



NCN: [2024] UKFTT 00286 (GRC)

Case Reference: EA-2023-0149

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP
Heard on: 14 and 15 March 2024
Panel Deliberations: 22 March 2024
Decision given on: 9 April 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PIETER DE WAAL
TRIBUNAL MEMBER RAZ EDWARDS

Between

EDMUND WILLISON

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) UK ANTI-DOPING

Respondents

Decision: The appeal is Allowed.

Substituted Decision Notice:

Organisation: UK Anti-Doping

Complainant: Mr Edmund Willison

The Substitute Decision – IC-295693-R6R3

1. For the reasons set out below the public authority was not entitled to rely on section 31(1)(g) (read with section 31(2)(b) or (d)) of the Freedom of Information Act 2000.

2. The public authority must disclose the withheld information to Mr. Willison within 42 days of the date this decision is sent to the parties.
3. Any failure to abide by the terms of the tribunal’s substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner’s decision notice IC-295693-R6R3 of 15 February 2023 which held that UK Anti-Doping (UKAD) was entitled to rely on section 31(1)(g) (exercising functions for specified purposes) of the Freedom of Information Act 2000 (FOIA). The Commissioner found that UKAD was in breach of section 10 and 17 FOIA. The Commissioner did not require the public authority to take any steps.
2. There is a closed annex to this decision. If this decision is not appealed the tribunal will ask for comments from UKAD and the Commissioner before making a decision on which parts of the closed annex can be disclosed to the Mr Willison. At this stage it is necessary to withhold the closed annex from the Mr Willison because otherwise the purpose of the appeal would be defeated.

Background to the appeal

3. The world of anti-doping contains many acronyms. Some of those are used in this decision:

AAF	Adverse Analytical Finding
ABP	Athlete Biological Passport
ADAMS	The Anti-Doping Administration and Management System
ADRV	Anti-Doping Rule Violation
APF	Adverse Passport Finding
ITA	The International Testing Agency
NADO/ADO	National Anti-Doping Organisation/ Anti-Doping Organisation
SIA	Sport Integrity Australia
UKAD	UK Anti-Doping
USADA	United States Anti-Doping Agency

WADA	World Anti-Doping Agency
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4. UKAD is an arms-length government body largely funded by a DCMS (Department for Culture, Media and Sport) grant. It is a National Anti-Doping Agency (NADO) established to discharge the UK government's obligation to the United Nations International Convention against Doping in Sport (the Convention). Through ratifying that convention the UK government made a formal legal commitment to work to eradicate doping in sport. UKAD carries out its role by implementing and complying with the World Anti-Doping Code and associated International Standards issued by the World Anti-Doping Agency (WADA).
5. UKAD's role is to ensure that sports meet their obligations under the UK government's National Anti-Doping Policy (the Policy) and the UK Anti-Doping Rules (the Rules). Its regulatory functions include both the detection and prevention of Anti-Doping Rule Violations (ADRVs) under the World Anti-Doping Code (the Code) and associated standards set by WADA, as well as the Rules.
6. The UK government adopted the Policy to satisfy the requirements of the Convention. The Policy sets out the roles and responsibilities of UKAD, incorporating those set out in article 20.5 of the Code. The first heading is 'Code compliance' which includes, inter alia:
 - 6.1. To adopt and implement anti-doping rules and policies which conform with the Code and the applicable international standards.
 - 6.2. To promote anti-doping research.
 - 6.3. To diligently pursue all potential anti-doping rule violations within its jurisdiction.
 - 6.4. To plan, implement, evaluate and promote anti-doping education in line with the requirements of the International Standard for Education.
7. Other than the roles and responsibilities set out under 'Code compliance' the Policy sets out roles and responsibilities for UKAD under diverse other categories such as:
 - 7.1. Influencing national and international anti-doping policy
 - 7.2. Publishing and maintaining a set of UK Anti-Doping Rules
 - 7.3. Education
 - 7.4. Research
 - 7.5. Testing
 - 7.6. Investigations and intelligence gathering
 - 7.7. Developing other anti-doping intelligence
 - 7.8. Results management
 - 7.9. Case presentation
 - 7.10. Quality assurance
 - 7.11. Confidentiality
 - 7.12. Accountability
 - 7.13. Assessment of policy compliance and assurance framework
 - 7.14. Prioritisation of particular sports

8. The Rules, issued pursuant to the Policy, are intended to implement the Code and its supporting international standards. They apply to UKAD and are intended to be adopted and incorporated into the rule book of each sport's national governing body (NGB).
9. All athletes who are members of a sport's NGB or its affiliate organisations or taking part in competitions recognised by a NGB are bound by the Rules and submit to the authority of the NGB and UKAD to apply and enforce the Rules. Under rule 1.3.1 it is the personal responsibility of each athlete to acquaint themselves with the Rules and to make themselves available for testing at all times upon request.
10. The primary purpose of the anti-doping process is the elimination of doping in sport through the prevention and detection of ADRVs.
11. UKAD carries out its functions of prevention and detection by, amongst other things, testing for prohibited substances ('traditional' or 'conventional testing'), as well as the Athlete Biological Passport (ABP) testing programme.
12. Conventional testing detects prohibited substances in samples. If a prohibited substance is detected this leads to an Adverse Analytical Finding (AAF) and can result in a finding that an ADRV has been committed by the athlete.
13. The ABP testing programme is explained in witness evidence submitted by UKAD. This programme monitors selected biological variables over time that indirectly reveal the effects of doping, rather than attempting to detect the doping substance or method itself.
14. ABP testing is expensive and UKAD has limited resources. Accordingly, only a limited number of athletes are selected by UKAD for APB testing.
15. Once ABP markers from an athlete's sample have been measured, the data is added to the athlete's 'passport' which is stored in the Anti-Doping Administration and Management System (ADAMS). The data is kept in the athlete's passport for 10 years.
16. An algorithm is used to identify any biological values outside the normal limits in ABP samples. This results in an Atypical Passport Finding which is referred to a single expert from an ABP expert panel (the Expert Panel). If the single expert deems the abnormal features of the passport to be 'likely doping', the passport is referred to a group of three experts from the Expert Panel, including the original expert, to review the same information.
17. If those three experts give a joint opinion of 'likely doping' after reviewing the ABP documentation package, an Adverse Passport Finding (APF) is reported. UKAD then sends the athlete a notice, including copies of the ABP documentation package and the joint expert report. The athlete has to right to respond. UKAD then considers the response, conducts further investigation as it sees fit and asks the three experts for another opinion. If their joint opinion is still 'likely doping' UKAD, if it considers that the athlete has committed an ADRV, will charge the athlete with the relevant ADRV. At this point the athlete is sent a charge letter.
18. UKAD, and other ADO's, use the ABP to:

