

Sent via email to: [REDACTED]

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15 February 2018

Official

Ref: FOI 173

Dear [REDACTED]

### Internal Review

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1. I write in reference to your email dated 17 January 2018 requesting information 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'), specifically, your request was as follows  
  
*As per other media organisations, the Press Association is requesting the release of the letter UKAD sent to Team Sky when it closed its 'Jiffy Bag' investigation under the terms of the FOI Act.*
2. In light of the fact that you were aware UKAD had refused to release this letter following a separate request made under the Act, you asked that UKAD proceed directly to an "appeal" (an "internal review" for the purposes of the Act), to which UKAD agreed. I can confirm that I have undertaken that internal review and am writing to notify you that my conclusion is not to disclose the information requested to you.
3. As this matter has proceeded directly to an internal review, I enclose a copy of a redacted letter dated 20 December 2017 ("the Response"), which was sent by UKAD in respect of FOI-158 which, you will see, was a request for the same letter sent to Team Sky that you are requesting, plus the letter sent to British Cycling. This letter should be read in conjunction with the Response, as I have conducted this internal review as if the Response had been provided to you.

### Review undertaken and conclusion

4. For completeness, I confirm that this letter does not consider the British Cycling letter requested in FOI-158, as you have not requested it. As you know, on 12 January 2018 British Cycling published on its website a copy of that letter.<sup>1</sup> We understand that British Cycling took this course of action after BBC Sport informed British Cycling that it was in receipt of a copy of that letter.<sup>2</sup>
5. When initially considering a request for information and when conducting an internal review, UKAD is required to consider the circumstances as at the date the request was originally received. FOI-158 was

<sup>1</sup> The letter is available at <https://www.britishcycling.org.uk/about/article/20180112-about-bc-news-British-Cycling-statement-0>.

<sup>2</sup> See <https://twitter.com/danroan/status/951904654023188480>.

received on 15 November 2017. However, in conducting this review, I have considered your request for information afresh, along with the Response, your email dated 17 January 2018, and whether there have been any material changes in circumstance since 15 November 2017.

6. Having carried out the internal review, I have concluded that the exemptions originally cited in the Response – i.e., those contained within sections 31, 36, 40 and 41 of the Act – were correctly relied upon for the reasons given in the Response. I expand upon this conclusion in relation to each section below. I have also taken account of section 21 of the Act in respect of any parts of the letter to Team Sky that are already in the public domain. Any such information is exempt from disclosure pursuant to that section.

**Section 31(1)(g): prejudice to the exercise of public functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper**

7. In the Response it was stated that disclosure of the requested information "would (or at the very least, would be likely to)" prejudice the exercise of UKAD's functions. It is my firm view that UKAD's disclosure of the requested information would (and so at the very least it would certainly 'be likely to') in fact prejudice the exercise of UKAD's ability to investigate and prosecute anti-doping rule violations (ADRVs) (i.e. to ascertain whether any person is responsible for any conduct that is improper, for the purposes of the Act). I express that view based on my experience as Director of Operations, which position includes responsibility for UKAD's intelligence and investigation function.
8. The Team Sky letter contains and refers to information gathered by UKAD in confidence for the purposes of its investigations into possible breaches of the UK Anti-Doping Rules ("ADR"). UKAD has no powers to compel the disclosure of information from any party and therefore the voluntary provision of such information is absolutely crucial to UKAD's work. If those who might provide information in confidence to UKAD feared that that information could then flow into the public domain as a result of requests under the Act (or howsoever otherwise), the obvious consequence is that such persons would be far less likely to provide confidential information to UKAD – that would in turn have a very significant adverse impact on UKAD's ability to investigate and prosecute ADRVs.
9. That weighs very heavily in the public interest analysis concerning the potential disclosure of the letter to Team Sky, given that UKAD's investigations and prosecutions of potential ADRVs are a critical part of fulfilling the important public policy objective of eliminating doping in sport.
10. In considering where the public interest lies in this instance, I have taken into account your 17 January 2018 email in which you state that (i) the recent publication of the letter sent to British Cycling and the subsequent media coverage of that proves there is significant public interest in this case; (ii) the letter to British Cycling makes clear that public money was almost certainly spent by both the governing body and the professional team during that period; and (iii) UKAD's own public funding.
11. As evidenced in the Response, UKAD very much recognises the general public interest in disclosure of information that would provide transparency in respect of UKAD's work and/or provide the public with an understanding of the operation of the anti-doping regime, particularly in such a high-profile case. UKAD considers that it respected and met that interest by issuing (i) a public statement (which stated,

