

[REDACTED]

By e-mail to: [REDACTED]

21 December 2017

Dear [REDACTED]

UK Anti-Doping
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Official

Ref: FOI-164

1. Thank you for your e-mail dated 21 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 British Cycling and Team Sky, specifically, your request was as follows:

I would be grateful if under the Freedom of Information Act 2000 you would provide me with the details of:

- i. *Any correspondence relating to the UKAD investigation into alleged wrongdoing at British Cycling and Team Sky, redacted if required, in the period from September 2016 to the end of November 2017, which mentions "testosterone".*
 - ii. *Any correspondence relating to the UKAD investigation into alleged wrongdoing at British Cycling and Team Sky, redacted if required, in the period from September 2017 to the end of November 2017 between UKAD's Executive members (including Nicole Sapstead) and either British Cycling or Team Sky.*
2. UKAD confirms that it does hold correspondence which meets the description set out in i. and ii. above. However, after consideration of your request, UKAD has concluded that the information you have requested is exempt from disclosure pursuant to the exemptions specified in sections 31, 36, 41, 42 and 21 of the Act. Therefore, the information requested has not been disclosed pursuant to these exemptions.

Section 41 – Information provided in confidence

3. 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*

4. 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.
5. Your request for information encompasses a request for copies of correspondence between UKAD and third parties. With respect to such correspondence, it is UKAD's view that the information requested falls within the criteria for information which might be exempt pursuant to Section 41 of the Act.
6. Insofar as any of the information you have requested was obtained by UKAD from third parties in pursuance of its investigation into possible anti-doping rule violations, this information was provided under the condition that it be kept confidential, and that it would only be disclosed in accordance with the UK Anti-Doping Rules ('ADR') (see ADR 5.9.2(b)). 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.
7. Therefore, disclosure of the requested information would breach UKAD's duty of confidentiality under the ADR. This exemption also applies to information created by UKAD, including correspondence from UKAD to third parties and UKAD's analysis, interpretation or comments, where that information reveals the content of information obtained from another person (to this end, the exemption therefore extends to certain internal UKAD correspondence which falls within the scope of your request).
8. This exemption applies in circumstances where disclosure to the public would constitute an actionable breach of confidence. UKAD is of the view that public disclosure would constitute an actionable breach of confidence.
9. This exemption is an absolute exemption and therefore the public interest test is not required to be considered. Nonetheless, UKAD has considered the public interest insofar as it has come to the view that a "public interest" defence would not be available to UKAD in the circumstances of this case. 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 correspondence 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. Accordingly, this information has been withheld from disclosure under section 41(1).

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

10. 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...

11. 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 (‘the 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.
12. One of UKAD’s primary functions is therefore 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. Some of the information you have requested encompasses the following:
- a. Correspondence between UKAD and third parties in the course of an investigation into potential anti-doping rule violations (‘ADRV’); and
 - b. Internal correspondence that considers information gained by UKAD in the process of an investigation into potential ADRVs and discusses strategy regarding same.
14. The disclosure of the above correspondence would, in UKAD’s view, prejudice UKAD’s ability to effectively investigate and/or prosecute potential ADRVs, in that it would discourage individuals and/or organisations from providing information to or otherwise assisting UKAD, knowing that such information as was provided might be made public following a request under the Act; and would inhibit internal discussion of, and strategizing regarding, such information and assistance received for the same reasons. 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 UKAD 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 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. Similarly, internal discussion and strategizing would be discouraged if it were known that the same would be made public under the Act.</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 for example by virtue of the information 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 (so far as the request relates to correspondence between UKAD and third parties and to communications which consider and discuss such information), 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.

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 (insofar as the request relates to a request for correspondence between UKAD and third parties and to communications which consider and discuss such information). 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 paragraphs 13 and 14 above.

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. As already noted above, UKAD has given evidence to the DCMS Select Committee which is publicly available. As such, and for the reasons already stated, UKAD strongly maintains that there is a greater public interest in the information requested being withheld.

Section 36(2)(b)(ii): inhibit the free and frank exchange of views for the purposes of deliberation

20. 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 -

(b) would, or would be likely to, inhibit -

(ii) the free and frank exchange of views for the purposes of deliberation...

21. UKAD has considered your request and, in the reasonable opinion of the qualified person, Nicole Sapstead, disclosure of the information requested (insofar as it relates to a request for internal correspondence between the UKAD Executive Team in relation to an investigation into possible ADRVs) would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. In so doing, Ms Sapstead has considered the following:

- a. The information you have requested relates to correspondence between members of the UKAD Executive Team in respect of a confidential investigation into possible ADRVs. UKAD considers that disclosure of that information would impact upon the nature of any future discussions about possible violations of the ADR, in that it would be likely to have an impact on the willingness of those involved to freely and frankly discuss sensitive matters critical to UKAD's ability to fulfil its role in enforcing the ADR. This is particularly pertinent given that UKAD staff are required, pursuant to the ADR, to keep information regarding investigations under the ADR confidential, as discussed above. If UKAD were required to disclose its internal deliberations regarding a particular case to the public, it would violate its obligations in this regard.
22. I confirm that UKAD has weighed the above considerations against the public interest in disclosing the requested information and in so doing has considered the following factors in addition to those already stated above:
- a. The importance of transparency in public decision making, in particular the increased trust in government that this inspires; and
 - b. The importance of public oversight of decisions and in knowing that a decision has been made in accordance with an appropriate process.
23. Having weighed the public interest considerations both for and against disclosure, UKAD has concluded that there is a greater public interest in withholding the information than in disclosing it. UKAD has therefore concluded that the information (insofar as it relates to a request for internal correspondence between the UKAD Executive Team in relation to an investigation into possible ADRVs) is exempt from disclosure.

Section 42 – Legal Professional Privilege

24. Section 42 of the Act states:

Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information

25. Some of the information requested (insofar as it relates to correspondence with and between external and internal legal counsel) is exempt pursuant to section 42 of the Act for the following reasons:
- a. The correspondence was between a client and a lawyer (both between UKAD staff and internal legal counsel and between UKAD staff and external legal counsel);
 - b. The predominant purpose of the correspondence was the seeking and/or giving of legal advice; and
 - c. The privilege associated with the correspondence has not been waived (that is, it has not been previously disclosed to the world at large).
26. Having established that section 42 is engaged in this instance, UKAD is required to apply the public interest test.

27. The principle of legal professional privilege ('LPP') is fundamental to English law. The ability of clients and lawyers to exchange views and advice freely and frankly is vital to the proper administration of justice. As such, the Information Commissioner has advised that the public interest in disclosure will need to be strong to warrant a departure from the principles of LPP. UKAD refers to and adopts the public interest arguments in favour of and against disclosure as set out in paragraphs 15-16. Having considered these arguments, together with the general importance of the principle of LPP, UKAD has concluded that, in the circumstances, there is a greater public interest in withholding the information requested than in disclosing it.

Section 21 – Information accessible to applicant by other means

28. Section 21 of the Act states as follows:

Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information

29. With respect to some of the information which falls within the scope of your request, that would not otherwise be exempt pursuant to the exemptions discussed above, that information is exempt as it is reasonably accessible to you in light of the fact that it is already in the public domain and available free of charge online.

Where to from here?

30. 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.

31. 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



UKAD