- 18.1. Efficiently manage their resources by driving their testing strategy in terms of who to test, when to test, how often to test, and to identify the samples from suspicious athletes that require additional analysis.
 - 18.2. Pursue a possible ADRV against an athlete for the use or attempted use of a prohibited substance or method based on their ABP data alone.
 - 18.3. Assist investigations into athletes who are suspected of doping.
 - 18.4. Deter athletes from doping or reduce the extent (and therefore effectiveness) to which they can dope as the perceived risk of getting caught is higher for the following reasons:
 - 18.4.1. ABP data is monitored over time unlike conventional anti-doping testing that is a snapshot at the point of sample collection;
 - 18.4.2. the ABP defines unique reference ranges (known as individual limits) for each marker to determine an athlete's expected normal physiological variation rather than relying solely on population data which is less sensitive to uncovering the effects of doping because of high inter-individual differences amongst athletes; and
 - 18.4.3. changes in biological markers (that is, the effect of doping) can be observed for longer than the window for detecting a prohibited substance or method following administration, as this approach not only identifies changes in markers that occur whilst an athlete is doping but also after doping has ceased.
19. UKAD and WADA publish a significant amount of data relating to conventional testing and some data relating to ABP testing including the following:
- 19.1. WADA publishes a quarterly breakdown of the total number of AAFs and ADRVs for each NADO broken down, in the case of traditional testing, by sport.
 - 19.2. UKAD publishes the total number of ADRVs in each year, including whether those are due to ABP testing.
 - 19.3. WADA publishes annual testing figures for ABP broken down by sport and by ADO.
 - 19.4. The WADA annual ADRV report shows AAF outcomes (necessarily excluding ABP testing results), broken down by category (for example where there is 'no case to answer').
20. UKAD do not publish any other ABP data.

The request

21. The following parts of a request made by Mr Willison on 16 June 2022, as amended, are in issue in this appeal:
4. Please can UKAD provide how many athlete ABP passports have been marked "likely doping" by the three person "Expert Panel" of UKAD's ABP programme between 2014 and 2017 (as 2009-12 data is not available) and 2017 to present. Please provide a breakdown by year and sport.
 5. How many athletes have been charged, not sanctioned, with ADRVs for abnormalities in their Athlete Biological passports by UKAD since 2009?

22. Mr. Willison's original request to UKAD (including the two parts above) was as follows:

"I would like to request the following information under the Freedom of Information act:

1. Which Athlete Passport Management Units (APMUs) has UKAD designated to administer and manage the ABP Programme on behalf of UKAD since 2009? Please provide the timeframe for each APMU that has been used.
2. Please can you provide every contract that UKAD has signed with these APMUs to administer and manage the ABP Programme on behalf of UKAD.
3. In the 2009 UKAD Anti-doping rules it makes no mention of UKAD's ABP programme. Since when has UKAD had the power to sanction athletes, under its jurisdiction, for an Athlete Biological Passport violation?
4. How many athlete ABP passports have been marked "likely doping" by the three person "Expert Panel" of UKAD's ABP programme between 2009 and September 2012 and 2017-2022 (present day)?
5. How many athletes have been charged, not sanctioned, with ADRVs for abnormalities in their Athlete Biological passports by UKAD since 2009.
6. How many ABP samples did UKAD collect in 2009, 2010 and 2011. Please provide a breakdown by sport."

The response to the request

23. On 12 October 2022 UKAD responded to each part of the request as follows:
- 1) information provided;
 - 2) information not held;
 - 3) information provided;
 - 4) information not held 2009-Sep 2012. The remainder withheld under section 31 of FOIA;
 - 5) information withheld under section 31 of FOIA;
 - 6) Information not held.
24. Mr Willison requested an internal review in relation to parts 2, 4 and 5 of the request. As part of that internal review, he made further requests for information which, in part, amended parts 2 and 4 to read:

Part 2 – “Please can UKAD provide any documents/invoices that detail the working arrangement or remit of the DCC to evaluate ABP passports on behalf of UKAD.”

Part 4 – “Please can UKAD then provide how many athlete ABP passports have been marked "likely doping" by the three person "Expert Panel" of UKAD's ABP programme between 2014 and 2017. Please provide a breakdown by year and sport.”

25. UKAD upheld its reliance on section 31 in relation to parts 2, 4 and 5 indicating that it considered that part 5 of the request effectively requested the same information as part 4.
26. In the course of the Commissioner’s investigation UKAD relied in addition on sections 41 and 43(2) FOIA in respect of some parts of the request which are not in issue in this appeal.

The decision notice

27. The Commissioner concluded that UKAD was entitled to rely on section 31(1)(g) FOIA (exercising functions for specified purposes) in conjunction with section 31(2)(b) FOIA (ascertaining whether any person is responsible for any conduct which is improper).
28. The Commissioner concluded that the actual harm related to the applicable interests and that UKAD had demonstrated a causal relationship between potential disclosure and the prejudice which was real and of substance. The Commissioner accepted that the prejudice would be likely to occur.
29. In relation to the public interest balance the Commissioner concluded that any adverse impact on deterrence and on the testing programme as a whole that may make the anti-doping regime less effective is not in the public interest. He determined that it was not in the public interest to disclose the information.
30. The Commissioner did not go on to consider section 41 or 43(2) FOIA.

Notice of appeal

31. In essence, the grounds of appeal are that the Commissioner was wrong to conclude that UKAD was entitled to rely on section 31(1)(g) to withhold the information described in sections 4 and 5 of the request.
32. Mr Willison submitted:
 - 32.1. AAFs are effectively the same as negative outcomes from ABP testing. UKAD publishes data in relation to AAFs.
 - 32.2. Disclosure would not risk revealing the ABP testing strategy because UKAD already discloses its ABP strategy every year, including how much ABP testing it carries out each year and which sports it focuses its resources on.
 - 32.3. Other anti-doping agencies release this information, for example Sport Integrity Australia (SIA).

