

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2023

Public Authority: UK Anti-Doping
Address: SportPark
3 Oakwood Drive
Loughborough
LE11 3QF

Decision (including any steps ordered)

1. The complainant has requested information from UK Anti-Doping (UKAD) relating to Athlete Biological Passports (ABP). UKAD provided some information, stated that it did not hold some information, and withheld some information under section 31(law enforcement) of FOIA.
2. The Commissioner's decision is that UKAD has correctly cited section 31 of FOIA and that the public interest does not favour the release of this information. However, it breached section 10(1) and 17(1) of FOIA.
3. The Commissioner does not require UKAD to take any steps.

Request and response

4. On 16 June 2022, the complainant wrote to UKAD and requested information in the following terms:

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)? 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.

6. How many ABP samples did UKAD collect in 2009, 2010 and 2011. Please provide a breakdown by sport."

5. UKAD responded on 12 October 2022. The response was 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

6. On 20 October 2022 the complainant asked for an internal review regarding parts two, four and five of the request. Within this review request the complainant made further related requests, effectively challenging the exemption applied to part five and replacing the earlier parts two and four with the following:

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."

7. Following an internal review, UKAD wrote to the complainant on 17 November 2022. It maintained the exemption cited – section 31 of FOIA in relation to what it describes as 'items' two and four as set out in the previous paragraph. The review stated that item five of the request was "effectively asking the same as item 4 and the same response therefore applies".

Scope of the case

8. The complainant contacted the Commissioner on 1 December 2022 to complain about the way their request for information had been handled.
9. After the Commissioner's investigation began, UKAD explained to the Commissioner that additional information that had been requested and identified in the internal review as also falling under section 31 would additionally be non-discloseable under sections 41 and 43(2) of FOIA.
10. The Commissioner considers that the scope of the case is UKAD's citing of section 31 of FOIA. Should the Commissioner decide that section 31 has been incorrectly cited, he will look at sections 41 and 43 of FOIA as it relates to some of the information. He will also consider any procedural errors that may have occurred.

Reasons for decision

Section 31 – law enforcement

11. UKAD explained to the Commissioner in relation to the information requested in parts four and five that it had determined on three occasions that it is entitled to withhold the information by virtue of the exemption at section 31(1)(g) and section 32(2)(b) of FOIA.
12. Section 31 of FOIA states that -

"(1)Information which is not exempt information by virtue of section 30 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)..."

13. The purposes (section 31(2)) UKAD has identified regarding section 31(1)(g) are:

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

14. The Commissioner's guidance¹ 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..."

15. To engage a prejudice based exemption such as section 31 there must be the likelihood that disclosure would, or would be likely to cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to do so:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

16. Consideration of the exemption at section 31 is a two-stage process, even if the exemption is engaged the Commissioner needs to consider where the public interest lies.

¹ [law-enforcement-foi-section-31.pdf \(ico.org.uk\)](http://ico.org.uk/law-enforcement-foi-section-31.pdf)

UKAD's view

17. UKAD is an arms-length government body that is largely funded by a grant from the Department for Digital, Culture, Media & Sport. UKAD describes its role and remit on its website as follows:

"UKAD is responsible for ensuring sports bodies in the UK are compliant with the World Anti-Doping Code through implementation and management of the UK's National Anti-Doping Policy.

Our functions include:

- a prevention through education programme
- intelligence-led athlete testing across more than 40 Olympic, Paralympic and professional sports
- investigations and results management authority for the determination of Anti-Doping Rule Violations (ADRVs)"

18. It therefore has a regulatory function and responsibility to ascertain improper conduct. UKAD has a role in ensuring compliance with the World Anti-Doping Code and was "established to discharge the UK government's obligation to the United Nations International Convention against Doping in Sport". It does this by "by making sure we implement and comply with the World Anti-Doping Code and associated International Standards issued by the World Anti-Doping Agency ('WADA')". UKAD ensures "that sports meet their obligations under the UK government's National Anti-Doping Policy and the UK Anti-Doping Rules".

19. UKAD describes the primary purpose of its anti-doping process as "the elimination of doping in sport through the detection and prevention of ADRVs". These are detected via the implementation of a testing programme that tests athletes for substances on the WADA prohibited list:

"The fundamental principle of the ABP testing programme is to monitor selected biological variables over time that indirectly reveal the effects of doping, rather than attempt to detect the doping substance or method itself. The ABP testing programme implemented by UKAD is fundamental to the prevention and detection of ADRVs and is core to UKAD's function."

20. UKAD argues that disclosure of the withheld information could be misinterpreted but the Commissioner is unable to outline all the reasons why it maintains this view, for reasons of confidentiality. However,

there are some arguments that can be included in this decision notice, these are outlined below:

- "Testing Strategy: An additional, significant benefit to be derived from the use of the ABP programme is the use of ABP data as intelligence to direct and drive the testing strategies of ADOs. The data that ADOs [anti-doping organisations] obtain from the ABP programme is invaluable in shaping the strategic planning and direction of their testing programmes. In addition to the ABP programme being able to detect doping, it produces data over time that allows ADOs to focus their limited resources on testing the right athletes at the right time, based on an intelligence and data-led risk profile, thereby materially increasing the chances of catching cheats and tackling doping in sport."

