

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2023

Public Authority: UK Anti-Doping
Address: SportPark
3 Oakwood Drive
Loughborough
LE11 3QF

Decision (including any steps ordered)

1. The complainant has requested information from UK Anti-Doping (UKAD) related to tests carried out by UKAD in respect of footballers playing in teams subject to the jurisdiction of the Football Association. UKAD provided some information but withheld other information, citing section 31 of FOIA (law enforcement).
2. The Commissioner's decision is that UKAD appropriately cited section 31 of FOIA and that the public interest favours maintaining the exemption. However, it breached section 10(1) and 17(1) of FOIA.
3. The Commissioner does not require further steps.

Background

4. UKAD explained to the Commissioner that the samples it collects are in respect of all footballers and not just "footballers under the jurisdiction of the FA". These "are analysed in a World Anti-Doping Agency (WADA) accredited laboratory".
5. UKAD describes ESAs (Erythropoiesis Stimulating Agents) as follows:

"a group of drugs that increase the number of red blood cells produced in the body. Consequently, ESAs increase the delivery of

oxygen to muscle tissue allowing muscles to sustain work for longer or at a higher intensity prior to fatigue. ESAs is a term used to describe several drugs that may have this effect on the body. Screening for ESAs is not part of routine Sample analysis and requires additional specialist testing as erythropoietin (EPO), a type of ESA, is also naturally produced primarily in the kidneys...”

It describes IRMS as follows:

“Testosterone is classified as an anabolic androgenic steroid, which is prohibited when administered exogenously. Testosterone is anabolic in nature as it promotes the building, maintenance, and repair of tissue such as skeletal muscle. GC/C/IRMS, or ‘IRMS’ for short, is a specialist technique used to determine whether the testosterone (and its metabolites) present in a urine Sample originates from natural production or from the administration of a synthetic form of the Prohibited Substance.”

6. The publishing test data are published each quarter at the following link:

[Quarterly Reports on UKAD's Testing Programme | UK Anti-Doping](#)

“These reports set out the number of tests that are conducted in a quarter and provide details of the number of tests carried out in different sports with reference to different national governing bodies, and for IFs [International Federations] and other NADOs [National Anti-Doping Organisations]. UKAD publishes these reports in accordance with Code Article 14.4 and the obligation on UKAD to ‘publish publicly a general statistical report of their Doping Control activities.’ UKAD does not publish the number or percentage of tests that are subject to ESA and IRMS analysis as we believe that this would undermine our ability to carry out our function...”

Request and response

7. On 1 September 2022, the complainant wrote to UKAD and requested information in the following terms:

“a. The total number of tests UKAD conducted on all footballers in 2016, 2017, 2018, 2019, 2020 and 2021.

b. Of these tests, How many were ESA tests? (in 2017, 2018, 2019, 2020, 2021).

- c. Of these tests, How many were IRMS [Isotope Ratio Mass Spectrometry] tests? (in 2017, 2018, 2019, 2020, 2021).”
8. UKAD requested clarification of the request on 15 September 2022. querying:
- “i. By “all footballers” whether you intended this to cover The Football Association (‘FA’), Scottish Football Association (‘SFA’) and Football Association of Wales (‘FAW’).
 - ii. If your request related to calendar years or football seasons.
 - iii. In relation to “IRMS tests”, whether this was a reference to gas chromatography carbon isotope ratio mass spectrometry (‘GC-C-IRMS’)
 - iv. In relation to “ESA tests” and “IRMS tests”, whether your request related to the number of samples which have been subjected to ESA and GCC-IRMS testing in the stated years.”
9. The complainant clarified on the same date as follows:
- “i. Preferably just the FA.
 - ii. I assume full calendar years is easiest for you - if that is not the case then football seasons is fine.
 - iii. Correct.
 - iv. Correct. Clarifying how many of each.”
10. On 11 November 2022 UKAD responded. Regarding part a) UKAD provided the requested information. Regarding parts b) and c) of the request UKAD confirmed that it held the information but that it was exempt under section 31 of FOIA (law enforcement).
11. UKAD received two emails from the complainant on 5 December 2022 requesting an internal review of its response because of the citing of section 31 of FOIA and providing a link¹ to UEFA’s website to underpin their argument.
12. Following an internal review, UKAD wrote to the complainant on 10 January 2023. It maintained its position that the information requested

¹ [uefa anti-doping flyer 2021-22 digital 003 .pdf](#)

at parts b) and c) was exempt under section 31(1)(g) and section 31(2)(b) of FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 6 February 2023 to complain about the way their request for information had been handled.
14. The Commissioner considers that the scope of this investigation is UKAD's citing of section 31 of FOIA and any procedural errors that may have occurred.

Reasons for decision

15. Section 31 of FOIA states that -

"(1)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)..."

