosure.

27. In the Commissioner's view, an express obligation of confidence should not be overridden on public interest grounds lightly. However, a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence based on the individual circumstances of the case will always be required.

Public authority's arguments

28. The public authority's submissions understandably focussed on the public interest in favour of maintaining the duty of confidence in this case. It submitted that the BEF report will not reveal any wrong doing by the British Equestrian Federation or the public authority and that the funds it provides to the BEF to conduct testing are properly accounted for.
29. The British Equestrian Federation had made it clear that if information it provides in confidence is later disclosed under the FOIA, in future, it will reconsider whether to provide certain information to the public authority for fear of it being disclosed to the public. The public authority was however, keen to stress that BEF's position was not the sole determinant on whether the report should be made available to the public. It also considered the impact such a breakdown of communication would have on its ability to properly perform its functions.
30. It explained that it could only function properly where information is facilitated between it and its stakeholders like the BEF. Information sharing by a National Governing Body (NGB) like the BEF is mandated by its policy. Such information sharing allows the public authority to facilitate its testing programme, investigate and prosecute athletes and support personnel for the commission of anti-doping violations. Information sharing is also provided for in the World Anti-Doping (WADA) Code, a global document that harmonises anti-doping testing procedures and compliance. This aids the public authority in maximising its limited resources by ensuring that its testing programme does not overlap with a sport's international federation. For example, if the public authority knew that the International Association of Athletics Federations is planning to test certain athletes in the lead up to a major event, it is able to divert resource elsewhere and test other athletes.
31. Receipt of information in confidence from participants of sport and the general public is also crucial to its ability to properly detect and prosecute doping activity. Disclosing a report provided in confidence could discourage individuals from providing intelligence in future for fear that their identities could be exposed from the information they provided.

32. It argued that the free flow of information to a public authority in order for that authority to perform its public function is a significant public interest in maintaining the confidentiality of requested information. It submitted that with the ever increasing importance of sharing information in order to effectively wage the war on doping in sport, there would be a substantial detriment caused if NGBs, international partners and individuals refrained from sharing information with it for fear of breaching confidences. It would be hindered significantly from performing its sole public function: the elimination of doping in sport in the UK.

Commissioner's assessment

33. The Commissioner agrees that there is a significant public interest in having adequate anti-doping measures in place to meet the ever growing challenge of doping in sports. He believes the disclosure of the BEF report will enhance the quality of the debate as to whether the current drug testing programme in British show jumping is adequate.
34. The significant weight of the public authority's argument in relation to NGBs becoming less willing to share information is in his view slightly weakened by the mandatory requirement in the public authority's policy for NGBs to cooperate with the testing programme. There is also the risk of losing their funding and the consequent reputational damage. International sports federations that do not cooperate also run the risk of breaching WADA's anti-doping code. However, the Commissioner acknowledges that the risk of non-cooperation is real and significant given that those bodies could very likely also owe a duty of confidence to those who provided the information to them in the first place. There is also the significant risk of individuals no longer willing to provide intelligence in future.
35. In any event, the task for the Commissioner is to consider whether, in the circumstances of this case, there would be a public interest *defence* in breaching the expressly imposed obligation of confidentiality by disclosing the BEF report. It is not to determine whether there is a public interest in disclosure. He does not believe there would be such a public interest defence in this case. Although the Commissioner has mentioned that there is a public interest in disclosure and also pointed out the slight weakness in the argument regarding non-cooperation in future by stakeholders, he does not consider that they would provide an adequate public interest defence in disclosure in this case.
36. He accepts that the express obligation of confidence imposed by the British Equestrian Federation on the public authority is crucial. There is a significant public interest in recognising and enforcing the obligation of

confidence. It is a matter of trust which is at the heart of a relationship between parties. Nevertheless, a duty of confidence should not be used as a shield to hide evidence of wrong doing in the face of compelling public interest reasons to reveal such evidence. The Commissioner has not found any evidence of wrong doing in this case. He notes that the public authority disclosed the number of tests conducting during a testing period, including the number of positive and negative results.

37. The Commissioner therefore finds that disclosing the BEF report would constitute an actionable breach of confidence to which there is no public interest defence.
38. He consequently finds that the public authority was entitled to withhold the BEF report on the basis of the exemption at section 41.
39. In view of his finding that section 41 was correctly engaged, the Commissioner did not need to consider the applicability of section 36(2)(c).

Right of appeal

40. 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

41. 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.
42. 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

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