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Official

Ref: FOI 165

Dear 

Thank you for your e-mail dated 15 November 2017, which requested information from UK Anti-Doping ('UKAD') pursuant to the Freedom of Information Act 2000 ('the Act'). You requested information pertaining to the UKAD investigation into the package delivered to Team Sky in 2011 ('the investigation'). On 21 November 2017, UKAD sent an email in reply to your request, advising you that your request was exempt from disclosure pursuant to Section 12 of the Act, that is, the cost of complying with your request exceeded the appropriate limit. In our email of 21 November 2017, we also provided you with advice to assist you in bringing your request within the cost ceiling. On 21 November 2017, you sent UKAD a further email providing a more targeted request, specifically, your request was as follows:

"...could I therefore request UKAD discussions with Bradley Wiggins in relation to the case please"

UKAD can confirm that UKAD has engaged in discussions with Sir Bradley Wiggins ('the Athlete') during the course of the investigation. We have taken your request to be for records of such discussions, for example, a transcript. UKAD confirms that it does hold records of its discussions with the Athlete. However, having considered the exemptions under sections 31, 36, 40 and 41 of the Act, UKAD has decided not to disclose the information requested.

Section 41 – Information provided in confidence

1. Section 41(1) of the Act provides as follows:

Information is exempt information if—

- a) *it was obtained by the public authority from any other person (including another public authority), and*
- b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person*

2. The information requested is therefore exempt if the following criteria are met:

- It was obtained by the authority from any other person;
- Its disclosure would constitute a breach of confidence;
- A legal person could bring a court action for that breach of confidence;
- That court action would be likely to succeed.

Was the information requested obtained by UKAD from another person?

3. You have requested records of discussions between UKAD and the Athlete. Those discussions contain information provided by the Athlete. In addition, any questions, comments and/or replies put to the Athlete in the course of those discussions, may also be exempt from disclosure as to disclose those details would reveal the content of information obtained during the investigation. It is therefore UKAD's view that the information requested falls within the criteria for information which might be exempt pursuant to Section 41 of the Act.

Would disclosure of the requested information constitute a breach of confidence?

4. The Information Commission has said that UKAD will need to consider the following when determining whether disclosure would constitute a breach of confidence:
 - whether the information has the necessary quality of confidence;
 - whether it was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider. However, where the information requested relates to a person's private life, there is no requirement to show detriment, as this is assumed.
5. The information requested was imparted in circumstances importing an obligation of confidence. The restrictions on use of the information were implicit from the circumstances in which the information was given: that is, in the context of a confidential investigation into a possible violation or violations of the UK Anti-Doping Rules ('ADR'). We refer you to Article 5.9.2(b) of the ADR and Articles 12.3.1 and 11.2.2. of the WADA International Standard for Testing and Investigations ('ISTI'), which make it clear that UKAD investigations are confidential.
6. The information requested possesses the necessary quality of confidence. This is because it is more than trivial (it relates to a personal matter and it is clear that the Athlete attaches importance to the information) and it is not otherwise accessible.
7. It is UKAD's view that the information requested relates to the Athlete's private life – it does not relate to commercial matters. On that basis, UKAD is not required to show detriment.
8. In light of the obligation of confidence that applies to the requested information UKAD has concluded that disclosure of the requested information would constitute a breach of confidence.

Could a legal person bring a court action for that breach and would that action be likely to succeed?

9. The Athlete, as a party to the confidence, would have standing to bring a court action against UKAD for breach of confidence if UKAD were to disclose the information requested. In UKAD's view, that action would be likely to succeed. In coming to this conclusion, UKAD has considered whether there is a public interest defence to the disclosure in the circumstances and concluded that there is not. The

test to be applied in regard to the public interest defence is a test of proportionality: is there a public interest in disclosure that overrides the competing public interest in maintaining the duty of confidence? UKAD has considered the arguments in favour of disclosure, in particular the need to ensure that public authorities remain transparent, accountable and open to scrutiny, so as to enable individuals to understand how decisions affecting their lives are made and to ensure accountability for the spending of public monies. UKAD has also considered the arguments against disclosure, in particular the impact of that disclosure on the persons mentioned in any discussions and on the Athlete himself and the impact such disclosure would have on the willingness of individuals and organisations to assist UKAD with its investigations in future. Having considered these public interest arguments, UKAD is of the view that the public interest defence would not be successful in the circumstances.

