

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 December 2018

**Public Authority:** UK Anti-Doping  
**Address:** Fleetbank House  
2-6 Salisbury Square  
London  
EC4Y 8AE

### Decision (including any steps ordered)

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1. The complainant submitted a request to UK Anti-Doping (UKAD) seeking communications between Mo Farah and his training team about performance enhancing drug use. UKAD refused to confirm or deny whether it held information falling within the scope of this request on the basis of sections 31(3) (law enforcement) and 36(3) (effective conduct of public affairs) of FOIA. The Commissioner has concluded that section 31(3) is engaged and that in all the circumstances of the case the public interest favours maintaining the exemption.

### Request and response

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2. The complainant submitted the following request to UKAD on 6 March 2018:

*'I am sending this request under the Freedom of Information Act.*

*1. Please provide a copy of all communications between UKAD, and*

*a. Mo Farrah*

*b. Mo Farrah's training team*

*Concerning performance enhancing drug use from January 1st 2010 to date.'*

3. UKAD contacted the complainant on 13 March 2018 and asked him to clarify the term 'Mo Farah's training team'. He responded on the same day and explained that:

*'I am happy to define the training team as the following individuals:*

- a. Alberto Salazar*
- b. Gary Lough*

*And any people you contacted as an intermediary to get in touch with them.'*

4. UKAD responded to the request on 2 May 2018. It refused to confirm or deny whether it held any information falling within the scope of this request on the basis of section 31(3) of the FOIA, by virtue of sections 31(1)(g) and 31(2)(b). UKAD also explained that it was relying on section 36(3) of FOIA, by virtue of section 36(2)(c), to also refuse to confirm or deny whether it held any information.
5. The complainant contacted UKAD on 4 May 2018 and asked it to conduct an internal review into its handling of this request.
6. UKAD informed him of the outcome of the internal review on 4 June 2018. The review upheld the application of the exemptions cited in the refusal notice.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 7 June 2018 in order to complain about UKAD's handling of his request. He argued that UKAD's refusal to neither confirm nor deny (NCND) whether this information was held was unsustainable and moreover that there was a strong public interest in disclosing the information sought by his request.
8. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
9. As explained above, UKAD is seeking to rely on section 37(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether UKAD is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not

considered whether the requested information – if held – should be disclosed.

## Reasons for decision

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### Section 31 – law enforcement

10. UKAD are relying on section 31(3) of FOIA to refuse to confirm or deny whether it holds any information falling within the scope of this request. This section states that:

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).'*

11. The subsection within section 31(1) which UKAD are relying on in this case is section 31(1)(g) which states that:

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

12. With the purpose in subsection 31(2) being that contained at section 31(2)(b) which states that:

*'the purpose of ascertaining whether any person is responsible for any conduct which is improper.'*

13. In determining whether a prejudice based exemption is engaged, the Commissioner considers that the following three criteria need to be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if it confirmed whether or not it held the information 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 confirming whether or not it holds the information 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, complying with section 1(1)(a) of FOIA 'would be likely' to result in prejudice or complying with section 1(1)(a) of FOIA 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk.

With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

### UKAD's position

14. UKAD argued that confirming whether or not it held information falling within the scope of the request would prejudice its ability to ascertain whether any person is committing an anti-doping rule violation ('ADRV') contrary to the UK Anti-Doping Rules ('ADR'). It explained that this purpose falls within section 31(2)(b) of FOIA.
15. In support of this position, UKAD explained that any communications of the type requested, if held, would be confidential. It referenced Article 5.9(2)(b) of the ADR in support of this position.<sup>1</sup> UKAD explained that it would not disclose the fact or content of such communications publicly, unless they fell to be disclosed pursuant to Article 8.4.1 of the ADR. This Article applies where a tribunal decides that the fact that an ADRV has been committed should be publicly reported.
16. UKAD argued that if it were to confirm, on request, that it held such communications in any case where it did so, this would enable people - other than those who were party to the communications - to discover the existence of otherwise confidential investigations. This in turn would create the risk of any such investigation being prejudiced or interfered with. UKAD noted that this would include any current investigations of potential ADRV charges by UKAD, were of course any relevant ones to exist. Furthermore, UKAD argued that confirming or denying whether it held information in the scope of this request would also enable athletes themselves to ascertain whether or not they were under investigation, and thus potentially thwart any such investigation.
17. UKAD explained that confidentiality of its investigations was also necessary so that people are not discouraged from assisting it with the exercise of its functions for the purpose identified in section 31(2)(b) of FOIA, for fear that such assistance may become public and that they may be subject to reprisals. It argued that without such confidentiality, anybody who did assist would be inhibited from being fully frank, for the same reason. UKAD emphasised that information provided voluntarily is vital to its ability to carry out its functions. This is particularly the case

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<sup>1</sup> '...Any information furnished to UKAD shall be kept confidential except when it becomes necessary to disclose such information to further the investigation of and / or to bring proceedings relating to an Anti-Doping Rule Violation, or when such information is reported to administrative, professional, or judicial authorities pursuant to an investigation or prosecution of non-sporting laws or regulations.'

as UKAD has no power to compel anybody to cooperate with it, or to provide information to it.