The Commissioner’s response

33. The Commissioner was satisfied that disclosure of the withheld information would be likely to prejudice UKAD's discharge of its anti-doping testing functions.
34. On an open basis the Commissioner maintained that the withheld information is likely to give rise to misinterpretations that would be likely to undermine the effectiveness of the ABP programme, including as regards its deterrent effect on athletes and insights that may be provided to athletes who dope and seek to avoid detection.
35. The Commissioner considered that there was a weighty public interest in maintaining that exemption so as to avoid such prejudicial consequences for the ABP testing programme. The Commissioner accepted that there was significant public interest in transparency about the ABP regime but maintained that it did not equal or outweigh the public interest in maintaining the exemption.
36. In relation to the grounds of appeal the Commissioner submitted:
 - 36.1. Traditional testing and ABP testing are very different.
 - 36.2. If data as to the *outcomes* of ABP testing were made public, the prejudicial consequences would be likely to arise.
 - 36.3. A single example of disclosure does not suffice to undermine the generality of UKAD's arguments for relying on the section 31(1)(g) exemption, and the consequences of disclosure would be likely to materialise even if other countries published comparable data.

The response of UKAD

37. In addition to section 31(2)(b) FOIA, UKAD relied on section 31(2)(d) in the alternative on the basis of anti-doping regulation forming a part of professional athletes' eligibility to participate in competitions.
38. UKAD submitted that there is a real risk that the requested data will be misinterpreted, and there is a real risk that that could lead to greater attempts by athletes to engage in doping activities and misplaced public lobbying to substantially alter the ABP testing programme.
39. UKAD argued that the ABP testing programme is also used as a means of intelligence gathering to maximise the efficiency of ADOs' use of their limited resources by focussing on the right athletes and the right sports. Disclosure of the withheld information would likely prejudice that function for the following reasons:
 - 39.1. Limiting the information publicly available in relation to the ABP testing programme is a key aspect of its effectiveness.
 - 39.2. The information will shed further light on UKAD's wider strategy, which would be of benefit to potential dopers seeking evasion.
 - 39.3. To the extent that ABP findings may reflect intelligence utilised by UKAD in subsequent targeted testing or investigative efforts, such investigations are subject to strict confidentiality requirements.
 - 39.4. Release of the withheld information is likely to provide greater insights to athletes as to how ABP testing works and would further assist dopers in

- seeking to understand how potential doping activities might be understood under the ABP programme.
- 39.5. It would be detrimental to UKAD's regulatory enforcement and deterrence functions to publish the withheld information if the relevant figures were low, so it must also resist disclosure if the figures are high – to avoid any inferences being drawn as to the statistics included in the withheld information.
- 39.6. Where UKAD is obliged to publish data already, the impact of any potential disclosure of the withheld information must be assessed against that backdrop. The prejudice to UKAD's objectives is enhanced by the potential for aspiring dopers to assess the number of 'likely doping' markers or charges against the number of tests in respect of a given sport.
- 39.7. While Mr Willison seeks anonymised data, he still seeks disclosure (over the relevant period) of the number of athletes whose ABP's were marked as "likely doping" (broken down by sport) and the number of athletes who have been charged with ADRVs under the ABP testing programme.
- 39.8. Even data that is not the most recent is still 'live', in that it remains part of an athlete's active history in relation to previous testing and outcomes, together with a sport-by-sport breakdown of the information sought by Mr Willison would further assist would-be dopers to inform their strategy, as such data is actively considered by UKAD to inform its testing strategy and deployment of resource in subsequent years. For example, since testing is intelligence-led, were there to be a sport with (for example) high testing figures but a low number of 'likely doping' markers, that may lead athletes to infer that doping is suspected in that sport, but the particular regimen adopted has gone undetected.
40. It remains UKAD's position that WADA and ADOs internationally do not generally publish the number of 'likely doping' markers or cases where athletes were charged as a result of ABP testing – certainly not proactively or in routinely published testing reports. UKAD submitted that the SIA comparison relied on by Mr Willison is in any event not necessarily apposite in this case.
41. UKAD rely in addition on closed submissions.

Reply of Mr Willison

42. Mr Willison submitted that all athletes whose ABPs are marked as 'likely doping' are already notified of that fact by UKAD. Therefore, the data does not help those athletes to avoid detection.
43. Mr Willison also submitted that the information provided by SIA included a period when the Australian anti-doping Agency ASADA carried out all anti-doping functions in Australia. UKAD and ASADA were identical bodies, while SIA and UKAD are near identical bodies when carrying out anti-doping responsibilities.

Legal framework

Section 31(1)(g)

44. Section 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

Section 31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 [investigations and proceedings conducted by public authorities] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)

...

(2) The purposes referred to in subsection (1)(g) ... are –

...

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper...

...

(d) the purpose of ascertaining a person's fitness or competence in relation to ... any profession or other activity which he is, or seeks to become, authorised to carry on?

...

45. For the purposes of section 31(1)(g), a public authority's "functions" are any power or duty exercisable by it for a specified purpose whether conferred by or under statute, common law or royal prerogative: **Stevenson v Information Commissioner** [2013] UKUT 181 (AAC).
46. The exemption is prejudice based. The harm that is identified must be real, actual or of substance and there must be a causal link between disclosure and that harm. "Would prejudice" means that it has to be more probable than not that the harm would occur. "Would be likely to prejudice" means that, even if the risk of harm occurring is less than 50 per cent, it must still be a real and significant risk.
47. The exemption is subject to the public interest test which means that, in all the circumstances of the case, the public interest in maintaining the exemption must outweigh the public interest in disclosing the information.

The role of the tribunal

48. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether a decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

49. We took account of an updated open bundle and a closed bundle. The open bundle is 1,155 pages long. We did not read the entire open bundle. We read the documents in tabs 1-4, the witness statements and any pages referred to therein, and any other pages to which we were referred in the hearing or in the pleadings, submissions or skeleton arguments.
50. We also took account of any pages that we were referred to in:
- 50.1. A supplemental open hearing bundle
 - 50.2. Materials in the ‘Bundle of Authorities and Additional Materials’
 - 50.3. Several pages of additional evidence submitted by Mr Willison by email dated 14 March 2024. One of these documents (beginning ‘Unredacted...’) is held by the tribunal on the basis that it will not be disclosed to anyone other than the parties.
51. It was necessary to withhold the closed material from Mr Willison because otherwise the purpose of the proceedings would have been defeated. In accordance with its duties in *Browning* the tribunal reviewed the closed bundle and highlighted to UKAD in the hearing a number of closed redactions which it considered did not need to be withheld. As a result, and with the agreement of UKAD, further unredacted documents were released to Mr. Willison during the hearing. He was given time to consider those documents before making submissions. The unredacted sections have been included in an updated open bundle.
52. We heard open evidence from Mr Willison and, on behalf of UKAD, from Mr Wojek, Head of Science and Medicine at UKAD. We heard open and closed evidence from Mr Coffey, Director of Operations at UKAD.
53. We held two closed sessions. In the first we heard closed evidence from Mr. Coffey, in the second we heard closed submissions from Mr. Isenberg. The following written gists of both the closed sessions were provided to Mr. Willison during the hearing.