10. UKAD has therefore decided that the information requested is exempt pursuant to Article 41(1) and is content that this decision complies with the overall purpose of the exemption, being to give those who provide confidential information to public authorities a degree of assurance that their confidences will continue to be respected should information fall within the scope of the Act.

Section 31 – prejudice to the exercise of UKAD's functions for ascertaining improper conduct

11. Section 31(1) provides as follows:

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)...

Section 31(2) provides:

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

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

12. One of UKAD's primary functions is to identify and prosecute any athlete or other person who commits an anti-doping rule violation pursuant to the ADR, and thus uphold professional standards in the field of sport. Such conduct falls within the meaning of "improper" as prescribed in the Act.
13. The UK Parliament has formally committed the UK Government to the pursuit of doping free sport based on the principles set out in the World Anti-Doping Code. To meet that commitment, the UK Government has established UKAD and has sought to satisfy the requirements of the UNESCO Convention by adopting the UK National Anti-Doping Policy, issued by the Secretary of State for Digital, Culture, Media and Sport ('DCMS'), which sets out the specific requirements of the UK Government in the field of doping in sport and the roles and the responsibilities of UKAD. This includes a duty on UKAD to properly investigate and prosecute all anti-doping rule violations set out in Article 2 of the Code.
14. In UKAD's view, the disclosure of the contents of confidential discussions between UKAD and a third party in the course of an investigation into a potential anti-doping rule violation ('ADRV') would

prejudice UKAD’s ability to effectively investigate and/or prosecute future actual or potential ADRVs, in that it would discourage individuals and/or organisations from attending interviews, or from providing information to or otherwise assisting UKAD in future, knowing that such information as was provided might be made public following a request under the Act. This concern is particularly acute (and therefore the potential prejudice particularly severe) because (i) UKAD is an intelligence-led organisation that relies on information provided in confidence, (ii) failure to co-operate is not an ADRV in relation to those bound by the ADR, and (iii) those not bound by the ADR fall outside UKAD’s jurisdiction so it is particularly vital that such parties are not discouraged from voluntarily providing information.

15. Given the above prejudice and having weighed the public interest arguments for and against, UKAD has decided that, in this particular case, there is a stronger public interest in the need to protect the ability of public authorities to effectively and efficiently prosecute improper conduct than there is in disclosure of the requested information. In considering the public interest test, UKAD has considered the following arguments regarding disclosure:

Public Interest In Favour	Public Interest Against
<p>Transparency and accountability: increase public confidence by scrutiny and examination of decisions taken in particular cases.</p>	<p>Inhibit and impede current and future investigations by UKAD into possible anti-doping rule violations, not only in cycling but all sports. A key source of UKAD intelligence stems from the cooperation of those involved in the relevant sport. If the content of discussions between UKAD and individuals/bodies assisting UKAD with its investigations were to become public, it would significantly impact on the likelihood of future cooperation by such individuals/bodies in attending interviews or otherwise providing information to UKAD; and therefore impact on UKAD’s ability to perform its key functions of ensuring compliance with and enforcement of the ADR.</p>
<p>Provide the public with an understanding of the operation of the anti-doping regime and how UKAD handles its investigations.</p>	<p>UKAD would likely become engaged in legal disputes (e.g. in respect of breach(es) of confidence) that would divert UKAD’s limited resources (financial and labour) towards legal matters unrelated to its core functions (which functions include investigating and prosecuting potential anti-doping rule violations, educating athletes, and ensuring compliance by sporting bodies with the UK ADR).</p>
	<p>A significant amount of information regarding the investigation is already in the public domain by virtue of UKAD’s public statement at the conclusion of the investigation and the information and submissions provided to the DCMS Select Committee with respect to its inquiries into doping in sport, including submissions made by UKAD’s Chief Executive, Nicole Sapstead, in March 2017 (available here). As such, the public interest in disclosure (as set out to the left) is less compelling than if no information was yet publicly available, particularly in light of the negative effect such disclosure would have (as set out above).</p>

16. Having weighed the public interest arguments for and against disclosure of the information requested, UKAD has decided that there is a stronger public interest in the need to protect UKAD's ability to effectively investigate and prosecute athletes and other persons under the ADR in respect of improper conduct than there is in disclosure of the contents of confidential discussions held between UKAD and a particular individual.

