



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2013/0177

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 22 July 2013
FS50468810**

Appellant: UK Anti-Doping Limited

First Respondent: Information Commissioner

Second Respondent: Philip Nourse

Heard in London on 28 January 2014

Before
John Angel
(Judge)
and
Roger Creedon and Nigel Watson

Subject matter: s.40(2) personal information and s.36(2)(c) effective conduct of public affairs

DECISION

The appeal is allowed to the extent that s.40(2) FOIA is found to be engaged for all the disputed information and a substituted decision notice is made accordingly.

REASONS FOR DECISION

Background

1. The United Kingdom Anti-Doping organisation (“UKAD”) derives its authority from the National Anti-Doping Policy (“the Policy”). The Policy in turn implements the UK Government’s obligations as a signatory to the UNESCO Convention Against Doping in Sports which includes a commitment to the principles of the World Anti-Doping Code (“Code”). This includes an obligation to conduct all Out-of-Competition Testing on a No Advance Notice basis (this being defined in the Code as being Testing “which takes place with no advance warning to the Athlete and where the Athlete is continuously chaperoned from the moment of notification through Sample provision”), and to prioritise Target Testing (defined as “Testing where specific Athletes or groups of Athletes are selected on a non-random basis for Testing at a specified time”).
2. Pursuant to the Policy UKAD is responsible for the conduct of Testing in respect of all sports in the UK that are in receipt of public funds and/or publicly funded benefits. It is also responsible for conducting the process of “Results Management” – which encompasses managing the results of Testing – and prosecuting anti-doping rule violations committed by Athletes and Athlete Support Personnel, as those terms are defined in the Code.
3. UKAD has fulfilled these responsibilities since its formation in December 2009 and carries out several thousand tests each year pursuant to a Test Distribution Plan (“TDP”).
4. UKAD develops a TDP each year, which allows it to plan how Testing will take place in relation to each sport and is subject to ongoing review and revision to ensure that resources are used in as efficient and targeted manner as possible. A TDP has to be developed in a manner that anticipates when and how doping will take place and be executed in a manner that provides both an effective deterrent and a means by which it can be detected. It includes a mix of random and targeted tests conducted In-Competition and Out-of-Competition.
5. For obvious reasons, UKAD does not want the TDP to be second guessed and anticipated so that Athletes know when and how they will be tested.
6. Where a test proves positive UKAD has power to investigate the matter and ultimately impose a disciplinary sanction like banning an athlete from competing for a period. Once any appeal process has been completed UKDA will publicise the banning order. Otherwise none of the individual test results are published except as part of a statistical analysis where no personal information is included.

7. The International Weightlifting Federation (“IWF”) routinely publishes the names, nationality, event and dates for the testing of ‘elite’ weightlifters both in and out of international competitions. The information does not include the results of tests.

The Request and Complaint to the Information Commissioner

8. On 1st August 2012, Mr Nourse requested from UKAD “*details of all tests carried out on competitive British Olympic Weightlifters over the last 24 months as well as details of all missed tests*”. Throughout the internal process and the Commissioner’s investigation, that has been interpreted as a request for: (i) the names of the athletes; (ii) the dates on which each athlete was tested; (iii) whether the test took place in or out of competition; and (iv) the outcome of the test (positive, negative, or missed). At the hearing Mr Nourse explained that he considered the scope of his request to be wider, namely to include all those engaged in the sport of Olympic Weightlifting which is a particular discipline within weightlifting. His request was not limited to those weightlifters that participated in the 2012 Olympic games as had been assumed by UKAD. Mr Nourse has been insistent throughout that he requires the names of athletes as well as the other information. He was given the opportunity at the hearing to consider whether he would be content with a redacted version of disputed information without names but he was still insistent that names should be disclosed.
9. In its response dated 28th August 2012, UKAD notified Mr Nourse that the information was being withheld pursuant to sections 36(2)(c) (conduct of public affairs) and 40(2) (personal information) of FOIA.
10. In relation to section 36(2)(c), UKAD stated in summary that: (i) it had relied upon the reasonable opinion of its Chief Executive; (ii) in his opinion releasing the information could give athletes an insight into the planning and execution of UKAD’s TDP which would assist them in avoiding doping control; (iii) this would prejudice the effective conduct of anti-doping in the UK, which came within the ambit of the effective conduct of public affairs; (iv) there was a public interest in upholding the transparency of public administration and the use of public funding by UKAD and athletes; (v) however, this was outweighed by the significant public interest in ensuring that sport is free of doping, which would be damaged by disclosing the information in question.
11. In relation to section 40(2), UKAD’s position was that: (i) some of the information was personal data; (ii) some of the information was sensitive personal data; and (iii) disclosure of that information in either case would contravene the first data protection principle under the Data Protection Act 1998 (“DPA”).

