

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 September 2008

Public Authority: King's College London
Address: Strand
London
WC1R 2LS

Summary

The complainant requested the standard operating procedures used by the public authority when testing for the use of performance enhancing substances by athletes. The public authority refused the request, citing sections 38(1)(a) (health and safety) and 43(2) (commercial interests) of the Act. The Commissioner has concluded that the health of sports people would be likely to be endangered through disclosure and has upheld the public authority's application of section 38(1)(a). However, the Commissioner has also concluded that the refusal notice issued by the public authority was inadequate and in breach of section 17. As the section 38(1)(a) conclusion covers the entirety of the information falling within the scope of the request, it has not been necessary for the Commissioner to reach any conclusion in respect to section 43(2).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 16 March 2006, the complainant made the following information request:

"The standard operating procedures used in the testing for T/E ratios of urine samples as part of the sporting anti doping procedures.

The standard operating procedures used in the testing of IRMS tests of urine samples as part of the sporting anti doping procedures.

The standard operating procedures used in the testing of T/LH ratios of urine

samples as part of the sporting anti doping procedures.

All the standard operating procedures results on the IRMS tests and the T/LH for urine sample A035571, ATN 38988. This sample is extremely well documented as being my sample; as such you have the permission to release the data to me."

3. The public authority responded to this on 6 April 2006. The public authority refused the request, citing sections 38 (health and safety) and 43 (commercial interests). The refusal notice did not specify which subsections of the exemptions cited were being applied and provided no explanation as to why the public authority considered the exemptions cited to be relevant or why it considered that the balance of the public interest favoured maintenance of the exemptions. Neither did the public authority advise the complainant of the details of its internal review procedure, or confirm that it had no such procedure in place.
4. The complainant responded to the public authority on 10 April 2006 raising the issue of the lack of explanation given in the refusal notice and asked if an internal appeal was possible. The public authority responded to this on 18 April 2006 and provided some further explanation as to why the exemptions cited were considered to apply. In connection with section 38, the public authority believed that disclosure could endanger the health and safety of athletes and in connection with section 43 the public authority believed that its own commercial interests could be prejudiced through disclosure. The public authority confirmed that the complainant could request an internal appeal if he was dissatisfied with the reasons given for withholding the information.
5. The complainant requested an internal review by letter dated 24 April 2006. The public authority responded on 5 June 2006 stating that the conclusion of the review was that the refusal was upheld.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 7 July 2006 and raised the issue of the refusal of the public authority to disclose the information requested. The fourth part of the request above refers to the complainant's own test. The stance of the public authority was that this would not be personal data for its purposes as it did not have sufficient information to enable it to relate the reference number of a sample to any individual. The public authority also stated that it would be data processor for this information, with UK Sport being the data controller. Following the intervention of the Commissioner, the public authority agreed that it would forward the fourth part of the request to UK Sport in order that it would be responded to in accordance with the requirements of section 7 of the Data Protection Act 1998. At the point of being passed to UK Sport this part of the request was considered resolved for the purposes of this complaint and as such the Commissioner has not considered it further in this notice.

Chronology

7. The Commissioner contacted the public authority initially on 25 October 2007. The public authority was asked for further information as to why it considered that the exemptions cited applied. The Commissioner also noted that the complainant had been given little explanation concerning the exemptions cited at either the refusal notice or internal review stage. In connection with the exemptions cited, the public authority was asked to reply to the following:

- Section 38
 - Specify which individuals would have their health and/or safety endangered through disclosure.
 - Specify how and why this endangerment would, or would be likely to occur.
 - Address why the balance of the public interest is considered to favour the maintenance of this exemption.
- Section 43
 - Specify to which organisation prejudice would result.
 - Specify how and why prejudice to commercial interests would result.
 - Address why the balance of the public interest is considered to favour the maintenance of this exemption.

The public authority was also asked to provide to the Commissioner a copy of the information withheld from the complainant.