16. The purposes (section 31(2)) UKAD has identified regarding section 31(1)(g) are

"...(b)the purpose of ascertaining whether any person is responsible for any conduct which is improper,

17. The Commissioner's guidance² states that the -

"exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime..."

18. To engage a prejudice based exemption such as section 31 there must be the likelihood that disclosure would, or would be likely to cause
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² [law-enforcement-foi-section-31.pdf \(ico.org.uk\)](https://ico.org.uk/law-enforcement-foi-section-31.pdf)

prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to do so:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed 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 the potential disclosure of the information being withheld 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 disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
19. Consideration of the exemption at section 31 is a two-stage process, even if he accepts that the exemption is engaged the Commissioner needs to consider where the public interest lies. UKAD has provided the withheld information to the Commissioner for his consideration.

UKAD's view

20. UKAD has explained that it provides detail (ESA and IRMS analysis of Samples) to WADA regarding its analysis of samples through the global Anti-Doping Administration & Management System in compliance with the requirements of the Code. WADA publishes annual testing figures in its reports³ where there is an overall analysis including UKAD's within the context of total testing:

"The information published by WADA regarding UKAD, does not break down the analysis of Samples subject to ESA or IRMS analysis by sport and this information is not publicly available."

21. The only National Anti-Doping Agency (NADA) that publishes the breakdown of ESA analysis by sport (since 2015) is NADA Deutschland. As far as UKAD is aware, NADA does not publish a breakdown of IRMS analysis by sport. UKAD is also not aware of any National Anti-Doping

³ [2021 anti-doping testing figures en.pdf \(wada-ama.org\)](#)

organisation (NADO) that publishes this breakdown. Each Anti-Doping Organisation (ADO) publishes "a general statistical report of their Doping Control activities in the manner it chooses to discharge this obligation". The International Federation for football – FIFA is a code signatory and did not publish this analysis in its Anti-Doping Report 2021/2022.

22. UKAD refers to the internal review request where the complainant said that UEFA publishes information about ESA and IRMS analysis. UKAD argues that UEFA is not an ADO because it is not a Code Signatory. UKAD states that it has had three opportunities to carefully consider the consequences of disclosing the information requested at parts b) and c) of the request. It believes it is entitled to withhold this information as it would/would be likely "to prejudice the exercise by UKAD of its function of ascertaining whether any person is responsible for conduct which is improper".
23. UKAD explains that it is an arms-length government body which is "largely funded by a DCMS grant". It was established "to discharge the UK government's obligation to the United Nation's International Convention against Doping in Sport". UKAD implements and complies "with the Code and International Standards issued by WADA". It makes "sure sports meet their obligations under the UK government's National Anti-Doping Policy and the UK Anti-Doping Rules". UKAD stresses that, "the primary purpose of the anti-doping process is the elimination of doping in sport through the detection and prevention of Anti-Doping Rule Violations (ADRVs)".
24. The implementation of a Test Distribution Plan and the analysis of samples it has collected are part of the core function of UKAD as they are "fundamental to the prevention and detection of ADRV's". It "publicly reports outcomes on its website...in a manner compliant with/in accordance with the Code when an ADRV is determined". Where an athlete has committed a violation it "will ordinarily include details of the Prohibited Substance (s) detected". This is not routine analysis and "additional, specialist analysis [ESA and IRMS analysis] is required in order to detect particular Prohibited Substances".
25. UKAD contends that -

"the disclosure of the requested data would have a serious detrimental effect on the overall effectiveness of UKAD's testing and analysis operations and be likely to prejudice UKAD's ability to carry out its function of the prevention of doping in sport through the detection and prevention of ADRVs."

UKAD provided further detailed argument as to how it had reached its

conclusions. The Commissioner has taken account of these arguments but cannot reproduce them here as they are considered confidential.

26. Although UKAD acknowledges points made by the complainant:

“...it is not possible from the publicly available data concerning UKAD to calculate how many of the total ESA or IRMS tests relate to any specific sport, and...UKAD tests all Athletes and not just footballers.”

27. UKAD also acknowledges the complainant's argument that data is available from WADA and that NADA Deutschland has chosen to publish some of the data (the data regarding ESAs). UKAD describes NADA's approach as appearing to be “exceptional”. It has taken into consideration several factors before deciding whether disclosure would undermine its specific functions by considering all specifically relevant matters such as – its Test Distribution Plan, the intelligence it holds regarding athletes, the use of prohibited substances in the UK/regarding specific sports.

28. It also highlights the risk of misinterpretation and incorrect conclusions being reached by the public, providing argument that cannot be detailed here. UKAD contends that, even with explanatory information to mitigate misinterpretation, the data may be published without such explanation:

“UKAD's position remains that to reveal the data requested would undermine and be likely to prejudice its ability to carry out its public function of preventing. UKAD has therefore determined that the section 31 of the Act applies to this information.”