12. Mr Nourse sought an internal review and challenged UKAD's reliance on both exemptions. UKAD responded on 5th October 2012. It informed Mr Nourse that it continued to rely upon the exemptions in sections 36(2)(c) and 40(2) of FOIA. In relation to section 40, UKAD drew Mr Nourse's attention to certain provisions of the Code concerning confidentiality and reporting. With regard to the public interest it set out the ways in which it was held to account and pointed out that it published testing statistics in place of individual data.
13. The Commissioner issued a Decision Notice on 22nd July 2013 ("the DN"). In the DN the Commissioner found that UKAD could not rely upon either exemption and required it to provide the information to Mr Nourse accordingly.
14. Since then the Commissioner has changed his position and now considers:
 - 14.1 The appeal should be allowed in so far as it relates to section 40(2) of FOIA and the DN substituted so that UKAD is not required to take any steps to comply with FOIA.
 - 14.2 He considers that details about whether athletes tested positive or negative for banned substances amounts to sensitive personal data.
 - 14.3 The Commissioner maintains that details of missed tests are not sensitive personal data, but is personal data, being information about the activities of the individual athletes in question. In the course of revisiting his approach to section 40(2), the Commissioner now concludes that disclosure of this information would contravene the first data protection principle.
 - 14.4 However the Commissioner still considers that in relation to section 36(2)(c) UKAD's appeal should be dismissed and the DN upheld. The opinion that disclosing the information would be likely to assist athletes in avoiding detection by UKAD is not unreasonable. However, on the basis of the evidence in this case, the risk of that actually happening, and the extent of the possible prejudice, are low. As such, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Legal Framework

Section 3(1)

15. Under section 3(1) UKAD is a public authority for the purposes of FOIA as a non-departmental body of DCMS.

Section 40

16. FOIA section 40 provides as relevant:

- (1) 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.
- (2) 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.
- (3) 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,
- (7) 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;...

...“personal data” has the same meaning as in section 1(1) of that Act.

17. “Personal data” is defined in section 1(1) of the DPA as:

data which relate to a living individual who can be identified—

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is 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 other person in respect of the individual;

18. Pursuant to section 2(e) of the DPA, “sensitive personal data” includes “personal data consisting of information as to [the data subject’s] physical or mental health or condition”.

19. The relevant data protection principle in this case is that in paragraph 1 of part 1 of schedule 1 to the DPA (“the first data protection principle”), which is as follows:

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.

20. Although we are not bound by other decisions of the FTT, “previous decisions are of persuasive authority and the tribunal is right to value consistency in decision-making. However, there are dangers in paying too close a regard to previous decisions. It can elevate issues of fact into issues of law or principle”. (*London Borough of Camden v The Information Commissioner & YV* [2012] UKUT 190 (AAC) at [12].) With this in mind we refer to decisions of the Information Tribunal and FTT which the Commissioner has brought to our attention as well as decisions of higher courts to which we are bound.

21. In relation to the issue of whether or not the processing in question is fair, the reasonable expectations of the individual as to what would happen with his/her personal data is relevant: see *Dainton v Information Commissioner and Lincolnshire CC* [2011] 1 Info LR 1482 at [31]. The question of fairness is usually considered first before moving on to assess if the requisite conditions are met.

22. In relation to sensitive personal data under condition 10 of Schedule 3 the Data Protection (Processing of Sensitive Data) Order 2000 (“2000 Order”) sets out a number of circumstances in which such data may be processed. The definition of processing under section 1(1) DPA is very wide and includes “disclosure of the information”. The relevant articles are:

2. The processing—

(a) is in the substantial public interest;

(b) is necessary for the discharge of any function which is designed for protecting members of the public against—

(i) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person, or

(ii) mismanagement in the administration of, or failures in services provided by, any body or association; and

(c) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the discharge of that function.

3. (1) The disclosure of personal data—

(a) is in the substantial public interest;

(b) is in connection with—

(i) the commission by any person of any unlawful act (whether alleged or established),

- (ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or
- (iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established);
- (c) is for the special purposes as defined in section 3 of the Act; and
- (d) is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

(2) In this paragraph, “act” includes a failure to act.