8. The public authority responded to this on 29 November 2007. In relation to section 38, the public authority stated that it believed that disclosure would assist the engineering of anabolic steroids that could not be detected in laboratory tests. The public authority cited the case of the Bay Area Laboratory Cooperative (BALCO), a US based company that produced an anabolic steroid with the specific intention that this would not be detectable through the existing drug testing regime. Information provided by a whistleblower eventually allowed an effective test for this drug to be developed. At least one British athlete was found to have taken performance enhancing drugs supplied by BALCO.
9. The public authority believed that the BALCO case was relevant in connection with the citing of section 38 in that it shows there are chemists willing to develop performance enhancing drugs with the specific intention that these will be undetectable through the drug testing regime. The stance of the public authority was that the information withheld here would assist this process.
10. The public authority went on to describe how prolonged use of anabolic steroids endangers health. The risks include infertility, raised blood pressure, increased risk of cardiovascular disease and liver damage. Their use may ultimately lead to death due to chronic toxicity. The public authority also stated that adverse psychiatric effects had been identified in scientific research into the results of steroid use and cited the following:

[research suggests] *that major psychiatric symptoms may be a common adverse effect of these drugs”.*

<http://ajp.psychiatryonline.org/cgi/reprint/145/4/487>

The public authority also cited the following:

“Users claim the drug makes them feel more aggressive. Normally calm people can become irritable and aggressive, or even violent, and they can experience mood swings... You may find that you start getting paranoid and confused, along with having trouble sleeping.”

www.talktofrank.com/drugs.aspx?id=170#effects

11. The public authority also provided a statement by Professor David A Cowan, the director of the public authority’s Drug Control Centre. Professor Cowan described the physical harm that can result from prolonged use of anabolic steroids and stated that psychological and personality changes are also possible. Professor Cowan also stated that *“...release of the procedures would aid the rogue chemist to produce substances that would beat our tests.”*

12. The public authority went on to address the issue of the extent to which drug use exists in sport. To this end, the public authority cited the following:

"I have had postcards from people telling me I'm not catching them... We get a lot of emails from Hotmail accounts. People think they've won and they've cheated the system".

Michelle Verroken, Former director of Ethics and Anti-Doping at UK Sport

http://news.bbc.co.uk/sport1/hi/front_page/3101375.stm

"it's probable that an awful lot of people who appear to be negative are in fact doping ... you can't believe what you're seeing"

Professor Peter Sönsken, doping advisor to the International Olympic Committee

http://news.bbc.co.uk/sport1/hi/front_page/7096221.stm

13. On section 43, the public authority described how it is one of 33 laboratories worldwide that are accredited by the World Anti Doping Agency (“WADA”) for carrying out drug tests and the only one in the UK. The public authority stated that it believed that disclosure would assist in the creation of undetectable drugs and that this would be incompatible with the goals of WADA. The harm to the relationship between the public authority and WADA could jeopardise the accreditation of the public authority and in turn reduce its income.

14. The public authority also stated that it considered its laboratory testing procedures to be its *“own unique intellectual property”* and that it would not wish these to be disclosed as this would lessen their commercial value. Overall, the

public authority stated that it believed the grounds for withholding the requested information to be “*overwhelmingly strong, outweighing any public interest in release*”.

15. The public authority supplied to the Commissioner a copy of the information withheld from the complainant, the Drug Control Centre Standard Operating Procedures, which shows the public authority's procedures for carrying out the tests specified in the request. Some sections of the version of the Standard Operating Procedures provided to the Commissioner post date the request. Whilst these sections of the Standard Operating Procedures are outside the scope of the request as they were not held at the time that the request was made, the Commissioner accepts that the equivalent information held at the time of the request was of a similar level of detail.

Findings of fact

16. The public authority is accredited by WADA to carry out drug testing.
17. The public authority has a contract with UK Sport to conduct drug tests.

Analysis

Procedural matters

Section 17

18. In failing to provide an adequate explanation as to why the exemptions cited were considered to apply the public authority failed to comply with the requirement of section 17(1)(c) and in failing to specify the relevant subsections of the exemptions cited, the public authority failed to comply with section 17(1)(b). In failing to adequately explain why the public interest favoured the maintenance of the exemptions cited, the public authority breached section 17(3)(b). Finally the public authority failed to make the complainant aware of its internal review procedure and the complainant's right to complain to the Commissioner should he have been dissatisfied with the outcome of any internal review process in breach of section 17(7).