29. UKAD's testing strategy states that an important benefit of the testing and sample analysis programme is the use of the intelligence it gets from the data “to drive the testing strategies of ADOs”. This data is “invaluable in shaping the strategic planning and directing of their TDP... over time that allows ADOs to focus their limited resources on testing the right Athletes at the right time”.

30. The Commissioner does not accept UKAD's argument concerning misinterpretation because any data can be misinterpreted by the public and this would be an argument to support a public authority never publishing statistical data.

31. However, the Commissioner accepts that the harm relates to the exercise of UKAD's functions for the purpose of ascertaining whether any person is responsible for improper conduct. He also agrees that UKAD has established a causal link between disclosing the information and the

undermining of its public function that is real and of substance and that the exemption is engaged at the lower level of prejudice.

32. The Commissioner will now go on to consider whether the public interest in disclosure outweighs maintaining the exemption.

Public interest test

Public interest factors in favour of disclosing the requested information

33. The complainant's view is that they are requesting information "that other Anti-Doping agencies release publicly every year", providing the example of UEFA and commenting on UEFA's prestige, yet it releases these statistics every year⁴. The complainant states that, although UKAD is not obliged to release these statistics, "UK transparency laws have no bearing on the WADA code". Their view is that UKAD did not answer their point about UEFA, other than to say that they were not aware of any other International Federation that publishes this information voluntarily. "As Code signatories all IFs have no choice about the reporting of their data by WADA." The complainant argues that hundreds of IFs that govern only one sport "release these statistics⁵ through WADA every year". They provided the example of the International Tennis Federation that discloses the number of ESA and IRMS tests carried out on international tennis players. The complainant maintains that this is the case with many other major international federations that govern one sport. They contended in their internal review request that information had been previously released by UKAD's predecessor, UK Sport.
34. In their internal review request the complainant contends that there are a very small percentage of IRMS tests carried out:

"UKAD performed 4219 tests on footballers licensed under the FA in 2019. That year, as released by UKAD in the World Anti-Doping Agency's annual statistics, UKAD performed 113 IRMS tests on ALL athletes under its jurisdiction. Even if ALL of these IRMS tests were all performed on footballer's licensed by the FA, then that would be mean that only 2.7% of all tests performed on footballers by UKAD in 2019, would have been IRMS tests. The reality is that, it is almost certain that only a small percentage of IRMS tests were on footballers, given that UKAD tests athletes from dozens of sports.

⁴ [uefa anti-doping flyer 2021-22 digital 003 .pdf](#)

⁵ [2021 anti-doping testing figures en.pdf \(wada-ama.org\)](#)

Therefore it is already known, using public information released by UKAD, that IRMS testing in football is very low. Therefore, UKAD revealing how many IRMS tests it has performed on footballers, whether that be zero or ten or fifty, has almost no bearing on alerting footballers how much they will be IRMS tested. That number, by definition, is already very low and is public information."

35. The complainant clearly believes that the release of the information would be in the public interest.

36. UKAD acknowledges that there is a public interest in transparency -

"in order that those carrying out a regulatory function can be checked and challenged and tested for effectiveness, and we recognise the importance of transparency and accountability with regard to anti-doping".

It also acknowledges "that there is public interest in enabling informed debate about UKAD's work and potential public lobbying resulting from this".

Public interest factors in favour of maintaining the exemption

37. UKAD sets against this,

"the likely prejudice that would be caused to UKAD's ability to carry out its regulatory function...the more important public interest lies in the maintenance of an effective anti-doping regime so that UKAD can carry out its obligations towards its public policy objective of eliminating doping in sport."

38. It highlights the potential for misinterpretation of the requested information. UKAD provided additional argument that cannot be repeated here without disclosing potentially confidential strategic information. These arguments led UKAD to conclude that the greater public interest lies in "the maintenance of an effective anti-doping regime".

Balance of the public interest

39. In its internal review UKAD countered some of the complainant's argument by stating that the disclosure by UK Sport that was used to support their view that the information should be released had only related to ESAs "and was made almost 20 years ago". UKAD has never published this information.

40. The Commissioner understands the complainant's view that the release of specific figures regarding ESA and IRMS tests would provide transparency and clarity. The complainant appears to have drawn their own conclusions from the information that is publicly available. UKAD's reasons for withholding this information cannot all be detailed here but it has carefully considered its reasons for not providing the requested information and determined that it was likely to undermine its function. The Commissioner is not persuaded that the public interest in the disclosure of the drilled down figures outweighs that in withholding them. He has concluded that there is a great deal of publicly available information but complete transparency in anti-doping testing might well subvert its effectiveness which is not in the public interest.

Procedural matters

41. UKAD breached section 1 of FOIA by providing information in relation to part a) beyond the time for compliance.
42. UKAD breached sections 10 and 17 of FOIA by failing to confirm that the information was held and to issue a refusal notice, within 20 working days.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Janine Gregory
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SK9 5AF