23. How these circumstances operate has been considered by the Information Tribunal in **Brett v IC & FCO** EA/2008/0098 at [46] to [57].

24. In relation to non-sensitive personal data, the schedule 2 condition at issue in this appeal is that set out in paragraph 6(1) of schedule 2 to the DPA (“Condition 6(1)”) which is in the following terms:

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.

25. “Necessary” has been taken to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a Convention right, namely, that there should be a “pressing social need” and the interference should be “both proportionate as to means and fairly balanced as to ends”: see **Corporate Officer of the House of Commons v The Information Commissioner and Brooke and Ors [2011] 1 Info LR 987** per Latham LJ (giving the judgement of the Divisional Court). A three stage test has been applied:

“(1) There must be a legitimate public interest in disclosure;

(2) The disclosure must be necessary to meet that public interest;
and

(3) The disclosure must not cause unwarranted harm to the interests of the individual.”

26. It is important to note that FOIA does not contain a presumption that personal data will be disclosed: see **Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550 (“CSA”)** per Lord Hope at [7].

27. Where the data in question is sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met in order for the processing to comply with the first data protection principle.

Section 36

28. So far as relevant to this appeal, section 36 of FOIA provides as follows:

(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—

...

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Is section 40(2) engaged?

Positive or negative test results

29. The information sought includes the names of athletes, the dates on which they were tested, whether the test was in or out of competition, and the outcome of the test (positive, negative, missed). This is personal data as defined under the DPA.
30. Informing someone that an athlete's test was positive or negative involves disclosing information as to the athlete's physical health or condition as at the date of the test. In particular, the information reveals the presence or absence of a substance in an athlete's body/system on a given date.
31. Mr Nourse contends that the data cannot be sensitive as positive outcomes are made public if a breach of anti-doping rules is established. The Commissioner responds that is a distinct and separate question concerning the legality of the processing/publication in question. It does not mean, as alleged, that the positive or negative test result is not a piece of the athlete's sensitive personal data.
32. We would conclude that the information tells the recipient something about the athlete in question's physical health or condition. Therefore we find it is sensitive personal data.
33. Is this still the position if we assume athletes are clean? The Commissioner contents that is an assumption, whereas providing information about a positive or negative test is confirmation about the presence or absence of something in someone's body. We agree.
34. As such, the details of athletes' positive or negative test results can only be disclosed consistently with the first data protection principle if it complies with the first data protection principle as to fairness and one of the conditions in Schedule 2 and one in Schedule 3 to the DPA is made out.
35. Firstly we must consider whether it would be fair to disclose the disputed information by reference inter alia to paragraphs 1 to 4 of Part II of Schedule 1 to the DPA. From the evidence provided we are not aware of any circumstance which would lead us to the view that these requirements have not been met. Also the data subjects would have a

reasonable expectation that their personal data would not be disclosed except where some disciplinary action was being taken. The fact an individual athlete might decide to disclose some information via social media is not something which would make it fair to disclose the personal data in relation to all test results.

36. Secondly we are required to see if any of the conditions under Schedules 2 and 3 are met. Although condition 6 of Schedule 2 might be relevant we need to identify any under Schedule 3. Condition 1 (explicit consent) maybe relevant. There is no evidence that such consent has been given except following disciplinary action for a positive test which is not relevant in this case. Condition 5 (information made public by the data subject) could be relevant. Although Mr Nourse claims that athletes use social media to exchange such information no specific evidence was provided to us. We find that both of these conditions are not applicable in this case.
37. The remaining conditions concern disclosure for a stated purpose, which the Commissioner says cannot be relevant given the applicant and motive blind nature of FOIA (see ***Rt Hon Frank Field MP v Information Commissioner EA/2009/0055***). The purpose for which information is disclosed under FOIA is the disclosure of information to the world under FOIA, not the specific or stated purpose of the requester. The Commissioner recognises that some divisions of this Tribunal have taken a different position regarding the applicability of the conditions relating to disclosure for a stated purpose (see for instance ***Brett v Information Commissioner; FCO EA/2008/0098; Cobain v Information Commissioner; CPS [2012] 1 Info LR 349*** at [40]-[42]; and ***Ferguson v Information Commissioner EA/2010/0085*** at [65]).
38. In our view it does not matter because none of the stated purposes in the other conditions, except 10, are relevant in this case.
39. As far as condition 10 is concerned the 2000 Order may apply. In our view only Articles 2.2 and 2.3 to the Schedule could be relevant. We have examined the conditions which need to apply for disclosure in these articles and find they are not all fulfilled and therefore do not allow disclosure. For article 2.2(c) there is no explicit consent of the data subjects. For article 2.3(d) UKAD as data controller is not considering on its own initiative publishing the disputed information. However would a hypothetical data controller reasonably believe that publication would be in the public interest? In the circumstances of this case it would at least be reasonably arguable that the disclosures already taking place (disciplinary sanction following positive test and statistical information about testing) together with the need to protect doping patterns would be sufficient to consider that it is not in the public interest to disclose.