18. As explained below the complainant argued that his request would also encompass not only information about a particular investigation (if held) but also any more general communications UKAD may have had with the individuals named in the request, eg generic communications it may have had with all athletes on the subject of anti-doping. As a result, the complainant was of the view that complying with section 1(1)(a) of FOIA would not necessarily result in the prejudicial effects envisaged by UKAD. In response UKAD explained that even if the Commissioner accepted that such generic communications fell within the scope of the request, it remained of the view that adopting an NCND position was necessary in order not to reveal whether UKAD held any communications that would be specific to any investigation or prosecution of an ADRV charge.

#### The complainant's position

19. The complainant argued that his request concerned drug use in general, rather than any possible drug use by Sir Mo Farah, and given that the communications could concern drug use by other athletes, or general advice about how UKAD operates to detect drug use, it did not follow that a confirmation that this information is held (if indeed it was) would imply that UKAD was investigating Sir Mo Farah. He also argued that UKAD had applied the exemptions in a blanket manner and did not consider whether some of this generic information could, if it were held, be disclosed.

#### The Commissioner's position

20. With regard to the three limb test set out above, the Commissioner is satisfied that the first limb is clearly met; UKAD's ability to investigate violations of the ADRV clearly falls within the scope of the exemption provided at section 31(2)(b) of FOIA.
21. With regard to the second limb, the Commissioner is also satisfied that there is a clearly a causal relationship between UKAD confirming whether or not it holds the information and the prejudice which the exemption is designed to protect. She has reached this view because she accepts the validity of UKAD's position that complying with section 1(1)(a) could reveal whether or not it is conducting an investigation into the individuals named in the request and it is plausible in turn to see how if this knowledge was made public this could undermine any potential investigation. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. In reaching this finding, the Commissioner has taken into account the line of argument advanced by the complainant, ie that the request would also encompass generic

correspondence on the subject of anti-doping. The Commissioner accepts the complainant's position that the wording of his request is sufficiently broad to encompass *any* communications UKAD may have had with Sir Mo Farah, or the others named in the request, on the subject of performance enhancing drugs. However, if it were the case that UKAD did not hold *any* information falling within the scope of the request – be it generic communications or communications specific to a particular investigation – then to confirm that this is the case could reveal to the individuals in question that no active or current investigation was taking place. Conversely, if UKAD did hold information falling within the scope of this request, and it confirmed that this is the case, then if individuals in question had not received any generic communications about anti-doping, then they would now be aware that they were subject to an investigation. Therefore, in the Commissioner's view, even though the request encompasses general correspondence of the type envisaged by the complainant, compliance with section 1(1)(a) still potentially prejudicial.

22. With regard to the third criterion, the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring and therefore the third criterion is met. She has reached this finding given that complying with section 1(1)(a) risks not only having an impact on any current investigation into the individuals named in the request (if indeed any such investigation exists) but also risks having an impact on the confidentiality of any such investigations more broadly, and this in turn could discourage individuals assisting UKAD with such investigations. The Commissioner has also taken into account the importance of a public authority adopting a consistent NCND position in respect of similar requests, regardless as to whether it holds the information, in order to ensure that issuing a NCND response is not in itself prejudicial.
23. For the reasons set out above, section 31(3) of FOIA is therefore engaged.

### **Public interest test**

24. However, section 31(3) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

*Public interest arguments in favour of confirming whether or not the requested information is held*

25. The complainant argued that there is a strong public interest in releasing information covered by this request. He suggested that should there be

serious concerns about a senior British athlete, there is a strong public interest in knowing what these concerns are given Sir Mo Farah's high profile. Moreover, the complainant argued that if UKAD was not conducting an investigation into Sir Mo Farah, then there seemed to be little public interest in withholding any generic correspondence falling within the scope of the request.

26. UKAD explained that it recognised the importance of transparency and accountability in general, both in terms of the public confidence that this inspires and also in providing the public with the ability to examine decisions taken in particular cases.

*Public interest arguments in maintaining the exclusion to confirm or deny whether the requested information is held*

27. Conversely, UKAD argued that there is an inherent public interest in a public body maintaining confidentiality in respect of the type of communications requested. UKAD explained that it had also considered the prejudice to the exercise of its investigatory functions if the exemption were not maintained in this instance, and the effect this would have on its ability to further its important public policy objective of eliminating doping in sport.
28. UKAD explained that it had concluded that the public interest in knowing whether it has communicated with the individuals specified concerning performance enhancing drug use during the period specified is outweighed by the public interest in ensuring the effectiveness of it carrying out its functions for the purpose identified in section 31(2)(b).

*Balance of the public interest arguments*

29. The Commissioner agrees that it is important for the public to have confidence in the ability of UKAD to effectively protect UK sport from doping violations. Furthermore, the Commissioner is also prepared to accept that confirming whether or not UKAD holds any requested information could potentially provide the public with reassurance that even high profile athletes can be subject to investigation by UKDA if there is suspicion that they have committed ADV.
30. However, in the Commissioner's view there is a very strong public interest in ensuring that UKAD is able to effectively investigate any ADV. Confirmation as to whether a particular athlete is subject to an investigation by UKAD risks directly impacting not only on the conduct of any such investigation into that athlete, should one exist, but also risks having much broader consequences by undermining UKAD's ability to conduct such investigations in the future. In light of these broader consequences, the Commissioner has concluded that the public interest favours maintaining the exemption contained section 31(3) of FOIA.

Reference: FS50753154



31. In light of this decision, the Commissioner has not considered UKAD's reliance on section 36(3) of FOIA.



## Right of appeal

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32. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**