IN AN APPEAL TO THE FIRST TIER TRIBUNAL **Case No. EA/2010/0162**
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BETWEEN:

MR C. ZACHARIDES **Appellant**

- v –

THE INFORMATION COMMISSIONER **Respondent**

- and –

THE UK SPORTS COUNCIL **Additional Party**

SKELETON ARGUMENT OF THE COMMISSIONER

References are given in the form: *[O/tab number/page number] (Open Bundle)*
[C/tab number/page number] (Closed bundle)

Essential reading:
ICO Decision Notice [O/1/1-8]
Information requested [C/1]
Skeleton arguments
Witness Statement of Peter Keen [C/4/35-45]
Additional Party letter to ICO of 31 March 2010 [C/2]
Witness Statements on behalf of the Appellant [O/5/413-472]
Appellant's Reply [O/1/89111]

Introduction

1. The background to the Appellant's request for information, its handling, and the relevant legal framework, are outlined in the Commissioner's Response of 28.10.10 ('the Response') [O/1/33-46] and are not repeated here.

2. Much of the Appellant's argument, and the evidence on which he appears to intend to rely, are directed at establishing his contention as to "*the vacuous nature of UK Sport's and UK Athletics impact on Athletics*" (Notice of Appeal 'NoA' [O/1/21]). The Tribunal will be sensitive to fact that its task is not to determine whether the present system for channelling funding into sport is working, or fulfilling the objectives for which it was established, or should be dismantled. The question is solely whether the information requested is properly considered to be exempt under section 41 Freedom of Information Act 2000 ('FOIA') for being confidential.

3. Three issues arise for the Tribunal's determination:

   (i) Are UK Sport ('UKS') and UK Athletics Ltd ('UKA') in fact one body for the purposes of FOIA?

   (ii) Is the information requested confidential, within the terms outlined by Megarry J in *Coco v A N Clarke (Engineers) Limited* [1968] FSR 415?

   (iii) Would disclosure of the information give rise to an actionable breach of confidence, or would a public interest defence be available?

I. Whether UKS and UKA are the same body

4. Under section 41 FOIA, information is exempt from disclosure if "*it was obtained by the public authority from any other person (including another public authority) and...*" (section 41(1)(a) FOIA).

5. In this case, UKA is an 'other person' for the purposes of section 41(1)(a).

   a. The two bodies are legally distinct, set up at different times, for different purposes and with different functions. UKS is a public authority, explicitly listed in Schedule 1 Part VI FOIA. It was established by Royal Charter in 1997 for the purpose of managing and distributing public funds to high performance sports. UKA is a company (number 03686940) limited by guarantee. It was established

in 1998 and commenced activities in 1999. It is the national governing body ('NGB') for athletics. UKS distributes funds to UKA, but also to various other NGBs.

b. Relations between the two bodies are governed by a contractual arrangement [O/4/260-286]. UKS provides funding to UKA, and UKA accepts certain obligations, including reporting obligations. No such arrangement would be required if the two were a single body.

6. The Appellant relies on the level of control exerted by UKS over UKA as establishing that UKA "*is effectively a lower tier of the same organisation*" (NoA [O/1/20]). The argument that UKA is essentially a part of UKS, and therefore a part of the public authority listed in Schedule 1 FOIA, is based on a misapprehension of the scope of FOIA:

a. The right to access information in section 1 is a right to access it from "public authorities", as defined in section 3. Section 3 makes clear that companies are within scope only where they are "publicly owned" within section 6, and not otherwise. That distinction between public bodies and companies cannot be elided, as the Appellant contends, by an assessment of whether the activities of one are closely controlled by the other. Such an approach would not only be highly uncertain, but it would render sections 3(1)(b) and 6 nugatory;

b. A read across to the Environmental Information Regulations 2004 ('EIR') confirms this interpretation. Regulation 2(2) makes clear that the EIR apply to "*any public authority as defined in section 3(1) [FOIA]*" (Regulation 2(2)(b)) and in addition to bodies that carry out public administrative functions (Regulation 2(2)(c)) or that are "*under the control*" of bodies which are themselves within the definition of a public authority (Regulation 2(2)(d)). By implication, bodies of the latter sort are not within section 3(1) FOIA;

c. Though not, of course, a determinative factor for the Tribunal the Appellant himself acknowledged that UKA is outside FOIA when he requested that the

Department of Constitutional Affairs extend its scope: letter of 14.12.05 [O/4/307].