Gist of closed evidence

Evidence of Mr Coffey

1. The witness gave evidence in CLOSED session. He expanded on certain matters put to the witness in OPEN by Mr Willison and the Tribunal, but which the witness felt only able to answer in CLOSED, including in relation to:
 - a. The impact of the disclosure of more ‘historical’ data from (e.g.) 2014 on the ability of athletes to dope effectively at the present. The witness explained by reference to the duration of typical athletic careers, as well as to those who were aware of others’ doping (including support staff, e.g. a coach).
 - b. How the ‘live’ nature of the data impacts the prejudice that the witness alleged would be caused if it were to be disclosed.
2. The witness was further questioned by the Tribunal, including on the following matters:

- a. The extent to which athletes are or are not aware of the details and nuances of the anti-doping testing programme.
- b. How many athletes' data may be affected by the disputed information in question.
- c. How the actual figures sought by Mr Willison impact upon some of the considerations set out in the witness' statement, such as mosaic identification; revelation of testing strategy and the use by UKAD of testing intelligence.
- d. The extent to which the ABP programme acts as an effective deterrent to would-be doping athletes.
- e. The public interest in disclosure of the particular information requested and how this is balanced against the prejudice in disclosure identified by the witness.
- f. The impact of disclosure of the disputed information on both: (a) the operation of the ABP programme; and (b) UKAD's functions more broadly. On this point the witness explained that:
 - i. Since doping practices have become more sophisticated, the more information is disclosed the more the deterrent effect is undermined.
 - ii. Misconception and misunderstanding as to the effectiveness of the programme could lead to increased pressure to amend the programme in a manner not conducive to the proper exercise of UKAD's functions.
 - iii. The ABP programme is an integral part of the functions of UKAD – including because of its function in assisting to determine testing strategy.
- g. Why the witness considered the ABP data would be misinterpreted if disclosed, while the equivalent AAF data is published by WADA.
- h. The bodies that could bring public pressure on UKAD (in terms of media, members of the public, sporting bodies, etc.).

Gist of closed submissions

1. UKAD made submissions on the CLOSED evidence (including in response to questions from the Tribunal), covering the following matters:
 - a. The nature of the prejudice in respect of the particular figures, as compared to other, hypothetical figures.

- b. How disclosure of the disputed information could provide insight into UKAD's testing strategies.
- c. How disclosure of the disputed information could potentially impact the activities of doping/aspiring doping athletes.
- d. How disclosure of the disputed information could undermine the deterrent effect of the ABP programme.
- e. The prejudice to UKAD's functions in light of the fact that those with an adverse passport finding will have been notified of the same.
- f. How the disputed information could be misinterpreted and the consequences thereof.
- g. The public interest in the disclosure of the particular figures.

Submissions of Mr Willison

- 54. The amount of ABP testing done per sport is in the public domain, so Mr. Willison submitted that the release of the data in his request does not reveal anything about which sports are targeted under the ABP testing programme.
- 55. In relation to the risk of identification in sports where there are small numbers, Mr. Willison indicated that he would be happy to be provided with a figure under the heading 'other sports' to cover all those sports where there was a risk of identification. If this is not acceptable, he contests the assertion that any individual would be able to be identified.
- 56. Mr. Willison submitted that it is not correct to suggest that the requested data is akin to a 'confidential report' and Mr. Wojek accepted this in evidence.
- 57. Mr. Willison noted that the term 'live' data is used to support an argument that the withheld information should not be released, but any athletes with an APF will already have been alerted to that fact.
- 58. Mr Willison highlighted that other NADOs have released similar information, in particular SIA (the Australian equivalent), who gave the view that their figures corresponding to parts 4 and 5 of Mr Willison's request (which were both zero) were not operationally sensitive.
- 59. Two international sports organisations have released the fact that an athlete has been charged under the ABP testing programme. WADA and the ITA have themselves released APF data which undermines UKAD's reliance on their opinion.
- 60. Mr. Willison submitted that the letter from WADA (relied on by UKAD) misinterprets his request, and specifically declines to give an opinion on disclosure of the withheld information under freedom of information legislation in the UK.

61. Mr. Willison argued that if there is a risk of misinterpretation arising out of disclosure of the number of charges in circumstances where that number is less than the number of APFs, this could easily be explained.
62. In relation to any impact on deterrence, Mr. Willison submitted that athletes will already know if they have been subject to an APF.
63. In relation to the argument that results from the ABP testing programme are used to inform UKAD's strategy, Mr. Willison submitted that traditional testing results are also used to inform UKAD's strategy.
64. In relation to the public interest, Mr. Willison argued that it is important to see how an anti-doping agency functions and that UKAD has recognised public interest in transparency. He submitted that there is little transparency in relation to APFs compared to conventional testing. He submitted that the data could be used to compare UKAD's operations by year and by sport and to understand how successful the ABP testing programme has been, particularly over a period when a previous investigation revealed that athletes with access to their ABP profile on ADAMS were able to calibrate a doping strategy to avoid detection.

Submissions of UKAD

65. Mr. Isenberg was asked to address the tribunal on the impact, if any, of Williams v ICO [2023] UKUT 57 (AAC) which appeared to the tribunal to support a narrow interpretation of sections 31(2)(b) and (d) FOIA.
66. Mr. Isenberg argued that the breadth of the exemption is guided by the breadth of the statutory functions of the public authority in question. He submitted that in Williams the narrow statutory functions of a coroner did not support a broad approach.
67. Mr. Isenberg argued that a reduction of the deterrent effect of the ABP testing programme would be likely to cause prejudice to UKAD's functions for the purpose of ascertaining improper conduct (section 31(2)(b)). He submitted that UKAD's function of identifying cheats includes the deterrence of cheating behaviour. Further, UKAD argued that one of the negative outcomes of disclosure of the withheld information is that it would enable athletes to inform their own doping strategy to avoid detection. He submitted that, on any view, that directly impacts on the ability of UKAD to ascertain improper conduct for purposes of section 31(2)(b).
68. Mr. Isenberg highlighted the information that is already in the public domain including:
 - 68.1. UKAD publishes the number of ADRVs, including whether those are due to ABP testing.
 - 68.2. A quarterly breakdown of the total number of AAFs and ADRVs from traditional testing, broken down by sport.
 - 68.3. The WADA data which includes figures for ABP testing (but not 'likely doping' figures) broken down by sport and by ADO.
 - 68.4. The WADA annual ADRV report showing AAF outcomes (excluding ABP testing results), broken down by category (for example 'no case to answer').