Exemption

Section 38

19. Section 38(1) provides that information will be exempt if its disclosure would, or would be likely, to:
- a) endanger the physical or mental health of any individual, or
 - b) endanger the safety of any individual.
20. In this case, the public authority applied section 38(1)(a). In considering whether this exemption has been applied correctly, the Commissioner must assess firstly whether the physical or mental health of any individual would or would be likely to be harmed as a result of disclosure of the information in question. The public authority has argued that disclosure in this case would result in endangerment to the physical and mental health of athletes. The Commissioner has focussed on whether endangerment would result, rather than whether it would be likely to result. In order for the Commissioner to conclude that endangerment would occur if the requested information were disclosed, the evidence must indicate that the endangerment to the physical or mental health of an individual would be at the least more probable than not. This exemption is qualified by the public interest. This means that, if disclosure would endanger the physical or mental health of an individual, it is necessary to go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.

Endangerment to physical or mental health?

21. Whilst there are sports in which the use of performance enhancing drugs is commonly held to be particularly prevalent, the term 'athletes' for the purpose of this notice is taken to relate to any sports person who may have or may in future use performance enhancing anabolic steroids.
22. The Commissioner is aware that an individual requestor who is a non chemist could not use the information requested in order to assist in the development of undetectable drugs. However, in considering disclosure under the Act the Commissioner must regard disclosure as 'global' rather than disclosure solely to a requestor in a particular case. As such the effect of a decision by the Commissioner to order disclosure in this case would be to make the withheld information publicly available, including to those individuals expert enough to make use of the requested information in the manufacture of undetectable drugs.
23. The central argument of the public authority is that disclosure of the contents of the Drug Control Centre Standard Operating Procedures would assist chemists in creating performance enhancing drugs that would be undetectable using existing testing methodology. Of note on this point is the description given by the public authority of how it was possible to detect the substances produced by BALCO. This was as a result of a whistleblower providing details of the substances manufactured by BALCO to a testing laboratory which enabled the development of an effective test. This demonstrates that it is possible to amend testing procedures to detect a particular substance. The Commissioner is satisfied based

on the evidence supplied by the public authority and particularly in view of the level of detail within the Standard Operating Procedures that the reverse would also be possible; that it would be possible to manufacture substances that would not be detectable through existing drug testing procedures with knowledge of the relevant procedures. The Commissioner therefore accepts that knowledge of the precise drug testing process would, therefore, assist in the creation of substances designed to avoid detection through these procedures.

24. Having concluded that the withheld information would assist in the creation of undetectable drugs, the Commissioner has also considered the extent to which chemists would attempt to manufacture such drugs and whether athletes would be prepared to take these. On this point, specific evidence is available. The public authority has referred to the development by BALCO of an undetectable drug. That example is indeed relevant in demonstrating the willingness of chemists to manufacture drugs with the intention that these will be undetectable and of athletes to take these. Further evidence of the willingness of athletes to take performance enhancing drugs is provided through the quotes given above at paragraph 12. On the basis of this evidence, the Commissioner accepts that some chemists would seek to use the withheld information for the purpose of manufacturing undetectable anabolic steroids and that there would be some athletes willing to use these.
25. Having concluded that disclosure would contribute to the manufacturing of undetectable drugs and that some chemists and athletes would seek to benefit from this, it is necessary to consider whether taking these drugs would endanger the physical or mental health of an athlete. The representations of the public authority on this point are given above at paragraphs 10 and 11. The Commissioner notes that the public authority has referred to Psychiatry Online and the UK Drug Advice Service in support of its arguments here and has provided expert testimony on this point in the form of the statement from the director of the Drug Control Centre. On the basis of the evidence on this point supplied by the public authority, the Commissioner accepts that the taking of performance enhancing anabolic steroids would, in the long term, endanger both the physical and mental health of an individual.
26. The conclusion of the Commissioner is that disclosure of the requested information would endanger the physical or mental health of athletes. Subsection 38(1)(a) is, therefore, engaged.

Public Interest

Factors considered

27. In considering where the balance of the public interest lies, the Commissioner has taken into account the following factors:
 - the extent of the risk involved;
 - the severity of the outcome were that risk to come about;
 - whether disclosure would further raise awareness of drug use in sport and contribute to the public debate on this issue;