7. The Tribunal is respectfully invited to decline to engage with the policy arguments which Appellant advances in favour of a wide interpretation of section 3(1) FOIA (such as it is contrary to the spirit of FOIA for a "*delivery arm*" to escape accountability: Appellant's Reply of 11.11.10 ('Reply') §95). Irrespective of any policy consequences of certain bodies falling outside the scope of FOIA (on which the Commissioner does not comment either way) the legislation is not capable of supporting the approach contended for.[1]

II. The information requested is confidential

8. The Commissioner and the Tribunal consistently approach section 41(1)(b) FOIA as importing the test of confidentiality outlined Megarry J in *Coco v A N Clarke (Engineers) Limited* [1968] FSR 415:

> *"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..."* (emphasis added).

9. The Commissioner submits that he has correctly applied all three limbs of this test in this case, for reasons given below.

[1] The Commissioner notes, in this regard, that it was common ground before the Tribunal in *Network Rail Ltd v ICO* (EA/2006/0061) that Network Rail, a company limited by guarantee and therefore broadly analogous to UKA, could not be a public authority under section 3(1) FOIA (see para. 22 of the Tribunal's decision) and though the Tribunal observed some discomfort at the policy implications of its decision that it was not within the scope of the EIR at all (through Regulation 2(2)(c) cited at paragraph 6(b) of this Skeleton) this did not affect its analysis of the legislation (paras. 56-58 of the Tribunal's decision).

Limb 1: Quality of Confidence

10. The information requested is contained in two documents:

    Submission in respect of Quarter 4 of 2007: 'Document 1' [C/1/1-2]

    Submission in respect of Quarter 1 of 2008: 'Document 2' [C/1/3-8]

11. The Tribunal may read these Documents in full, but in summary the information is a breakdown of how elite athletics is progressing towards its targets for the 2012 Olympics.

12. This information is not of a nature that is publicly available already, nor is it trivial. Lord Goff in *AG v Guardian Newspapers Ltd (No 2)* [1990] AC 109 indicated at 282 that the first two "limiting principles" on the protection of information as confidential are:

> *"The first limiting principle (which is rather an expression of the scope of the duty) is ... that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it...*
>
> *The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia..."*

13. In this case, UKA and UKS have taken steps to keep the information requested out of the public domain:

    a. UKS' Response to the Consultation on Mission 2012 contained an undertaking that it would not publish the information submitted to it by NGBs. It stated, in respect of the public reporting which would be undertaken:

       "*Most significantly, we have decided not to report publicly on the outcomes of the first quarter of Mission 2012 – i.e. your unchallenged self-assessments...*" (this refers to the submissions in Quarter 4 of 2007, of which Document 1 is one)

"...We would absolutely not depart from our existing practice of keeping specific details out of the public domain where issues have sensitive commercial, competitive or personnel elements at their heart – such as those likely to feature in the Reporting Template and underpinning information..." [O/4/328]

"*Here is a reminder of some of the key undertakings we will make as a result of your input:*

Public Reporting

- *We will not report publicly on the outcomes of the first quarter of Mission 2012 – your unchallenged self-assessments...*
- *No further information, such as that contained within the Reporting Template or Profiling Tool, will be put in the public domain..."* [O/4/332]

b. There is now a contract in place between UKS and UKA to ensure confidential information is protected: [O/4/369-372]

14. Nor is the information trivial. The Commissioner refers to the evidence of UKS as to the damage which could potentially arise from its disclosure: Witness Statement of Peter Keen [C/4/35-45]; UK Sport's letter to the Commissioner of 31 March 2010 [C/2].