69. Mr. Isenberg highlighted that the ABP data published by WADA is limited to the total number of ABP ADRVs per year and that it is not broken down by sport or with reference to the number of charges or ultimate sanctions.
70. Mr. Isenberg argued that WADA consciously chooses to publish less data in relation to ABP testing. They have access to the ABP data and could publish it if they wished. Although there was a suggestion in the USADA letter that WADA publishes charge data, Mr. Coffey's evidence was that that was mistaken (which Mr. Isenberg argued is consistent with the WADA reports in the bundle).
71. Mr. Isenberg relied on a letter from WADA which states that WADA does not consider that there is any good or compelling reason from an anti-doping perspective to disclose the withheld information to the public and that, 'where WADA does consider it important that data is publicly disclosed, this is required under the Code'. Mr. Isenberg submitted that this reflects WADA's view there is a greater sensitivity to ABP testing data.
72. In terms of the prejudice relied on, Mr. Isenberg submitted the following are relevant:
 - 72.1. The complexity of the ABP testing programme and the fact that many athletes will not appreciate precisely how it operates, either because they don't have a detailed appreciation of the standards of the process or because some aspect of the process are rightly treated as confidential.
 - 72.2. Doping practices are sophisticated and becoming more so.
 - 72.3. Those who want to dope will look for any opportunity to exploit the data in order to circumvent the rules.
73. Mr. Isenberg acknowledged that the withheld information would be known to the individual athlete, but they would not know the position in relation to other athletes. Further on a macro basis it is submitted that the release of the figures would enable athletes to look at trends and attempt to read UKADs testing strategy.
74. Mr. Isenberg highlighted four particular aspects of the claimed prejudice.
 - (i) *The impact on potential dopers in understanding the testing strategy and using it as an intelligence tool.*
75. It is submitted that the data that emerges from the results management strand of ABP is fed into the strategy and intelligence, so you cannot release information about the former without prejudicing information about the latter.
76. Mr. Isenberg submitted that this must be understood against the backdrop of information already in the public domain including, importantly, the breakdown of UKAD's ABP testing figures by year and by sport. This provides a mosaic context in which the withheld information could be used.
77. Mr. Isenberg submitted that disclosure of the disputed information would enable a doper or potential doper to look at the 'likely doping' and/or charging figures for any given year and sport and then look at the number of tests undertaken in those sports in the following year or years. He submitted that the potential prejudice is obvious - it

demonstrates clearly how this information could be used as a crucial data point by an ill motivated athlete as a window into UKAD's testing strategy. Athletes can then attempt to use this data to predict future testing or use future knowledge of 'likely doping' findings to predict future testing and to use this as a guide to their own doping activities.

(ii) *Deterrence*

78. Mr. Isenberg submitted that the complexity of the ABP testing programme and the fact that many athletes are not aware of exactly how it works, or even if they were subject to the programme, is an important part of its deterrent effect. The more the curtain is pulled back on the programme, the greater the confidence given to athletes who wish to try and evade it.

79. Mr. Isenberg submitted that this is an important point whether the relevant figures are low or high, because it is important for UKAD to take a consistent approach to disclosure of the type of information that is requested.

(iii) *Potential for misunderstanding*

80. Mr. Isenberg submitted that even accurate data can unwittingly be misrepresented. The tribunal has to consider the information as it is and not whether the prejudice from disclosure could be mitigated by the disclosure of other information, particularly where the ABP testing programme would be impacted by more data being in the public domain.

81. Mr. Isenberg argued that there is a potential for misunderstanding against the backdrop of a testing programme that is small in size and that it is difficult to draw any meaningful conclusion from the withheld information.

82. Mr. Isenberg submitted that WADA shares those concerns.

(iv) *Mosaic identification*

83. As the request asks for a breakdown by sport, there is a risk of identification by a motivated intruder where the numbers for any sport are low. Although Mr. Willison has said that low numbers giving rise to a risk of identification can be put under the heading of 'other sports', that is not the way the request was put.

The international position

84. In relation to the international position Mr. Isenberg noted that Mr. Willison contacted a number of additional ADOs and would have included evidence from those ADOs in the bundle if they had disclosed the type of data in his request. Mr. Isenberg submitted that, despite his efforts, Mr. Willison has only identified two ADOs in support of his arguments in favour of disclosure, plus some examples of the publication of charges against athletes.

85. Mr. Isenberg submitted that there may be good reasons why a charge based on ABP testing may be published on a particular occasion.

86. He submitted that the position of SIA (relied on by Mr Willison) does not take the matter any further. They operate under a different regime and released the requested information outside of their equivalent of FOIA. SIA make the point twice that the information did not reveal testing strategies and that there are no operational sensitivities because no person or sport is identified, unlike in this request.
87. In relation to the Spanish NDO Mr. Isenberg argued that it is not a good example of best practice.
88. In relation to any inferences to be drawn from WADA's statement about the Spanish situation, Mr. Isenberg argued that the information was already in the public domain and the best evidence of WADA's view is as set out in its letter to UKAD.

Public interest

89. UKAD acknowledged a clear public interest in transparency of its operations as a public authority and the regulator in the field of doping. It is submitted that, in this appeal, public interest in transparency must be weighed against the key public interest in the regulatory objective of preventing and identifying those who participate in doping to protect clean athletes and ensure a level playing field.
90. It is submitted that this particular information cannot be disclosed without harming UKAD's regulatory function. The public interest in transparency is met through other means:
 - 90.1. WADA oversight as global regulator, which audits and has the power to investigate and take action in relation to NDOs.
 - 90.2. Other mechanisms such a parliamentary scrutiny, UKAD's board and DCMS
 - 90.3. A substantial amount of data is already published both in UKAD's quarterly reports and in WADA reports. In addition, there is the publication of ADRV decisions where there has been a sanction.
91. In response to a question from the tribunal, Mr. Isenberg confirmed that the total expenditure on traditional and ABP testing for the year 2022-2023 was roughly half of its total expenditure of £10.5 million.