among other things, that UKAD had written to British Cycling and Team Sky),<sup>3</sup> and (ii) a summary in relation to its investigation into the "Jiffy bag".<sup>4</sup> These things were done as this case already had a public profile, and as an exception to UKAD's usual approach. Ordinarily UKAD would not publish any details of an investigation that did not lead to a charge.

12. The assertion that public money was almost certainly spent by Team Sky during this period is supposition, and therefore not something that I could properly take into account in determining where the public interest lies (for its part, UKAD did not investigate the use of public funds). However, for the avoidance of doubt, even if I were to assume that Team Sky has benefitted from the receipt of public funds by British Cycling, that would not alter my conclusion in respect of the balance of the public interest argument. As for any other public funding received by British Cycling separately from Team Sky, that does not seem to me to be relevant to the public interest in respect of the letter to Team Sky. UKAD's funding status is of course the context for all of its decisions under the Act and in my view, does not tip the balance in favour of disclosure in this instance.
13. Further, disclosure of the letter to Team Sky would (as set out in the Response and touched upon below) be a breach by UKAD of the confidentiality provisions of the ADR (specifically, Article 5.9.2(b)). There is a clear and important general public interest in public bodies adhering to the rules which apply to them, and a clear and important specific public interest in UKAD adhering to the confidentiality provisions of the ADR in conducting its investigations and prosecutions. It is a fundamental principle of the ADR (and the World Anti-Doping Code) that anti-doping investigations be conducted in confidence.
14. All things considered, I have concluded that there is a far stronger public interest in the need to protect UKAD's ability to effectively investigate and prosecute potential ADRVs in all cases, not just high profile ones, and so to further the public policy objective of eliminating doping in sport, and in UKAD's adherence to the confidentiality provisions of the ADR, than there is in disclosing the letter sent to Team Sky in the context of one particular case (however interested the public might be in that case).

**Section 36: Prejudice to the effective conduct of public affairs and inhibiting the free and frank provision of advice**

15. I have confirmed with the qualified person, Nicole Sapstead that she considers that, for the same reasons as set out above, disclosure of UKAD's letter to Team Sky would prejudice the effective conduct of public affairs (section 36(2)(c)) – those public affairs being UKAD's ability to effectively investigate and prosecute possible ADRVs and to ensure compliance with the ADR.
16. Further, because disclosure of the letter would in UKAD's view give rise to an actionable breach of confidence (see below), disclosure of the letter would be likely to result in a significant diversion of resources in managing the impact of the disclosure i.e. engaging in legal correspondence with, and possibly defending any claim made by, Team Sky's lawyers. In those circumstances, UKAD's legal resource would be diverted from its core purposes, which include (among other things) assisting UKAD investigations and the prosecution of alleged ADRVs. Whilst the Response addressed this point as an element of the public interest test, I have also confirmed with Nicole Sapstead that she considers that this diversion of resource, and the potential costs, would serve to prejudice the conduct of public affairs

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<sup>3</sup> Available at <https://www.ukad.org.uk/news/article/ukad-statement-after-closing-investigation-into-the-package-delivered-to-tea>.

