



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0104

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50266856
Dated: 5 May 2010**

Appellant: Paul Edwards

Respondent: Information Commissioner

Heard at: Field House London

Date of consideration: 21 October 2010

Date of decision: 8 November 2010

Before

Christopher Hughes OBE
Judge

and

Henry Fitzhugh and Marion Saunders
Members

Attendances:

The consideration was conducted on the papers in the absence of the parties.

Subject matter: FOIA S.50 Decision notice by Commissioner, appeal under S57.

**Cases: Linda Bromley and Others and Information Commissioner v
Environment Agency (EA/2006/0072)
Garrard v Information Commissioner and Home Office (EA/2009/0107)
Berend v Information Commissioner and LB Richmond upon Thames
(EA/2006/0049)**

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal and upholds the decision notice dated 5 May 2010.

Signed

Judge
Dated this 9th day of November 2010

REASONS FOR DECISION

Introduction

- 1 This case has its origins in a test carried out on a sample from Mr Edwards taken as part of the anti-doping regime in sport on 21st June 1997. The test was carried out at King's College London. On 2 July 1997 the "A" sample was reported as having a greater proportion of testosterone to epitestosterone than is permitted. The "B" sample was tested in the presence of Mr Edward's advisers on 18th September 1997 with similar result. A Drug Advisory Committee considered the case in 2000 and made a determination adverse to Mr Edwards.
- 2 Mr Edwards has been dissatisfied with this finding and has, over the years, contested the basis upon which it was made. There has been considerable correspondence between Mr Edwards and the various bodies concerned with sport; as well as with the then Minister of State for Sport and Mr Edwards' MP. Some of this correspondence has been included in the bundle and provides background to this case. At some stage in 2003 or before Mr Edwards made a subject access request under the Data Protection Act for data which related to his sample. He was provided with what was considered to be personal data but calibration data was held not to be personal data and so not liable to be disclosed under the Data Protection Act. In a letter of 23 June 2003 from Kings College to the Director of Anti-Doping, UK Sport (a letter which forms part of a longer exchange of correspondence of which the Tribunal has not seen all items) which addresses various of these issues, the following text appears:-

"Like the data pertaining to Mr Edwards's samples that is also on fan paper. We could make the calibration data available to Mr Edwards, or his representative, to inspect at the Centre."

The request for information

- 3 On 13 March 2006 Mr Edwards made a request (citing the Freedom of Information Act ("the Act")) to King's College London to supply him with:-
 - "1 The calibration curves and calibration data for my test results dated 21/6/1997 ATN number 0100830
 - 2 The contract for doping control/analysis of urine between UKS and DCC Kings College 13th March
 - 3 The tender document supplied by UKS for doping control analysis from which the contract followed."
- 4 Issues concerning the contract between UK Sport and the Drug Control Centre do not fall to be considered by this Tribunal and the sole matter with which we have been concerned is that contained in 3(1) which for convenience have been referred to as the "calibration data".

- 5 On 3rd April 2006 King's College declined to provide the information asserting that S38 of the Act allowed them to refuse to supply the information sought. At Mr Edwards' request King's College carried out an internal review; however this did not produce any change in the College's stance.

The complaint to the Information Commissioner (IC)

- 6 Mr Edwards complained to the IC on 10 July 2006 about the way the request had been handled. The IC initially treated this as a subject data access request under the Data Protection Act but concluded that the material under consideration did not constitute Mr Edward's personal data. During the course of this process King's College informed the IC on 5 May 2009:

"I have [...] established that we did not run calibration data contemporaneously as part of the formal protocol for either the A-sample or the B-sample. This was not a requirement at the time. The data we do hold are the calibrations run closest to the samples under consideration."

- 7 Having concluded the consideration of data protection issues the IC then considered this as a request falling within the scope of the Freedom of Information Act. On 12 November 2009 the IC wrote to King's College identifying two issues in the investigation:-

(a) Whether King's College held the calibration data specified in the request, and

(b) If so, what exemptions King's College sought to rely on to withhold the information.

- 8 King's College responded on 16 December 2009. They stated that they did not hold calibration data dated 21 June 1997, that it held such data for subsequent dates, that a file note of 14/10/99 indicated that it did not have contemporaneous calibration data but data from follow-up work prior to the "B" sample analysis, that it could not find any earlier calibration data, that it assumed that such data would have been routinely destroyed after 8 years according to the College's usual practice, that it had operated its procedures in accordance with the relevant World Anti-Doping Agency procedures current at the time and that it did not consider that it held the data specified in the request.

- 9 The IC communicated this response to Mr Edwards and indicated a preliminary view that the data was not held. Mr Edwards confirmed that he remained of the view that the data was held, undertook to supply evidence to that effect and asked the IC to continue the investigation. Mr Edwards subsequently provided documents to the IC which did not lead the IC to change his stance. Mr Edwards asked the IC to come to a formal decision and on 5 May 2010 the IC issued a Decision Notice which found that, on a balance of probabilities, King's College did not hold the calibration data for 21 June 1997. It further found that King's College, in failing to notify Mr Edwards of this, had been in breach of S1(1)(a) and S10(1) of the Act. The IC also expressed concern at the approach that King's College had taken to its handling of the request.

The appeal to the Tribunal

- 10 Mr Edwards appealed to the First-tier Tribunal (Information Rights) (“FTT”) on 5 May 2010.
- 11 The key points raised in the appeal were:-
- a. The methodology of the assay required a contemporaneous calibration curve to be generated which can be directly related to the test results.
 - b. It was clear to King’s College that the request was for the calibration data directly related to his test, such data was mandatory and the denial that King’s College held it was demonstrably false, the different reasons given by King’s College for non-disclosure where an indication of deliberate concealment.
- 12 The IC in his response noted that the issue of precise interpretation of whether the request was for calibration test data of 21 June 1997 or related to Mr Edwards sample of 21 June 1997 had been raised with Mr Edwards and he had affirmed that he wished to have disclosed calibration test data of 21 June 1997. It further noted that after initially misleading responses Kings College had consistently maintained that it did not hold calibration data of 21 June 1997 but held such data for July and September which was outside the scope of the request. Accordingly the IC was satisfied that King’s College did not hold the requested information.

The law

- 13 The Tribunal’s jurisdiction in determining appeals is set out in S58 of FOIA. This provides
- “(1) If on an appeal under section 57 the Tribunal considers –**
- (a) That the notice against which the appeal is brought is not in accordance with the law, or**
 - (b) To the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.**
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”**
- 14 S. 1 FOIA provides in material part as follows:
- "General right of access to information held by public authorities**
- (1) Any person making a request for information to a public authority is entitled –**
 - (a) To be informed in writing whether it holds information of the description specified in the request, and**

(b) If that is the case, to have that information communicated to him”

- 15 The Tribunal reminded itself that in order to be satisfied that particular information is not held, it is not necessary for the public authority to prove to a point of certainty that this is so, rather the matter is to be determined on the balance of probabilities (*Linda Bromley v ICO & the Environment Agency EA/2006/0072*). Thus, the Tribunal must ask itself is it more likely than not that the information is held.
- 16 In *Berend v the IC and LB Richmond upon Thames (EA/2006/0049)* it was held that the request for information should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request.

Question for the Tribunal

- 17 In the light of the evidence available to it the Tribunal had to decide whether on the balance of probabilities King's College holds the information specified at paragraph 3(1) above.