Section 36 – prejudice to the effective conduct of public affairs

17. Section 36(2) provides as follows:

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

18. In the opinion of the qualified person, Nicole Sapstead, disclosure of the requested information would prejudice the effective conduct of public affairs. The “prejudice” in this case is that disclosure of the requested information would undermine UKAD's ability to effectively investigate and prosecute possible ADRVs and to ensure compliance by individuals and organisations with the ADR. We refer to and adopt the reasoning set out at paragraph 14.
19. As the qualified person has concluded that disclosure of the requested information would prejudice the effective conduct of public affairs, UKAD is then required to consider the public interest arguments both for and against disclosure. To this end, UKAD repeats its reasoning regarding the balancing of the public interest test set out at paragraphs 15 and 16 above. In summary, UKAD recognises the general public interest in disclosure of information which would promote openness, transparency and clarity of decision-making. There is a significant public interest in understanding how the National Anti-Doping Organisation proceeds with investigation of possible ADRVs reported by the media. In recognition of that interest and as already noted above, UKAD has published a detailed statement regarding the outcome of the investigation; Ms Sapstead has also given evidence to the DCMS Select Committee and this information is publicly available. As such, UKAD strongly maintains that there is a greater public interest in the information requested remaining confidential.

Section 40 – personal information

20. Section 40(2) of the Act states:

Any information...is exempt if it constitutes personal data...and...the disclosure otherwise than under this Act would contravene any of the data protection principles.

21. The information you have requested constitutes “personal data” and, in some respects, “sensitive personal data” under the definition of “data” in the Data Protection Act 1998 ('DPA'). Personal data is defined by reference to whether information relates to an identifiable individual and whether the data impacts or has the potential to impact on an individual, whether in a personal, family, business or professional capacity. The discussions between UKAD and the Athlete therefore constitute personal data.

Would disclosure of the personal data contravene one of the data protection principles?

22. UKAD has focused on the first data protection principle as set out in Schedule 1 to the DPA, which is as follows:

*1. 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.*

23. In determining whether or not disclosure of the requested information would contravene the first data protection principle, UKAD has first considered whether disclosure would be fair to the data subject, being the Athlete. If disclosure would not be fair, the exemption under section 40(2) of the Act would be satisfied and the requested information could not be disclosed. After considering the various factors applicable in this matter, UKAD has concluded that disclosure of the requested information would not be fair to the data subject. In coming to this conclusion UKAD has considered the following factors:

- a. The reasonable expectations of the data subject. Given the context in which the discussions with the Athlete occurred – a confidential investigation into a possible violation or violations of the ADR – the Athlete would expect that such discussions would remain confidential and would not be disclosed to the public.
- b. The consequences of disclosure of the data subject. Disclosure contrary to the data subject's expectation of confidentiality would be distressing to the data subject given the intrusion into what they would have considered to be a confidential process.
- c. Whether there is a legitimate public interest in the disclosure. UKAD refers to and adopts its reasoning in regard to its consideration of the public interest in this matter as set out at paragraphs 15 and 16 hereof. To the extent that there is a legitimate public interest in disclosure of the requested information, in UKAD's view this does not outweigh the factors against disclosure as set out above.

24. Having concluded that disclosure of the requested information would not be fair, to disclose the information would contravene the first data protection principle. Therefore, the exemption under section 40(2) of the Act applies to the information.

25. As UKAD has concluded that disclosure of the information would be unfair, it is not required to consider whether any of the conditions in Schedule 2 or 3 of the DPA would be met. Nonetheless, for the sake of completeness, UKAD is satisfied that none of the conditions in Schedule 2 or 3 of the DPA are met in this case.

Where to from here?

26. If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to: Philip Bunt, Director of Business Services, UK Anti-Doping, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8AE. Please remember to quote the reference number above in any further communications.

27. If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely

UK Anti-Doping

UKAD