

Official

Ref: FOI-450

Sent via email only: [REDACTED]

18 October 2024

Dear [REDACTED]

1. Thank you for your email of 20 September 2024 in which you requested information from UK Anti-Doping ('UKAD') under the Freedom of Information Act 2000 ('the Act'). Specifically, you asked:

If i can have the names of sportspersons who have failed drug tests in the last 3 years and who have a TUE exemption?

Summary of Response

2. UKAD confirms that it holds the information requested. However, this information is being withheld from disclosure pursuant to sections 40 and 41 of the Act. Further detail as to the application of these exemptions is set out below. To contextualise this response we also explain, as set out below, the role of the Therapeutic Use Exemption ('TUE') process in the anti-doping system that applies under the applicable anti-doping rules.

Response

3. The TUE process is a means by which an Athlete can obtain approval to use a Prohibited Substance or Method for the treatment of a legitimate medical condition.
4. 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'). The TUE process is an important part of this system, as it represents a means by which an Athlete can obtain approval to use a prescribed Prohibited Substance or Method for the treatment of a legitimate medical condition.

Information outlining the TUE application process is publicly available on the UKAD website.¹

5. All information submitted as part of a TUE application is confidential, in keeping with the World Anti-Doping Agency ('WADA') International Standard for Therapeutic Use Exemptions ('ISTUE')² and International Standard for the Protection of Privacy and Personal Information ('ISPPPI').³ Athletes applying for a TUE have an expectation that their information will only be processed in this manner⁴ and as such UKAD extends this confidentiality to the fact that a TUE has been granted to an Athlete.
6. UKAD is withholding the requested information because were UKAD to do otherwise, it would identify individual Athletes that had returned Adverse Analytical Findings ('AAFs'), i.e. have '*failed drug tests*', and hold TUEs and thereby disclose the personal data (and special category personal data) of those Athletes. UKAD therefore withholds this data pursuant to section 40 of the Act.

Section 40 – Personal information

7. UKAD considers that the exemption at section 40 of the Act applies to the information requested, meaning it is not disclosable.
8. Section 40 of the Act provides as follows:

Section 40 *Personal information*

...

(2) Any information to which a request for information relates is also exempt information if–

(a) it constitutes personal data which does not fall within subsection (1) [personal data of which the applicant is the data subject], and

(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act–

¹ <https://www.ukad.org.uk/medicine>

² <https://www.wada-ama.org/en/resources/world-anti-doping-code-and-international-standards/international-standard-therapeutic-use>

³ <https://www.wada-ama.org/en/resources/world-anti-doping-code-and-international-standards/international-standard-protection>

⁴ https://www.ukad.org.uk/sites/default/files/2021-07/2106_Standard_TUE_Application_Form_v7.2.pdf

(a) would contravene any of the data protection principles,

9. Personal data is 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 ('UK GDPR') and includes information relating to an identified living individual.
10. The information requested constitutes "personal data", that is personal information that relates to identified living individuals. Moreover, given the obvious link between TUEs and health, there is a risk that such disclosure would also constitute processing of special category (health) data (per section 10(1) of the DPA and Article 9 of the UK GDPR). There is a general prohibition on processing special category data, save for where relevant conditions apply.
11. As a starting point, having determined that the information you have requested is personal data, UKAD has gone on to consider whether disclosure would contravene any of the data protection principles as set out in Chapter 2, Article 5(1)(a) of the UK GDPR. The first data protection principle states that personal data shall be processed transparently, fairly and lawfully.
12. The lawful basis on which UKAD generally processes this type of personal data is contained in Chapter 2, Article 6(1)(e) 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 Act.⁵
13. Accordingly, UKAD may only lawfully disclose the information you have requested on a different basis. The only two bases that may apply are consent (being consent to disclose that information under the Act) or if disclosure would be necessary for the purposes of legitimate interests. Athletes that return AAFs and have a TUE have an expectation that such information will remain confidential. Therefore, UKAD may only lawfully disclose this information to you if it is necessary for the purposes of legitimate interests (which outweigh the corollary interests of the relevant Athlete). To establish this lawful basis, all three of the following criteria must be met:
 - a) the purpose of disclosure is a legitimate interest;
 - b) disclosure must be necessary for that purpose; and

⁵ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/>

- c) the legitimate interests outweigh the interests and rights of the individual.
14. UKAD acknowledges the legitimate public interest in transparency and accountability regarding anti-doping matters. However, it is UKAD's view that disclosing the information you have requested would not be necessary to achieve that purpose, particularly given the information UKAD publishes concerning testing, AAFs and ADRVs pursuant to the applicable anti-doping rules in any given case. UKAD is also of the view that even if such disclosure was necessary, it would not outweigh an individual Athlete's right to privacy in being granted with a TUE. Therefore, UKAD does not have a lawful basis to disclose this information to you and we are withholding the information requested under the exemption in section 40 of the Act.
15. For completeness, UKAD's position is that, to the extent such disclosure may constitute processing of special category data, it also does not consider any of the relevant conditions (per Article 9 of the UK GDPR) to the prohibition generally on processing such data apply here. UKAD has a specific 'anti-doping derogation' for processing special category data in connection with its public purposes (paragraph 27, Schedule 1, Part 2 of the DPA). In UKAD's view, the derogation does not extend to the type of processing which might be required in responding to your specific request.

Section 41 – Information provided in confidence

16. UKAD also considers that the exemption to disclosure at section 41 of the Act applies to the information requested.
17. Section 41 of the Act provides as follows:

Section 41 Information provided in confidence

(1) 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.*

18. The information requested is information obtained from a third party (i.e. an Athlete) as part of the TUE application process. As explained above, all parts of the TUE application process (including the name of the Athlete) are confidential. The information requested therefore comes within section 41(1)(a) of the Act.

19. If UKAD were to disclose to you the information requested, in circumstances where an individual Athlete would therefore be identified, it would constitute a breach of confidence actionable by those Athletes. Any such action would be likely to succeed, with the public interest in disclosure not outweighing UKAD's duty of confidence; therefore, the information is exempt from disclosure pursuant to section 41 of the Act. This exemption is an absolute exemption, and as such UKAD is not required to consider the public interest test any further in this context.

Conclusion

20. 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 further communications.
21. 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