- the promotion of transparency and accountability of the public authority through disclosure.
28. There is clearly a public interest in protecting the health of athletes. When considering what weight to give the arguments in favour of maintaining the exemption the Commissioner has been mindful of the extent of the risk, in other words the number of people likely to be affected. He notes that the endangerment is only to a relatively small number of individuals. Arguably the public interest in maintaining the exemption may attach greater weight the larger the number of people affected. The Commissioner would also acknowledge that in some cases the number of individuals affected can be used to justify the weight given to arguments on the opposite side of the scales. In other words the larger the number of individuals impacted the stronger the arguments may be for disclosing the information. For example, where an existing and critical health risk impacting on a large number of individuals would be brought to light through disclosure, there would still be a valid public interest argument in favour of disclosure on the grounds that those affected should be alerted to the existence of this risk to their health.
29. When considering the extent of the endangerment to the physical and mental health of athletes that would result from disclosure, the Commissioner also considers it relevant to take into account that the endangerment will only result where athletes choose to take performance enhancing drugs. This means that the extent of the endangerment as an outcome here is significantly reduced when compared with a situation where endangerment would be the involuntary result of disclosure.
30. However, the Commissioner has also considered the severity of the harm to the physical and mental health of athletes who do choose to take performance enhancing drugs. On the basis of the evidence provided by the public authority, the Commissioner considers the severity of the endangerment to the physical and mental health of those athletes who choose to take performance enhancing drugs to be high. There Commissioner has therefore attached significant weight to this factor. There is clearly a public interest in preventing endangerment to the mental and physical health of any athlete.
31. The Commissioner recognises that drug use in sport is an issue upon which there has been a considerable amount of public debate. Whilst it could be argued here that the information is of such a level of technical complexity that disclosure would not result in any furthering of public understanding, when considering whether disclosure of information would be in the public interest the technical complexity of the content of the information is of no significance. In any event the Commissioner believes that disclosing further detail about the methods of detection used by testing centres would increase public understanding of the issues surrounding the detection of drug use in sport and as such would inform the debate on this issue. In particular the requested information may enable those involved in and subject to drug testing to contribute to the debate about the efficacy of different methods from a more informed stand point. The Commissioner therefore considers this argument to have significant weight.

32. In this case, disclosure clearly would result in improved transparency given that the details of the procedures used in testing for performance enhancing drugs are kept confidential. Arguably greater transparency about the methods employed by the public authority to test athletes may improve accountability and public confidence in the processes employed by the public authority. The Commissioner is also aware the degree of controversy about the reliability of testing processes and the relatively small amount of information available in the public domain.
33. However in considering the weight to attach to the aforementioned arguments the Commissioner has also noted the fact that the public authority is one of only 33 accredited drug testing laboratories worldwide. In particular the Commissioner notes that this accreditation reflects the fact that the public authority's procedures have been subject to review and have met the standards set by WADA. Further an element of transparency is provided through the information published on the website of the public authority. This public authority's website describes its role in providing testing for performance enhancing drugs and gives some description of the methodology it uses in carrying out this testing.
34. Where disclosure would bring to light information about a risk to public health relating to a previously existing but not widely recognised danger to public health the Commissioner is of the view that this would need to be considered when weighing the public interest. However, in this case the risk to health arises as a result of disclosure. In this case the Commissioner does not consider that the specific information requested in this case would highlight risks to health arising from drug use in sport which are not already known. Therefore he has not considered this as a relevant factor in favour of disclosure.

Weighing the public interest factors

35. In considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner has weighed the factors set out at paragraphs 27-34 above. Whilst the Commissioner accepts that there is a public interest in enhancing the public's understanding of drug use in sports, to allow the public to contribute more meaningfully to the debate about the efficacy of different methods from a more informed stand point, to encourage greater transparency and accountability to improve public confidence in the procedures employed by bodies like the public authority he considers that the extent and severity of the harm to the physical and mental health of athletes identified in this case to outweigh these factors. As such on balance the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 43

36. As the conclusion of the Commissioner on section 38 relates to the withheld information in its entirety, it has not been necessary to also consider whether section 43(2) was applied correctly and therefore the Commissioner has formed no conclusion on this issue.

The Decision

37. The Commissioner finds that the public authority complied with the Act in that the exemption provided by section 38(1)(a) was applied correctly. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of section 17(1)(b) and (c), section 17(3)(b) and 17(7) in its initial refusal.

Steps Required

38. Whilst the Commissioner has concluded that the public authority failed to comply with section 17(1)(b) and (c), section 17(3)(b) and 17(7) in its initial refusal, this breach does not necessitate remedial action at this stage. The public authority is not, therefore, required to take any steps.

Right of Appeal

39. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk
Website: www.informationtribunal.gov.uk

41. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 25th day of September 2008

Signed

**Nicole Duncan
Head of FOI Complaints**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Section 38

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.”

Section 43

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”