<sup>4</sup> Available at <https://www.ukad.org.uk/news/article/ukad-summary-of-its-cycling-investigation-into-the-package-delivered-to-tea>.



within the meaning of section 36(2)(c). This is particularly the case as UKAD has a small legal team with scant spare capacity to divert from its core purposes.<sup>5</sup>

17. As for the public interest for the purposes of section 36(2)(c), I have reached the same view as in respect of section 31(1)(g) i.e. the public interest in disclosure of information that would provide transparency in respect of UKAD's work and/or provide the public with an understanding of the operation of the anti-doping regime (to the extent disclosure of the Team Sky letter would in fact do so) is outweighed – and in my view significantly so – by the need to protect UKAD's ability to effectively investigate and prosecute athletes and other persons under the ADR, in all cases, not just high-profile ones, and also the need for UKAD to adhere to the ADR.
18. I have also confirmed with Nicole Sapstead that in her opinion disclosure of the letter would serve to inhibit UKAD's ability to provide free and frank advice to individuals, sporting bodies and other relevant stakeholders in future (section 36(2)(b)(i)). To expand upon this point from the information contained within the Response, it is obviously necessary and desirable for UKAD to provide external advice to stakeholders in relation to anti-doping matters, whether or not it is bringing a charge for an ADRV. UKAD frequently provides this form of advice to stakeholders and, speaking generally, sometimes such advice is put in forceful (i.e. frank) terms in order to seek to ensure it is effective and encourages changes in stakeholder practice. UKAD considers it appropriate, necessary and consistent with the ADR and National Anti-Doping Policy that such advice be given in confidence.
19. In the event that each piece of UKAD's advice were to be subject to publication following requests under the Act, UKAD's ability to provide its advice in a free and frank manner would be severely inhibited. It would mean not only that UKAD would have to consider what advice to give, but it would also have to very carefully consider how it gave that advice and the consequences of publication of the advice, both to the recipient and also to UKAD itself (as, depending on the content of any advice and the profile of the matter to which it related, it could also have potentially significant consequences on resource – in particular to UKAD's legal and communications resource).
20. There is also a danger that – depending on the facts of any case – the publication of UKAD's advice would come to be seen as some form of public censure (i.e. a sanction outside of the ADR). This is not the intention of such advice. Publication would have the potential to be unfair on recipient stakeholders and to damage UKAD's relationship with those stakeholders. This would further serve to discourage UKAD from providing free and frank advice to stakeholders.
21. In considering the public interest in this context, I have taken into account that disclosure of the information would provide transparency in respect of UKAD's work and/or provide the public with an understanding of the operation of the anti-doping regime, particularly in relation to a high-profile case. However, in my view the balance of the public interest in this case lies very clearly in not providing the information sought. I consider that disclosing the letter to you would set a precedent that would serve to inhibit UKAD's future ability to be free and frank in its advice to stakeholders, to such a degree that the utility of UKAD providing such advice would be severely reduced if not eroded completely. UKAD provides this advice towards the important public policy objective of eliminating doping in sport. It is therefore in my view in the greater public interest for UKAD to continue to be able to provide free and

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<sup>5</sup> I would refer you to the recently published 'Tailored Review of UK Anti-Doping' in respect of this point, which is available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/677496/Tailored\\_Review\\_of\\_UK\\_Anti-Doping\\_-\\_Final\\_Version\\_for\\_Publication\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/677496/Tailored_Review_of_UK_Anti-Doping_-_Final_Version_for_Publication_.pdf) (see in particular pages 28 and 29).

frank advice without the inhibition of the additional concerns that would attach to its public disclosure (as set out above).

**Section 41(1): Information provided in confidence**

22. In relation to Section 41 of the Act, I simply endorse and reiterate the content of the Response. Disclosure of the letter to Team Sky would breach the confidentiality provisions of the ADR and it would also in my view constitute an actionable breach of confidence. The fact that British Cycling chose to publish its letter does not impact upon confidentiality in the Team Sky letter.

**Section 40: personal information**

23. Again, in relation to Section 40 of the Act, I endorse and reiterate the content of the Response. Parts of the letter to Team Sky contain personal data for which there is no lawful basis for processing (so, whilst the entirety of the letter is being withheld with reference to sections 31, 36 and 41 of the Act, that personal data would be subject to an absolute exemption under section 40 in any event).

I am therefore satisfied that, as at the time of request FOI-158, the information requested was exempt from disclosure. Furthermore, since that time, there has been no change in circumstances that alters that conclusion.

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

  
Director of Operations