UKAD's view is that disclosing data would risk revealing its ABP testing strategy. It could identify which sports it focuses its resources on and put "potential dopers on notice that we are targeting them for testing and giving them the opportunity to modify their behaviour to avoid getting caught".

- International Importance: "The reason the global ABP programme works is because it measures something different to traditional sample collection and testing...The ABP programme is implemented by ADOs across the globe. To UKAD's knowledge, neither WADA nor any other ADO discloses details of how many ABPs are reviewed and flagged as 'likely doping' or charged. On the contrary, global anti-doping regulators publish a significant amount of data in relation to traditional testing and ADRV statistics. It is plain, therefore, that this ABP data is kept confidential for good reason. It is also clear that disclosing the ABP data in the UK would not only undermine the ABP programme in this country, but it could also put the effectiveness of the global ABP programme at significant risk."

To reveal this data "would undermine and prejudice its ability to carry out its public function of preventing doping in sport".

The complainant's view

21. The complainant also addresses the issue of whether the information would -

"provide assistance to any Athletes who may seek to cheat by giving an insight into the operations" – these operations as explained are clearly laid out in UKAD's 2021 Anti-Doping guidelines. UKAD considers that the public interest in knowing how

many ABP Passports have been marked as "likely doping" would undermine its ability to carry out its function. Abnormal ABP passports, just like Adverse analytical findings, are used to charge athletes with anti-doping rule violations.'

They contend that -

"UKAD every year publicly releases how many athletes fail doping tests (adverse analytical findings)² As UKAD releases this data, it can equally release the data of how many ABP passports were marked "likely doping" by a three-person F panel"

The Commissioner's view

22. The Commissioner accepts that the actual harm relates to the applicable interests in the exemption. UKAD has demonstrated that there is a causal relationship between potential disclosure and the prejudice that the exemption is designed to protect and that the prejudice is real and of substance. UKAD has stated that there "would" be detriment but set the prejudice at the lower level of "would be likely to" occur. The Commissioner agrees that prejudice is at least at the lower level.

Public interest test

23. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31 of FOIA outweighs the public interest in disclosing the information requested by the complainant.

Public interest factors in favour of disclosure

24. The complainant's view suggests that there is no reason why the requested information can't be disclosed. Regarding part two of the request, the complainant argues,

"that UKAD, a state body, is paying another body for its services. The fact that state funds are being used for this should mean citizens have the right to understand exactly what services UKAD is paying for"

² [Raising the game for clean sport | World Anti Doping Agency \(wada-ama.org\)](https://www.wada-ama.org/en/raising-the-game-for-clean-sport)

25. Regarding part four of the request they ask the question, 'Why would revealing how many ABP passports were marked "likely doping" give athletes not involved in these cases any opportunity to cheat.' How UKAD goes about implementing its programme is outlined in its Regulations. These reveal that "some athlete's ABP passport have been marked "Likely Doping", is known to all athletes familiar with UKAD's anti-doping regulations posted on its website.' Athletes being investigate are alerted 'when their passports are marked "likely Doping" by an expert panel'. The complainant argues that UKAD releases Adverse Analytical Findings that are detected in athlete samples every year and that it can release the requested data. There is also "absolutely nothing in the WADA regulations or UKAD's that stop them providing a breakdown of these statistics by sport".
26. The complainant contends that UKAD should release information regarding part five of their request on the same grounds explained above. They suggest that it is in the public interest to know if UKAD follows their own protocols.
27. UKAD acknowledges the arguments for disclosure regarding anti-doping as there is a public interest in "transparency and accountability" in order that "regulators can be checked and challenged and tested for effectiveness". Additionally it says "that there is public interest in enabling informed debate about UKAD's work and potential public lobbying resulting from this".

Public interest factors in favour of maintaining the exemption

28. However, UKAD 's view is that,

"given the likely prejudice that would be caused to UKAD's ability to carry out its regulatory function, we consider that the more important public interest lies in the maintenance of an effective anti-doping regime so that UKAD can carry out its obligations towards its public policy object of eliminating doping in sport".

29. UKAD argues that data can be misinterpreted which risks undermining the "programme as a tool used by ADOs worldwide in the fight against doping". This would have an "impact on the deterrent effect and the highly medical nature of the ABP Programme" Therefore it has concluded that the "greater public interest in this case is the maintenance of an effective anti-doping regime".

The balance of the public interest

30. The Commissioner agrees with UKAD that data can be misinterpreted but that is not the reason for his decision as explanation or clarification

could potentially accompany any data disclosure. As mentioned earlier in this decision, there are certain confidential matters that the Commissioner cannot include in his decision notice but have been factored into the decision. Any adverse impact on deterrence and the programme as a whole that may make the anti-doping regime less effective is not in the public interest.

31. As the Commissioner has decided that the requested information has been correctly cited and that it is in the public interest not to disclose this information he has not gone on to look at either section 41 or 43(2) of FOIA.

Procedural matters

32. UKAD breached sections 10 and 17 of FOIA by failing to confirm that the information was held and to issue a refusal notice, within 20 working days.

Right of appeal

33. 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@justice.gov.uk

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

34. 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.
35. 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

Janine Gregory
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