Issues

92. The issues the tribunal has to determine are:
 - 92.1. Would disclosure of the withheld information prejudice or be likely to prejudice the exercise by UKAD of its functions for the purposes of:
 - 92.1.1. ascertaining whether any person is responsible for any conduct which is improper; and/or
 - 92.1.2. ascertaining a person's fitness or competence in relation to ... any profession or other activity which he is, or seeks to become, authorised to carry on?
 - 92.2. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosure?

Discussion and conclusions

93. Our reasoning below is set out in the context of section 31(2)(b), but in the wider context of this appeal the analysis is materially identical for the purposes of section 31(2)(d). In its use of the withheld information, UKAD would only ascertain fitness or competence to compete in sport by ascertaining if a person is responsible for improper conduct. Accordingly our reasoning below applies equally and should be read as applying equally to section 31(2)(d) even where it does not explicitly refer to that section.
94. One of the figures requested by Mr. Willison was how many athletes' ABP passports have been marked 'likely doping by the three person Expert Panel. Under the Rules, if the three experts give a joint opinion of 'likely doping' after reviewing the ABP documentation package, an APF is reported. For that reason, we sometimes refer to the requested information as the number of APFs, although that is not the wording of the request.

The relevance of the views/actions of WADA, other NADOs etc

95. The parties spent a significant amount of time in the hearing outlining the views, approaches or actions of other NADOs or WADA in relation to the publication of similar data. There was also a large amount of evidence in the bundle on this issue. We have found this to be of limited assistance in determining the relevant issues before us. This was, in part, because we have found that the exemptions are not engaged and did not go on to consider the public interest test. It is also for the following reasons.
96. To the extent that WADA is (or other bodies are) of the same view as UKAD that disclosure of the withheld information presents a risk of misrepresentation and a risk to the deterrent effect of the ABP testing programme, we have concluded below that this is not relevant to the question of prejudice for purposes of the exemptions claimed by UKAD. It is not necessary therefore to determine how much weight to place on WADA's opinion or the opinion of other bodies.
97. We also observe, in any event, that the opinion of WADA in their letter of 17 October 2023 is subject to some qualifications. First, we have not seen any letter from UKAD by which WADA's opinion was sought, or how that was framed. Second, WADA explicitly states that it 'takes these points in general terms from its perspective as the global regulator for anti-doping, and not by reference to the applicable freedom of information legislation.' To be clear, WADA takes no position as to whether the withheld information should (or should not) be disclosed under FOIA.
98. We are not assisted by the fact that WADA does not choose to publish the type of data in the withheld information in its quarterly or annual statistics. The question of whether this type of data should *always* be made public is a very different question to the one we have to answer.
99. In relation to evidence of disclosures (or non-disclosures) by other similar bodies, our role is not to decide whether information of this nature should always or should never be disclosed.

100. We are determining whether this particular information should be disclosed by this particular public authority in the light of the circumstances at the date of the response to the request.
101. Even if another body was responding to a request under FOIA (which, in the examples provided, they were not) they may have reached a different decision because, for example, they applied a different exemption, or took a different view on the public interest balance. It is for the tribunal to decide whether the FOIA exemptions are engaged and, if so, whether the public interest favours disclosure. In doing so we gain little assistance from the disclosure approaches of other bodies outside of the FOIA framework.

Would disclosure be likely to prejudice the exercise by UKAD of its functions for the relevant purposes?

102. The first question for us to answer is what is the applicable interest within the exemptions relied upon. Here, the relevant interest is clear on the face of the exemptions.
103. In the case of 31(2)(b) the relevant interest is to protect a public authority's ability to exercise its functions for the purposes of ascertaining whether any person is responsible for any conduct which is improper.
104. In the case of 31(2)(d) it is to protect a public authority's ability to exercise its functions for the purpose of ascertaining a person's fitness or competence in relation to ... any profession or other activity which they are, or seek to become, authorised to carry on.
105. The next question is whether the purpose of ascertaining whether any person is responsible for conduct which is improper is one of the functions of UKAD. 'Ascertaining' connotes some element of determining or deciding whether a person was responsible for improper conduct.
106. A function is a power or duty exercised by a public authority for a specified purpose, whether conferred by or under statute. It includes only those functions assigned to the public authority and does not also include anything conducive or incidental to those functions (***DVLA v Information Commissioner*** [2021] 1 WLR).
107. UKAD is responsible for ensuring sports bodies in the UK are compliant with the World Anti-Doping Code and International Standards through the implementation and management of the UK's National Anti-Doping Policy and the Assurance Framework.
108. UKAD's strategy states:

“We are here to ensure doping free sport, promoting and protecting clean sport through education, testing and enforcement. Insight into doping and its threat to sport is central to what we do, using an intelligence-led approach to deter and detect wrongdoing. On broader integrity issues we share our knowledge and expertise to work with others within sport for the benefit of athletes, those who work with them, and the wider public.”

109. We accept that UKAD’s functions include, inter alia, detecting and investigating doping and issuing sanctions. We accept that doping falls within improper conduct and that UKAD exercises these functions for the purpose of ascertaining whether individuals are responsible for improper conduct.
110. We note at this stage that UKAD also has other functions and that not all of its functions are exercised for the purpose of ascertaining whether individuals are responsible for improper conduct. Many of its functions are exercised, for example, for the purpose of deterring rather than detecting wrongdoing. We deal with this in more detail below.
111. The next question is whether the claimed prejudice relates to the applicable interest (or purpose).
112. In determining this question, we do not accept Mr. Isenberg’s submission that the provisions of section 31 should be construed broadly. Both **DVLA** and **Williams v ICO** [2023] UKUT 57 (AAC) make clear that the statutory drafting suggests the opposite (para 37-38 of **Williams**):

“37. Section 31(2) of FOIA sets out (in paragraphs (a) to (j)) ten distinct purposes that may apply for the purposes of section 31(1)(g)-(i) (inclusive). As Judge Wikeley commented in **DVLA v Information Commissioner and Williams (Section 31)** [UKUT] 334 (AAC) at [59]:

“It is an important tenet of statutory interpretation that the legislative wording in issue must be read in its context. Here the context comprises ten specifically enumerated purposes. That level of statutory detail does not suggest that there is any warrant for giving each individual purpose an especially broad construction. Rather, the parliamentary intention would appear to be one of making some quite fine distinctions.”

