

Ref: FOI-363

Sent via email only:

15 February 2023

Dear [REDACTED]

1. Thank you for your email of 21 January 2023 in which you requested information from UK Anti-Doping ('UKAD') under the Freedom of Information Act 2000 ('the Act').
2. You requested the following information:

"Can I please request all information you have on drug tests carried out in relation to the South African boxer Zolani Tete. Including the following specific points:

1. *Dates and times of all tests conducted.*
2. *Dates when any A sample analysed.*
3. *Results of any A sample tests, and dates results were known.*
4. *Dates of, and to whom, any notifications provided on A sample test results.*
5. *Results of any A sample tests*
6. *Dates of any request to have a B sample tested*
7. *Dates when any B sample analysed.*
8. *Results of any B sample tests, and dates results were known.*
9. *Dates of, and to whom, any notifications provided on B sample test results.*
10. *Results of any B sample tests*
11. *Current status of any UKAD investigation in relation to A and or B sample test results for Zolani Tete."*

Response

3. UKAD neither confirms nor denies whether it holds the information in parts 1. to 11. of your request. In doing so, UKAD relies on the exemptions in sections 31 and 40 of the Act.

4. Please note that this “neither confirm nor deny” response should not be taken as an indication that the information you have requested is or is not held by UKAD, or as in any way indicative of the position of the individual in your request. It is simply an application of the relevant tests in the context of the wider framework, rules, and procedures applicable to UKAD as an organisation subject to the Act.
5. UKAD is taking a “neither confirm nor deny” approach to each of your individual requests. The reason for taking such an approach is the same for each request made, therefore UKAD provides a singular response to your requests, rather than addressing each in turn.

Section 31 – law enforcement

6. Section 31(1) of the Act 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)...

7. Section 31(2) of the Act 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...

8. UKAD’s functions, including the sample testing process in the system that applies under the UK Anti-Doping Rules (the ‘Rules’)¹, clearly fall within the scope of the exemption provided at section 31(2)(b) of the Act.
9. Pursuant to the Rules and the World Anti-Doping Agency’s Code (the ‘WADC’) and International Standards, and to safeguard its effectiveness, all stages of the sample testing process are confidential, and so specific information generated by or derived from it, including whether or not any particular test took place and any test results (to the extent such exists) will only be published if it is determined that an Anti-Doping Rule Violation (or ‘ADRV’) has been proved.

¹ See: [https://www.ukad.org.uk/sites/default/files/2020-11/2021 UK Anti-Doping Rules v1.0 FINAL.pdf](https://www.ukad.org.uk/sites/default/files/2020-11/2021%20UK%20Anti-Doping%20Rules%20v1.0%20FINAL.pdf).

10. Further, it is UKAD's view that if it were to confirm or deny whether it tests an athlete, it would risk undermining the testing program. This is because a fundamental principle of drug testing is that it is conducted without advanced notice, and such information would indicate to an athlete at a similar level of competition the likelihood of being tested at any given time.
11. More generally, it would give an insight into UKAD's testing strategy and may enable testing patterns to be identified, providing assistance to any athletes who may seek to cheat by attempting to evade testing or avoid the detection of ADRVs. Further to this, athletes may be less likely to cooperate with UKAD's testing programme if the confidentiality of the process was not maintained.
12. UKAD's position is that any disclosures, including confirmation as to the presence or otherwise of such information, would undermine the integrity and effectiveness of the testing programme and so prejudice the exercise of UKAD's functions.
13. For similar reasons, UKAD considers that the public interest lies in not confirming or denying whether we hold the information responsive to your request. UKAD of course recognises the importance of transparency and accountability in general and specifically in providing the public with more understanding of its regime.
14. However, to do otherwise in response to your request would, in our view, genuinely risk undermining UKAD's ability to organise and operate its testing programme across sport. There is an important public interest in the maintenance of an effective anti-doping regime – so that UKAD can work towards its public policy objective of eliminating doping in sport.

Section 40 – personal information

15. UKAD also neither confirms nor denies that it holds the information requested under the exemption in section 40 of the Act.
16. If UKAD were to confirm or deny whether it held the information requested, it would disclose 'personal data' as defined in Section 3(2) of the Data Protection Act 2018 ('DPA') and Article 4(1) of the General Data Protection Regulation (EU) 2016/679 ('GDPR'). This is because such a confirmation or denial would be information relating to an identifiable living individual.
17. Section 40(5B) of the Act states, in respect of personal data:

The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –

(a) Giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –

(i) Would (apart from this Act) contravene any of the data protection principles.

18. Having determined that to confirm or deny whether UKAD holds the information would disclose personal data, UKAD has gone on to consider whether such disclosure would contravene any of the data protection principles as set out in Chapter 2, Article 5(1)(a) of the GDPR and section 8 of the DPA, being that it is necessary for the performance of a task carried out in the public interest (i.e., eliminating doping in sport). However, as set out in the Information Commissioner's (ICO) Guidance Note on section 40 of the Act, UKAD's lawful processing of personal data for this purpose does not extend to disclosure to the general public under the Act².

19. Accordingly, UKAD would only be able to disclose such information on a different basis. The only two bases that may apply are consent (being consent to disclose information under the Act) or if disclosure would be necessary for the purposes of legitimate public interests. If an individual athlete had been tested by UKAD, they would have an expectation that such information would remain confidential (including the fact of whether or not they had been tested); therefore, UKAD could reasonably infer that consent has not been provided to disclose whether or not a test has been carried out, and what, if applicable, any consequences of that test were.

20. Therefore, UKAD may only lawfully disclose information of this nature to you if it is necessary for the purposes of legitimate interests. To establish this lawful basis, all three of the following criteria must be met:

- a. The purpose of disclosure is a legitimate public interest;
- b. Disclosure must be necessary for that purpose; and
- c. The legitimate interests outweigh the interests and rights of the individual.

² See: <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>.

21. UKAD has concluded that to confirm or deny that it holds the information requested would not be fair or lawful – as explained below. Therefore, pursuant to section 40(5B) of the Act, UKAD can neither confirm nor deny that it holds the information.

22. In coming to this conclusion UKAD has considered the following factors:

- a. That information of the type sought (an Athlete's test history) is not trivial personal data.
- b. The reasonable expectations of the data subject. We have set out above the confidentiality of the testing process – all athletes subject to the Rules have a reasonable expectation that UKAD would not release any information relating to that process, if it existed; and
- c. Whether there is a legitimate public interest in the disclosure. UKAD recognises 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 evaluate UKAD's testing programme. On the other hand, UKAD has taken account of the fact that confirming or denying whether UKAD tests an athlete would contravene the rights of athletes to have the confidentiality of that information respected pursuant to the Rules and the WADC. In this particular case, UKAD does not consider that there is an overriding legitimate public interest in confirming or denying whether it holds the information requested, particularly given the information UKAD publishes about ADRVs under the Rules³.

23. As UKAD's view is that to confirm or deny whether it holds the information would not be lawful, it necessarily follows that should doing so disclose any information considered 'special category personal data' as defined in Chapter 2, Article 9 of GDPR, UKAD would not have a lawful basis for disclosing such information to you either.

24. We emphasise that this "neither confirm nor deny" response to your request should not be taken as an indication that the information you have requested is or is not held by UKAD.

³ Information about current and historic ADRVs can be found on the UKAD website, see: <https://www.ukad.org.uk/sanctions>.

Conclusion

25. 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 request and should be addressed via email to: foi@ukad.org.uk. Please remember to quote the reference number above in any future communications.
26. 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

A handwritten signature in blue ink that reads "UK Anti-Doping".

UK Anti-Doping