

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to UK Anti-Doping (UKAD) for communications sent and received by its Chief Executive relating to the story published in *The Sunday Times* on 2 August 2015 concerning allegations of doping in athletics. UKAD provided the complainant with some of the information falling within the scope of his request but withheld the remainder on the basis of sections 36(2)(b)(i) and (ii) (effective conduct of public affairs) of FOIA. The Commissioner has concluded that both exemptions are engaged and the public interest favours withholding the information.

Request and response

2. The complainant submitted the following request to UKAD on 4 August 2015:

'Please provide copies of all communications sent and received by Nicole Sapstead [UKAD's Chief Executive] between July 1 and today's date which relate in any way to IAAF [International Association of Athletics Federations] data subsequently published in the Sunday Times on August 2. This includes copied in communications and all attachments.'

3. UKAD responded on 1 September 2015 and provided the complainant with some of the information falling within the scope of his request but withheld the remaining information on the basis of sections 36(2)(b)(i) and (ii) of FOIA.

4. The complainant contacted UKAD on 3 September 2015 in order to ask for an internal review of this decision. UKAD informed him of the outcome of the internal review on 8 October 2015. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

5. The complainant contacted the Commissioner on 8 October 2015 in order to complain about UKAD's handling of his request. He argued that that the public interest favoured disclosure of the withheld information and the Commissioner has referred to the complainant's submissions to support this view below.

Reasons for decision

Section 36 – effective conduct of public affairs

6. Sections 36(2)(b)(i) and (ii) state that:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation'

7. In this case Nicole Sapstead, UKAD's Chief Executive, provided the opinion in relation to the application of sections 36(2)(b)(i) and (ii). The Commissioner is satisfied that Ms Sapstead is a qualified person for the purposes of section 36.
8. The qualified person did not specify whether the exemptions were engaged at the higher threshold, ie that disclosure 'would' result in the prejudicial consequences each exemption was designed to protect or whether the disclosure would only 'be likely to' result in the prejudicial consequences. The Commissioner has therefore simply considered whether the exemptions are engaged at the lower level.
9. In order to do so the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
10. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
11. UKAD explained to the Commissioner that the submission provided to Ms Sapstead, with which she agreed, suggested that the exemptions were engaged for the following reasons:
- The prejudice related to the specific subsections of section 36(2) that were being claimed as the envisaged consequences of disclosure related to the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation between UKAD Directors and between UKAD and key stakeholders;
 - The request related to information pertaining to an ongoing issue, ie that of allegations of doping in athletics, which UKAD is heavily engaged in as the UK's anti-doping body. UKAD staff and officials therefore needed to be able to discuss related issues in confidence and to provide advice and exchange views for the purposes of deliberation and to form professional, robust and effective decisions and actions in the best interests of sport;
 - The qualified person was the subject of the request itself and was therefore the individual with the most knowledge or involvement in the issue and the engagement of the exemption.
12. The Commissioner accepts that the qualified person's opinion is a reasonable one. The withheld information clearly represents a free and

frank exchange of views and advice about a high profile and ongoing issue in which UKAD was involved. In the Commissioner's view it is therefore reasonable to conclude that disclosure of this information at the time of the complainant's request would have been likely to have an impact on the candour of UKAD's further discussions on this topic.

Public interest test

13. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

14. The complainant argued that the information covered by his request related to the most serious allegations of doping allegations athletics has ever faced. He argued that there was a compelling public interest in the disclosure of information capable of demonstrating how the UK body charged with fighting doping reacts to such allegations. Disclosure would demonstrate how professional and robust UKAD was in dealing with these allegations. The complainant noted that the information disclosed revealed the concern of the UKAD's Chief Executive that the allegations did not detract from the Rio countdown.¹
15. He emphasised that officials who are discharging their duties and giving opinions in a fair, professional and impartial manner have nothing to fear from disclosure. Moreover, the complainant suggested that the public understands that a range of views is often imparted in reaching positions or developing lines to take.
16. UKAD acknowledged that disclosure of the withheld information would promote transparency and accountability in decision making by UKAD. It also accepted that disclosure would provide the public with greater information about how UKAD reacts to allegations of doping. Finally, UKAD argued that disclosure could demonstrate how professional and robust its decision making process is in relation to doping allegations.