38. I agree with Judge Wikeley that the statutory drafting of section 31(2) FOIA does not support a broad constructive approach.”

113. Judge Church in **Williams** goes on in paragraph 38 to consider the specific statutory context of an inquest and notes that it defines the purpose of any inquest in very narrow terms. We do not accept Mr. Isenberg’s submission that it was only this narrow statutory context which led to Judge Church’s conclusion that section 31(2) FOIA should not be construed broadly. It is clear from the extract cited above that **Williams** and indeed **DVLA** make a broader point based on the way in which section 31(2) is drafted. We are bound by and, in any event, agree with this.
114. It is clear from **Williams** that this focussed approach applies not only to the question of whether a body has the relevant function for the purposes of section 31(1)(g), but also to the question of whether the claimed prejudice relates to the purpose for which the function is exercised under section 31(2)(b):

“49. The exemptions provided for by section 31 of FOIA are designed to protect the integrity of a wide range of law enforcement activities with a view to avoiding such activities being jeopardised by information disclosure. The specific function for which an exemption was sought in this case is that of

“ascertaining whether any person is responsible for any conduct which is improper”.

50. It is clear that anything that presents a real and significant risk to the carrying out of an investigation, such as information that would alert a person suspected of conduct which was improper to the identity of a whistleblower, or the location of a hidden camera which had been placed to collect evidence of such improper conduct, could be taken into account, because that would relate to the process of ascertaining whether any person was responsible for conduct which was improper. However, I am not at all persuaded that the purpose of “ascertaining” can be stretched so far as to cover the way that the output of a completed process of “ascertaining” (such as the outcome of an IOPC investigation or the verdict of a coroner or jury) is received by the public.”

115. In interpreting section 31(1)(g) we take the above into account and we note the importance of focussing on the specific wording of the specific purposes listed under section 31(2) when considering the scope of the exemption and the interests protected.
116. In passing we note that the Commissioner in the decision notice refers to the wrong part of his guidance when setting out what is covered by section 31(1)(g)/31(2)(b), which might create the impression that the exemption is broader in scope. The extract from the Commissioner’s guidance set out in paragraph 14 of the decision notice states:

“The Commissioner’s guidance states that the -

“exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime...””

117. This is an extract from the Commissioner’s guidance on section 31(1)(a) (prejudice to the prevention or detection of crime) not section 31(1)(g) or 31(2)(b).
118. While section 31(1) includes other categories of exemptions aimed at avoiding prejudice to detection *and* prevention of crime, the wording of section 31(1)(g) read with section 31(2)(b) (or (d)) cannot in our view be read to include prejudice to the ‘prevention’ of improper conduct. In the tribunal’s view, prejudice to the exercise by a public authority of its functions for the purpose of preventing conduct which is improper is not within the scope of sections 31(1)(g) and 31(2)(b) or (d). Section 31(2)(b) is squarely focussed on the purpose of *ascertaining whether* any person is responsible for any conduct which is improper (and (d) on the purpose of *ascertaining* a person’s fitness or competence).
119. Although UKAD has functions which it exercises for the purpose of preventing doping or deterring people from doping, any prejudice to the exercise of its functions for those purposes does not fall within section 31(1)(g) and 31(2)(b).
120. Any negative impact on the deterrent effect of the ABP testing programme might result in more people doping, but it would not affect UKAD’s ability to ascertain or detect those who were doping, or to carry out investigations into whether people were doping or to issue sanctions etc. In other words, it would not prejudice the exercise by UKAD of

its functions for the purpose of ascertaining whether any person was responsible for any conduct which is improper.

121. Mr. Isenberg argued that UKAD has broad powers, including for example enforcement, education and testing. He submitted that UKAD's powers in identifying cheats include the deterrence of cheating behaviour. We disagree. Deterrence is not part of the process of identifying (or *ascertaining*) cheats. It is intended to reduce the number of cheats.

122. In Mr. Coffey's statement at para 38 he says:

“UKAD has limited resources to conduct efficient ABP Testing. The more Athletes who engage in doping, the greater the challenge of UKAD being able to detect and catch all of them, simply because UKAD does not have the resources to test all the Athletes all the time. The deterrent effect is therefore vital in maintaining the effectiveness of the ABP programme and keeping the floodgates closed.”

123. We do not accept that this brings prejudice to the deterrent effect of ABP testing within the remit of the exemption in section 31(1)(g) read with section 31(2)(b). Even if UKAD's concerns about a reduced deterrent effect are legitimate, we do not accept the proposition that the existence of more cheats would make it more difficult to ascertain whether any person is responsible for any conduct which is improper.

124. In any event we are not persuaded that there is any basis for finding that any increase in doping caused by disclosure of the withheld information would be of such an extent that it would be likely to cause prejudice to UKAD's ability to operate its ABP testing programme effectively. The number of ADRVs from ABPs over the relevant period is already in the public domain and therefore athletes can already form a judgment about the likelihood of getting caught. Athletes are already informed if they are subject to a finding of 'likely doping', resulting in a logical understanding of whether their doping strategy has been detected or not.

125. For those reasons we do not accept that the assertion of a likely reduction in the deterrent effect of the ABP testing programme is a prejudice covered by section 31(1)(g) and section 31(2)(b) or (d).

126. In respect of each claimed prejudice, we must determine if the claimed prejudice relates to the applicable interest or purpose under section 31(2), if causality has been demonstrated between disclosure of the withheld information and the occurrence or likely occurrence of the prejudice claimed, and if the risk of prejudice in the event of disclosure is real and significant.

127. Before considering the claimed prejudices, we remind ourselves that the withheld information is made up of two figures. The first is the number of adverse passport findings (APFs) during the relevant period broken down by year and sport. The second is the number of athletes who have been charged, but not sanctioned, with anti-doping rule violations (ADRVs) for abnormalities in their ABPs during the relevant period.

128. As Mr. Willison helpfully identified, there are three possibilities:

- 128.1. The total number of APFs and the total number of charges may both be zero.
- 128.2. The total of number of APFs and the total number of charges may be the same and above zero.
- 128.3. The total number of charges may be lower than the total number of APFs.