40. Therefore as none of the conditions in schedule 3 are met we find that the section 40(2) exemption is engaged for positive and negative test results.

41. We make these findings despite the fact athletes consent to the publication of disciplinary sanctions following a positive test because this not a relevant circumstance in this case.

Missed tests

42. The Commissioner's position is that information concerning missed tests, whilst personal data within the meaning of the DPA, is not sensitive personal data. Unlike information about positive or negative tests, it reveals nothing about an athlete's health or condition. It does not reveal the presence or absence of anything from his/her system. We agree.

43. We would make the point that the IWF published data may also not be sensitive personal data because it does not publish testing information which would disclose results.

44. Here we are only concerned with Schedule 2 to DPA and the only condition which is applicable is condition 6(1). Mr Nourse is pursuing a legitimate interest in requesting the disclosure of the test data. He wants to know whether his sport is clean and that UKAD are carrying out their job properly. To do this he says UKAD's testing regime needs to be transparent and subject to scrutiny.

45. However the Commissioner submits as far as the prejudice to the rights and freedoms or legitimate interests of those being tested (data subjects) that disclosure of missed tests data would contravene the first data protection principle because:

45.1 There are many reasons why a drugs test might be missed. However, there is a tendency to infer that an athlete has missed a test because he/she is using a banned substance and is seeking to avoid detection.

45.2 Disclosure to the world under FOIA that an athlete has missed a drugs test (notwithstanding that there may be a completely innocent explanation for it and no finding of wrongdoing may be made) risks giving rise to the suspicion that the athlete in question is using a banned substance, or at least is engaged in misconduct. Such disclosure has the potential to have a significantly adverse impact on the athlete's reputation, as well as on matters such as funding and sponsorship. Additionally, prima facie private reasons for missing a test (such as a sensitive family emergency) may have to be made public to rebut the presumption of wrongdoing which results from the missed test result being disclosed.

- 45.3 An athlete would reasonably expect that UKAD would not publish a missed test result prior to it being established that an anti-doping rule had been breached. Moreover paragraph 4.7.3 of the Policy provides that the breach of an anti-doping rule will not be published until the point where the athlete's right to appeal against a first instance decision of wrongdoing has been exhausted. UKAD is otherwise restrained from commenting on the specific facts of any pending case (para. 2.10.2 of the Policy). An athlete would not expect UKAD to disclose that he/she had missed a test to the world under FOIA, contrary to the provisions of the UK Anti-Doping Policy.
46. Taking all this into account we do not consider that disclosure of missed tests is necessary for Mr Nourse to pursue his legitimate interests. Although there is a legitimate public interest in UKAD's testing regime being transparent and subject to scrutiny, the potential unwarranted harm which could result from a missed test result being published, together with athletes' reasonable expectation that this would not happen, render the disclosure of such information a disproportionate and unfair way of fulfilling that interest.
47. We note that that this position is not affected by UKAD's publication of positive test results. That publication, per the Anti-Doping Policy, takes place after a breach of an anti-doping rule has been established and an athlete's appeal rights have been exhausted. That is plainly different from the information which would be disclosed in accordance with this request, namely a bare statement of an outcome. Whilst an athlete would expect a finding of wrongdoing to be published in accordance with the Policy, he/she would reasonably expect that details of a missed test would not be made public without more at an earlier stage.
48. Therefore we find that condition 6(1) is not met and that section 40(2) is engaged for this data.

Conclusion

49. We find that section 40(2) is engaged for all the disputed information. As it is an absolute exemption then we need go no further. We do not need to consider the other exemption claimed, namely section 36(2)(c). We therefore allow the appeal and substitute a new decision notice reflecting this finding.
50. Our decision is unanimous.

Judge John Angel

10th February 2014