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http://www.thesundaytimes.co.uk/sto/news/uk_news/thedopingscandal/article1606588.ece

Public interest arguments in favour of maintaining the exemption

17. However, UKAD argued that it was firmly of the view that the public interest favoured maintaining the exemptions. It argued that there was a significant public interest in it being able to meet its public function by fulfilling the UK government's commitments to the UNESCO Convention Against Doping in Sport. UKAD explained that it was a small organisation, with flexible working arrangements and staff located in multiple locations at any one time. Furthermore, it explained that UKAD's stakeholders are located all over the world. Consequently, most discussions between UKAD staff at all levels, and notably at senior levels where key decisions take place, and with UKAD stakeholders, are conducted via email, rather than in person or by phone.
18. It was therefore fundamental to UKAD's day-to-day operations that staff are able to exchange advice and engage in free and frank discussions for the purposes of deliberation in this way for it to be able to fulfil its public function effectively. UKAD emphasised that this was especially crucial when the organisation is required to react promptly, effectively and professionally to serious doping allegations. It was of the view that disclosure of the withheld information had the potential to infringe upon the frankness of such discussions in the future. It also argued that disclosure of the information had the potential to hamper and impede UKAD's existing procedures and processes by which its directors took critical business decisions.

Balance of the public interest test

19. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
20. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is

finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

21. In the circumstances of this case, the Commissioner accepts that at the time of the complainant's request UKAD's response and decision making in relation to the doping allegations in question were clearly still live: the request was submitted on 4 August 2015 and allegations had only been report in *The Sunday Times* two days earlier. Furthermore, as noted above, the Commissioner accepts that the withheld information clearly contains free and frank exchange of views concerning UKAD's reaction to the doping allegations. Consequently, in the Commissioner's view disclosure of the withheld information at the point of the complainant's request was submitted would have been likely to infringe upon the candour of UKAD's staff in terms of their further email exchanges on this and related topics. Furthermore, in the particular circumstances of this case, the Commissioner believes that the chilling effect arguments are particularly compelling given the manner in which UKAD conducts a significant amount of its key communications, both internally and externally, ie via email.
22. In theory, the Commissioner does not dispute the complainant's line of argument that professionals giving their views in objective ways have nothing to fear from disclosure. However, the Commissioner believes that it ignores the potential impact of disclosing the withheld information upon the safe space that UKAD needed at the time of the request to discuss, debate, formulate and present its response to the allegations. The allegations that appeared in *The Sunday Times* were the most serious ones involving athletics in recent years and the story was clearly a high profile one with an obvious international dimension. In the Commissioner's opinion it is plausible to conclude that disclosure of the withheld information, at the point of the request, would have potentially resulted in the infringement of the safe space that UKAD needed to efficiently debate the issues raised without external inference and distraction. In other words, as UKAD suggested, disclosure risked hampering and impeding its existing decision making processes by having to address questions raised as a consequence of the withheld information being disclosed. In the Commissioner's opinion it is reasonable to envisage such questions being raised even if the withheld information simply demonstrated discussions that were both professional and impartial.
23. With regard to the public interest in favour of disclosing the withheld information, given the gravity of the allegations concerning international athletics, the Commissioner agrees that there is clear interest in the public being able to understand how UK's anti-doping organisation formulated its reaction to the allegations. Furthermore, the

Commissioner believes that disclosure of the withheld information could genuinely reassure the public as to the robustness of UKAD's decision making process and such an outcome would also be in the public interest. However, in attributing weight to the public interest in disclosure, the Commissioner believes that it is important to remember that in response to the allegations, UKAD published a detailed statement explaining its reaction to the news of the allegations. UKAD's position and reaction to the allegations is therefore in the public domain.² In the Commissioner's view, this lessens the weight that should be attributed to disclosure of the information which would reveal how this position was formulated.

24. Ultimately, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner has been particularly persuaded by the potential impact of disclosing the withheld information on the candour of UKAD's communications given the central role email communications play in its decision making processes. He also believes that disclosure of the withheld information at the point of the complainant's request would have presented a real and genuine risk to the safe space UKAD needed to consider and respond to the allegations in question. In reaching this conclusion the Commissioner is not seeking to play-down the public interest in disclosure of the withheld information; he recognises the significance of the story and the allegations published in *The Sunday Times*. However, he believes that the public interest is best served by the UK's anti-doping organisation being able to make robust and effective decisions in response to such allegations. He is firmly of the view that disclosing the details of communications which comprise the withheld information would ultimately undermine the effectiveness of such discussions in the future.

² <http://www.ukad.org.uk/news/article/uk-anti-doping-statement-following-doping-allegations-in-athletics>

Right of appeal

25. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF