

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 09 September 2010

Public Authority: The UK Sports Council
Address: UK Sports Council
40 Bernard Street
London
WC1N 1ST

Summary

The complainant asked the public authority to provide him with “all reviews, quarterly or annually, received from UK Athletics since the UK’s performance update 2006/2007 Quarter Two”. The information was identified by the public authority as being two reports it had received from UK Athletics and its own comments on those reports. The Commissioner decided that the two reports are within the scope of the request but the public authority’s comments on them are not. The public authority released some of the requested information but relied on sections 27, 28, 36, 41 and 43 to exempt the remainder. The Commissioner found that the exemption provided by section 41 (information provided in confidence) was properly applied by the public authority to all of the withheld information; he did not therefore go on to consider the alternative exemptions cited by the public authority.

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 1 of the Freedom of Information Act 2000 (the “Act”). This Notice sets out his decision.

Background

2. The UK Sports Council ("the public authority"), established by Royal Charter in 1997, is responsible for distributing around £100 million of public funds each year, from both the National Lottery and the Exchequer, in high performance sport.
3. UK Athletics was formed in January 1999 as the national governing body for athletics in the United Kingdom.
4. 'Mission 2012' is a programme developed by the public authority with the purported aim to help each Summer Olympic and Paralympic sport achieve success in the 2012 Olympics, as part of the process UK Athletics submits a quarterly report to the public authority.

The Request

5. The complainant made a request to the public authority on 6 May 2008 for "all reviews, quarterly or annually, received from UK Athletics since the UK's performance update 2006/2007 Quarter Two". The public authority provided its response on 4 June 2008 in which it explained that it identified the requested information as being UK Athletics' reports to it for the fourth quarter of 2007 and first quarter of 2008 ("Q4 2007" and "Q1 2008" respectively). It disclosed part of the information requested but withheld the remainder of the information on the basis of the exemptions contained in sections 27, 28, 36, 40, 41 and 43 of the Act but advised that they needed further time to consider the public interest test where applicable.
6. In a letter dated 2 July 2008 the public authority informed the complainant that upon considering the public interest test it was of the view that the public interest lay in the maintenance of the exemptions rather than in disclosing the withheld information.
7. The complainant requested an internal review of the public authority's decision on 10 November 2008. On 22 January 2009 the public authority wrote to the complainant with the details of the internal review it had carried out, upholding the original decision.

The Investigation

Scope of the case

8. On 6 February 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled by the public authority.

Chronology

9. As part of the investigation, on 2 February 2010 the Commissioner wrote to the public authority requesting that it provide him with a copy of the withheld information and further explanation of its reliance on the exemptions. On 31 March 2010 the public authority wrote to the Commissioner and provided a copy of the withheld information and a copy of a confidentiality agreement between it and UK Athletics dated the 31 March 2009. The letter also provided further details regarding its reliance on exemptions not to communicate the information to the complainant.
10. The Commissioner, aware that the written confidentiality agreement post dated the withheld information, requested the public authority to furnish him with evidence that pre-dated the withheld information. In response to this request the public authority provided the Commissioner with a copy of a letter from UK Athletics dated 30 April 2010. UK Athletics in the letter stated unequivocally that "confidentiality was a prerequisite of (its) agreement to engaging with the M2012 process". This, the letter went on to say, had been discussed back in 2007 between the most senior officials of UK Athletics and the public authority.

Analysis

Substantive Procedural Matters

11. The Commissioner notes that the public authority considered its own comments upon the reports from UK Athletics to be within the scope of the complainant's request. However the request was for information received from UK Athletics and therefore the public authority's comments are outside the scope of the request. The Commissioner therefore went on to consider the public authority's position as regards the withheld information which is within scope i.e. the two reports from UK Athletics.

Exemptions

12. The withheld information comprises two "Mission 2012" reports (Q4 2007 and Q1 2008) from UK Athletics to the public authority. The public authority's position is that the information from UK Athletics is exempt from disclosure by virtue of sections 27, 28, 36, 40, 41 and 43(2).

Information provided in confidence

13. **Section 41(1)** provides that –

"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."
14. The public authority contends that the withheld information which was supplied to it by UK Athletics is confidential in nature and that to disclose it would constitute an actionable breach of confidence.
 15. The most commonly cited statement, in respect of commercial types of information, of the constituent elements of an 'actionable breach' is the judgment of Megarry J in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 which reads:

"In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself [...] must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

Whilst there are other approaches (than that set out in *Coco & Clark*) to the analysis of confidentiality, the Commissioner believes that, due to the possible commercial impact of releasing the withheld information, this is the correct approach to apply in this case.

“Necessary quality of confidence”

16. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though it will be if it has been disseminated to the general public. Information which is of importance to the confider should not be considered trivial. A duty of confidence will not be found where the information is actually freely or relatively freely available. The Commissioner accepts, given the contents of UK Athletics letter dated 30 April 2010 (paragraph 10 above), that the withheld information is considered important to them. In addition as it is apparently known only to a limited number of individuals the withheld information does have a necessary quality of confidence.

An obligation of confidence

17. An obligation of confidence may be expressed explicitly or implicitly. If information is provided in circumstances that created an obligation of confidence, the circumstances in which any further information provided subsequently, connected to and arising out of the first provision, will also give rise to an implied obligation of confidence.
18. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, Megarry J in *Coco v Clark* suggests that the ‘reasonable person’ test may be a useful one – “If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.”
19. The public authority has maintained that the information received from UK Athletics was done so in confidence. By way of supporting evidence they have provided the Commissioner with a copy of an agreement between the public authority and UK Athletics dated 31 March 2009. Though the agreement post dates the information request, the public authority maintains that the agreement merely places in writing what had been previously understood between it and UK Athletics. In further support of this the public authority also provided the Commissioner with a letter from UK Athletics dated 30 April 2010. This letter unequivocally states that the withheld information was given (by UK Athletics to the public authority) on the known understanding that it was and was to remain confidential. Therefore the Commissioner is satisfied that when the public authority obtained the information it did so in circumstances giving rise to an obligation of confidence.

20. The Commissioner next considered whether the withheld information is already in the public domain, as a duty of confidence will not be found where information which is claimed to be held in confidence is actually freely or relatively freely available. The Commissioner found no evidence that the withheld information was in the public domain.

Detriment to the confider

21. The Commissioner notes that it was stated in *Coco v Clark (Engineers) Limited* [1968] FSR 415 that for a disclosure to constitute a breach of confidence there has to be a detrimental impact on the confider. Whilst this is not always the approach latterly taken by the courts in the context of personal information confidences (see for example *Home Office v BUAV & the ICO*) it still remains the position for commercial confidences.
22. The public authority in its letter to the Commissioner dated 31 March 2010 stated that "it is accepted in the world of high performance sport that competitor nations will attempt to find out the sporting performance "secrets" of other nations who are seen to be successful on the world stage." UK Athletics, in a letter to the public authority dated 23 March 2010, stated categorically that releasing the withheld information would be detrimental to its aim to create a competitive sporting advantage over other nations.
23. In this matter the Commissioner acknowledges that unauthorised disclosure of the withheld information would be detrimental to UK Athletics as asserted in its letter to the public authority dated 30 April 2010 and as asserted in the public authority's letter to the Commissioner dated 31 March 2010. This is because having viewed and assessed the withheld information the Commissioner accepts as correct the assertions made in the UK Athletics letter dated 23 March 2010. That is the withheld information is of a competitively sensitive nature in particular in those areas of World Class Programme discussions.
24. For the reasons set out above, the Commissioner is satisfied that, on the balance of probabilities, UK Athletics would be able to bring an actionable breach of confidence were the information to be disclosed by the public authority in response to the request.

Public interest defence

25. As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, case-law on the common law concept of confidence suggests that action for breach of confidence in the courts will not be successful in circumstances where a public authority can rely on a public interest defence. In *Derry*, the Tribunal interpreted a Court of Appeal decision (*London Regional Transport v The Mayor of London*) regarding the public interest defence, in the law of confidentiality, to mean that:
- No exceptional case has to be made to override the duty of confidence that would otherwise exist.
 - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
26. The Commissioner interprets this to be that the duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. (This differs from the Act's public interest test for qualified exemptions which assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.) The view of the Commissioner therefore is that an express obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. The Commissioner's position is that a consequence of any disclosure of confidential information would be, to some degree, to undermine the principle of confidentiality which is, in essence, the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. Thus, there is a public interest in maintaining trust and preserving this free flow of information to the public authority where this is necessary for the public authority to perform its functions in the public interest.
27. While there are public interest factors in favour of disclosure (such as the public money UK Athletics receives, the accountability and transparency in respect of the work it does) on the facts of this case the Commissioner cannot identify any evidence that would establish a public interest defence to an action for breach of confidence if the public authority were to release the information without the consent of UK Athletics. The Commissioner therefore concludes that the withheld information that comprises the reports from UK Athletics to the public

authority was correctly withheld by reference to section 41(1). In the light of this finding the Commissioner did not go on to consider the alternative exemptions relied upon by the public authority.

The Decision

28. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

29. The Commissioner requires no steps to be taken.

Other matters

30. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Late Review

31. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner expresses his concerns that the review request was made on the 10 November 2008 yet the review outcome was not conveyed to the complainant until the 22 January 2009 which is in excess of 50 working days.

Right of Appeal

32. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 09 day of September 2010

Signed

**Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority 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."

International Relations

Section 27(1) provides that –

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."

Relations with the United Kingdom

Section 28(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration."

Section 28(2) provides that –

"In subsection (1) "administration in the United Kingdom" means-

- (a) the government of the United Kingdom,
- (b) the Scottish Administration,
- (c) the Executive Committee of the Northern Ireland Assembly,
- (d) the National Assembly for Wales."

or

Section 28(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

Section 36(5) provides that –

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,

- (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
- (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Information provided in confidence.

Section 41(1) provides that –

"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."

Section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

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).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”