15. The Appellant invites the Tribunal to find that the information does not meet this limb as "*the spirit of [FOIA] is to overcome this element. To allow such reports the mask of confidentiality because the content is not generally known undermines the very value of transparency that the ICO stands for*": Reply §87 [O/1/72]. The Commissioner submits that the inclusion of section 41 in FOIA confirms that the spirit of FOIA recognises the need to preserve confidentiality.

Limb 2: Circumstances in which information imparted

16. Both of the Documents were created as part of Mission 2012. As far as the Commissioner understands the arrangement, Mission 2010 requires NGBs, including

UKA, to report additional information over-and-above that which they would be required to report under Clause 12 of the Funding Arrangement [O/4/272] (and as the information is more extensive than that which NGBs would be required to report under Clause 12, no further or separate reports are made). NGBs, including UKA, agreed to provide this additional information on the understanding that it would remain confidential. The only information to be published was the 'traffic light' system and a short summary prepared by UKS specifically for the media.

17. The understanding that the Documents would remain confidential is confirmed by:

    a. The undertakings given by UKS in its Response to the Consultation on Mission 2012, referred to at paragraph 13(a) above;

    b. Witness Statement of Mr. Keen, in particular paragraphs 7, 18-21 [C/4];

    c. Letter of 30.04.10 from Mr. de Vos on behalf of UKA stating that "*confidentiality was a prerequisite of UKA's agreement to engaging with the M2012 process. This was discussed back in 2007 by both myself as CEO and Ed Warner (Chair) with the Chair and COO of UKS*" [O/3/213].

18. The Commissioner submits that the circumstances in which the Documents were submitted were therefore such as to import an obligation of confidence. The Appellant argues, essentially, that it was inappropriate for UKS to accept this obligation of confidence; this is dealt with under the 'Public Interest' at paragraphs 20-27 below.

Limb 3: Detriment of the party communicating the information

19. The Appellant does not contest the potential for disclosure of the information to have a detrimental impact on UKA. To the contrary, he appears to hope that the content of the information is such as to "*shame [it] out of existence*": Reply §91 [O/1/73]. The question of whether such a result would be in the public interest is dealt with below. For the purposes of 'limb 3' of the test, it appears to be common ground that this is met.

III. Disclosure of the information would give rise to an "actionable breach" of confidence

20. It is well established that it may be a defence to an action for breach of confidence that there is a public interest in disclosure which outweighs the public interest in maintaining confidentiality:

> *"... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure. Embraced within this limiting principle is, of course, the so-called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made the 'confidant of a crime or a fraud' (see Gartside v Outram (1856) 26 LJ Ch 113 at 114 per Page Wood V-C). But it is now clear that the principle extends to matters of which disclosure is required in the public interest (see Beloff v Pressdram Ltd [1973] 1 All ER 241 at 260 per Ungoed-Thomas J and Lion Laboratories Ltd v Evans [1984] 2 All ER 417 at 432-433, [1985] 1 QB 526 at 550 per Griffiths LJ)."*

Lord Goff in *AG v Guardian Newspapers (No 2)* [1990] 1 AC 190 at 282 (emphasis added).

21. In order to establish that there would be no "actionable breach" under section 41(1)(b) FOIA if the information were to be disclosed, it must be shown not only that such a defence could be constructed, but that it would, on the balance of probabilities, succeed.

22. The Appellant's complaint appears to centre around the fact that UKA is in receipt of public funds and is not accountable for its spending decisions.

23. The Commissioner accepts, and accepted in his Decision Notice §27, that there is a public interest in transparency around spending public funds. However, the fact that the party communicating the information is in receipt of public funds cannot, in itself, be sufficient to constitute a defence to an actionable breach of confidence. Section 41(1)(a) provides that information is exempt when it has been received from another person "*including*

another public authority". This confirms that information supplied by a person who is in receipt of public funds can be exempt.

24. The question for the purposes of section 41 must be whether the information is capable of being put to some use that is positively in the public interest, beyond merely showing how public funds have been spent. Moreover, if the confidentiality of the information is to be overridden it must be shown that that positive public interest is sufficiently compelling to outweigh the public interest in maintaining confidentiality[2]. It must also be shown that that positive public interest cannot be served by other means. The Commissioner submits that there is no such public interest here:

    a. The public funding which is at issue is that which is channelled into elite athletics. The Appellant may disagree with the choice to provide funding to elite athletics rather than 'grass root' athletics, but the information requested is not relevant to that debate;

    b. The number of medals awarded at a particular event, and the rankings of individual elite athletes, is a matter of public record. The amount of public money invested in elite athletics by UKS is a matter of public record. These appear to be an adequate basis upon which the efficacy of UKS and UKA can be assessed (see, for example, the Appellant's Reply §43 [O/1/98]; Times Online article at [O/4/317]; the exchange between Mr. Bicourt and Mr. Niels de Vos of UKA: [O/5/414-417], and [O/4/351-353] respectively; and the statistical evidence of Mr. Whittingham [O/5/439-467]);

    c. UKS does put a high level summary of the Mission 2012 reports it receives from NGBs into the public domain through its traffic light system and short summaries: Witness Statement of Mr. Keen, paragraph 16 [O/5/476] and UKS letter of 31 March 2010 [O/3/179];

[2] The Commissioner notes in this regard that the Tribunal has confirmed that the approach outlined in *AG v Guardian Newspapers (No 2)* [1990] 1 AC 190 requires a presumption in favour of maintaining confidentiality when considering whether to disclose the information under section 41 FOIA: *Derry County Council v ICO* (EA/2006/0014) at [35(m)], page 29.

d. There is no hindrance to public debate on the efficacy of UKA, or UKS, in supporting and promoting elite athletics as a result of the detailed information requested being kept confidential;

e. The Appellant's contention that UKS is retreating from a level of transparency which it intended at the time of entering Clause 12 Funding Agreement and Mission 2012 (Reply §§58-59 [O/1/65]) does not hold. The Commissioner will refer to Clause 25 Funding Agreement [O/4/260-286, in particular 280] and UKS' undertakings of confidentiality in its Response to the Consultation on Mission 2012 (see Paragraph 13(a) above) in interpreting UKS's intentions as to confidentiality/transparency.

25. Even if (contrary to the above) the Appellant were able to show some public interest in disclosing the information, the Commissioner submits nonetheless that there is a compelling public interest in maintaining the confidentiality of the information requested. He will rely on the evidence from UKS in this regard. This public interest outweighs any public interest in disclosure.

26. The Commissioner further submits that, for this reason, the Appellant's contentions that the confidentiality obligation is a "sham", and that it was inappropriate for UKS to accept this obligation as UKA "*have received millions of pounds of public money, can [not] expect confidentiality in how they have spent the money.*" (Reply §88 [O/1/72]) must fail. The obligation is protecting a legitimate public interest.

27. The Appellant may wish to go so far as to contend that the Documents will show public money being misspent. The Commissioner appreciates that it is difficult for the Appellant, who has not had sight of the information, to particularise the respects in which it might do this. Nonetheless, "*a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source.*" (Lord Goff in *AG v Guardian Newspapers (No 2)* [1990] 1 AC 190 at 282). The Appellant cannot establish a 'credible

allegation' in this case. He may disagree with UKS' and UKA's choices as to how they spend public money (in particular, he appears to disagree with UKS funding elite athletics but not 'grass root' athletics), but that does not mean those choices are iniquitous.

Conclusions

28. For reasons given above, the Commissioner respectfully invites the Tribunal to dismiss the appeal, and uphold the Decision Notice in its entirety.

LAURA ELIZABETH JOHN
Monckton Chambers
23 February 2011