Consideration of the evidence

- 18 Mr Edwards in his witness statement gave a history of his attempts to challenge findings that he had committed doping offences in 1994 and 1997. In 2003 he obtained some data which in his view cast doubt on the veracity of the King's College results. He affirmed that contemporaneous validation data was required in 1997, asserted that King's College thwarted his request for the data with a succession of excuses, made extensive reference to letters concerning his case over the years.
- 19 On the key claim made by King's College that the data will have been destroyed he stated:-
- “It is an accepted fact that in disputed cases all data relevant to a drugs conviction will be held indefinitely. KCL have known since 1997 that I strongly disputed their work and rather than supply data to convince me or my advisers that they were correct they have studiously avoided the issue, refuse to properly discuss anomalies in the data obtained in 2003 and absolutely avoided releasing calibration data which be capable of invalidating al their test results and thus exonerate me.”
- 20 A statement by Mr Eastwood (who has considerable experience of regulatory affairs in the pharmaceutical industry) was submitted by Mr Edwards as expert evidence:-
- “My comment is that validated assays at that time (1997) normally were run with standards.... It is unlikely that they omitted to run calibration for Paul Edwards's test in 1997.”

- 21 Although Mr Edwards was given the opportunity to clarify and refine precisely what information he was seeking in his application he made clear to the IC by an e-mail of 31 January 2010 that he wished to proceed with the request which the IC had confirmed to him meant calibration data dated 21 June 1997.
- 22 The IC has identified various statements made by officers of King's College over the years that the relevant procedures were correctly followed. In a letter of 9th September 2004 to UK Sport King's College produced a detailed rebuttal to claims which had been made on behalf of Mr Edwards as to the conduct of the test; in particular confirming that "external samples" were processed at the time of the test; i.e. that the instrument was calibrated. That statement, together with the statement quoted in paragraph 2 above, clearly indicate the King's College position that the tests were properly carried out. However while it could be inferred from these statements that such calibration data continued to exist, from the terms of the letters it is not clear on what specific date the calibration data was collected. King's College, having relied inappropriately on S38 of the Act when they received Mr Edwards' request for the calibration data in 2006, did not consider whether they actually held the specific information requested until a considerable time later. This was disclosed to the IC by an email dated 5 May 2009 and elaborated on in an e-mail of 16 December 2009 when King's College disclosed to the IC an internal file note from 1999 that they do not hold contemporaneous calibration data for the first test but data from follow-up work prior to the B-sample analysis.

Conclusion and remedy

- 23 Much of the material submitted to the Tribunal, while informative, does not bear on the question of whether calibration data for that date exists or not. In considering whether the information sought by Mr Edwards was held the tribunal has considered all the evidence available. . Mr Edwards has been unable to point to any unambiguous evidence that any calibration data as specified in his request ever existed. While he may feel aggrieved at how King's College handled his request for the calibration data and this may have fuelled his suspicions; they are no more than that.
- 24 Although the Tribunal notes the assertions and expectations of Mr Edwards that all data relating to all his tests would be retained indefinitely he is unable to identify any specific applicable regulation from 1997 which would require it nor any procedural requirement that it be produced to the hearing in 2000 which made the determination in his case.
- 25 Nor has he been able to produce any evidence tending to show either that such calibration was not carried out, or that such a calibration was carried out and casts doubt on the reliability of the test on his sample.
- 26 Mr Edward's case is that King's College have dishonestly suppressed the calibration data. The finding of the Information Commissioner was that on the balance of probabilities while King's College initially showed poor practice in handling this request there is no evidence of dishonesty and no evidence that the information is held.

27 The Tribunal agrees with the IC. There is no evidence to suggest that there has been impropriety on the part of King's College and no evidence to indicate that calibration data of 21 June 1997 exists. The evidence shows that the calibration data relevant to the test on Mr Edward's "A" sample no longer exists. The Tribunal notes that King's College have disclosed that it has held calibration data of 17 July and 16 September 1997. The Tribunal would not regard it as vexatious if Mr Edwards were to make a request for such information.

28 Our decision is unanimous.

Permission to appeal

29 An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

Judge
Christopher Hughes OBE

Dated: 8th November 2010