The data would likely be misinterpreted as to the operation and effectiveness of the ABP programme

129. There is additional reasoning on this issue set out in the closed annex.
130. As set out above, any prejudice to the exercise of UKAD's functions for the purposes of prevention (rather than detection) of anti-doping rule violations does not, in our view, fall within the exemption. As set out above, we are not persuaded that there is any basis for finding that any increase in doping caused by disclosure of the withheld information would be of such an extent that it would be likely to cause prejudice to UKAD's ability to operate its ABP testing programme effectively. A risk of an increase in the number of doping athletes does not, in our view, fall within the exemption.
131. In its response UKAD puts the argument on misinterpretation like this:

"There is a real risk that the data in respect of ABPs may be misinterpreted, leading to the potential for a skewed public understanding of the operations of the ABP programme. That would be particularly detrimental to UKAD's core public and regulatory functions as there is a very real risk that such misinterpretation could lead to greater attempts by athletes to engage in doping activities. More specifically, disclosure of the withheld information could lead to public lobbying to substantially alter the ABP programme in circumstances that would be detrimental to anti-doping objectives, and where that pressure was based upon an erroneous understanding of the true impact of the programme and its wider effectiveness."
132. We are not persuaded that a skewed public understanding of the operations of the ABP testing programme would or would be likely to prejudice the relevant interests for purposes of section 31(2), because we are not persuaded that it could have any impact on UKAD's ability to ascertain if athletes have committed ADRVs. The prejudice asserted here is not a prejudice relevant to the purpose or interests protected by section 31(2). This aspect is explained further in closed.
133. Further, we are not persuaded that public lobbying or pressure to alter the ABP testing programme is a prejudice relevant to the purpose or interests protected by the exemption in section 31(2). We are not persuaded that public lobbying and pressure could cause prejudice to UKAD's ability to ascertain if athletes have committed ADRV's.
134. We note that in **Williams** Judge Church held, in relation to IOPC proceedings, that 'the undermining of public confidence in proceedings is not the same as undermining the proceedings themselves' (at para 51). In our view the same point applies in this appeal to the extent that UKAD seeks to rely on concerns about public misunderstanding or misinterpretation in order to withhold the requested information.

ABP data as an intelligence tool: The impact of dopers/ potential dopers in understanding the testing strategy

135. The historical and current data that is held on the ABP system may be 'live' in the sense that it is used to inform an overall (and ongoing) picture of an athlete and as intelligence to inform UKAD's operations, but there is no impact on the effectiveness of this 'live data' by disclosing the number of APFs and the number of charges.
136. It is argued that the data would likely provide a key insight into UKAD's testing strategy because ABP data is used by UKAD as an intelligence tool to inform its strategy. It is submitted that the withheld data is therefore likely to be of use to a would-be doping or doping athlete in seeking to take steps to avoid detection.
137. We accept that this claimed prejudice relates to the applicable purpose and interests referenced in the section 31(2) exemption. *If* the information could be used by athletes to take steps to avoid detection, this would present a real and significant risk to the process of ascertaining whether persons are responsible for conduct that is improper.
138. However, we are not satisfied that the particular data in question could be used to assist athletes to avoid detection. Some of our reasoning on this issue is set out in closed.
139. First, any athlete who is already subject to ABP testing will already know whether or not they have personally received an APF, because they would have been notified by UKAD if that was the case.
140. UKAD submitted that one of the benefits of the ABP testing programme is that it is opaque and that many athletes would not necessarily be aware that they would have been notified by UKAD if they did have an APF.
141. However, the fact that athletes are informed of an APF is information that is in the public domain and easily accessible on UKAD's website. Under rule 1.3.1 it is the personal responsibility of each athlete to acquaint themselves with the Rules, which make clear that athletes will be notified of an APF.
142. In terms of informing an individual whether they themselves have been subject to an APF, the disclosure of the requested information does not therefore release any new data into the public domain.
143. For those reasons, release of the withheld information would have no consequences for athletes knowing whether or not they personally have been subject to an APF.
144. Further, it is submitted by UKAD that the data that emerges from the results management strand of ABP is fed into the strategy and intelligence, so UKAD cannot release information about the former without prejudicing information about the latter.
145. Mr. Isenberg argued that this must be understood against the backdrop of information already in the public domain including importantly the breakdown of UKAD's ABP testing figures by year and by sports. This provides a mosaic context for what can be done with the requested information.

146. Mr. Isenberg submitted that disclosure of the disputed information would enable a doper or potential doper to look at the likely doping and/or charging figures for sports in any given year and then look at the number of tests undertaken in those sports in the following year or years. He submitted that the data could be used by an ill motivated athlete as a window into UKAD's testing strategy. They can then try and use this data to predict future testing or use future knowledge of likely doping findings to predict future testing and use it as a guide to their own doping activities.
147. We do not accept that the data could plausibly be used in this way. The reasoning for this conclusion is set out in the closed annex.
148. Mr. Isenberg submitted more broadly that the complexities of the operation and function of the ABP testing programme are unlikely to be fully appreciated by athletes or their support personnel, and that 'the system is somewhat reliant on that aspect at least as a deterrent: the more athletes know, the greater information available to them to take steps to avoid detection.'
149. This data is very far from the type of data previously available to athletes from their real time ABP profile on ADAMS and which they were able to use to calibrate their doping strategy to avoid detection. Other than the use of the data in the way as described above, which we do not accept, it was not explained to us how the withheld information could enable athletes to take steps to avoid detection or how it could provide insight or intelligence into UKAD's operations or strategy.
150. Although it was submitted that the ABP system relies on its complexity/opaqueness, the tribunal finds that the withheld information casts no material or useful additional light on its operation. We note that athletes have a personal responsibility under the UK Anti-Doping Rules in any event to familiarise themselves with the Rules.

Mosaic identification

151. We have rejected this argument for reasons set out in closed.

Summary of conclusions

152. For those reasons we conclude that section 31(1)(g) read with section 31(2)(b) is not engaged and, for the same reasons, that section 31(1)(g) read with section 31(2)(d) is not engaged. We do not need to go on to consider the public interest balance.
153. We find that the Commissioner erred in concluding that the exemption in section 31(1)(g) read with section 31(2)(d) was engaged and the appeal is allowed.
154. UKAD has not relied on any other exemptions in relation to those parts of the request in issue in this appeal (it relied on section 41 and 43(2) in relation to other parts of the request) and therefore it is appropriate to issue a substituted decision notice requiring UKAD to disclose the withheld information to Mr. Willison.

Signed Sophie Buckley

Date: 8 April 2024

Judge of the First-tier Tribunal