IN THE MATTER OF AN APPEAL TO THE (FIRST-TIER) TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case Number: EA/2010/0162

BETWEEN

MR C ZACHARIDES (Appellant)

and

THE INFORMATION COMMISSIONER (Respondent)

and

THE UK SPORTS COUNCIL (Additional Party)

APPELLANT'S REPLY TO

SKELETON ARGUMENT'S OF THE

A) COMMISSIONER (Paragraphs 1 to 29)

B) ADDITIONAL PARTY (Paragraphs 30 to 43)

TO BE LODGED BY 4TH MARCH 2011

REPLY TO THE COMMISSIONER'S SKELETON ARGUMENT

1) In paragraph 2 of the Commissioner's Skeleton Argument it is said "The Tribunal will be sensitive to [the] fact that its task is not to determine whether the present system for channelling funding into sport is working or fullfilling the objectives for which it was established, or should be dismantled".

2) The Appellant would hope the Tribunal will recognise the responsibility that the Additional Party has to ensure that the expenditure of public money is seen to meet its purpose. By demonstrating that the Additional Party has no interest or ability to ensure value for money from UK Athletics or that the money is being spent appropriately, it is hoped that the Tribunal will recognise the relationship between the two organisations to be a sham. The relationship is such a sham it undermines any quality of confidence, and any obligation of confidence. Furthermore it establishes a compelling case for disclosure being in the public interest.

WHETHER UKS AND UKA ARE THE SAME BODY

3) In paragraphs 4 and 5, the Commissioner relies on the fact that the two organisations have been registered separately in different ways to confirm their individuality. The Appellant would remind the Tribunal that UK Athletics were created by UK Sport who were instrumental in ensuring that they were limited by guarantee, without shareholders or members, and therefore only answerable to themselves as funders. It is hoped that a public authority will not be allowed to evade legitimate scrutiny by placing its speculative activities into a company of convenience, limited by guarantee.

4) In paragraph 5b, the Commissioner uses the funding agreement between UKA and UKS to demonstrate the separateness of the two organisations. The Appellant contends that the failure UK Sport to implement a clear system of reporting from UK Athletics, and the failure to impose sanctions for the negative outcomes, shows the funding agreement to be a "fig leaf of convenience".

5) In paragraphs 6 and 7, the Commissioner presents arguments why the Tribunal should decline to engage with evidence which demonstrates that UK Sport and UK Athletics are acting as a single entity, and are jointly producing a negative impact in the quality of performances and the levels of participation in athletics. The Commissioner argues that the scope of the legislation is clear in protecting non "publicly owned" companies such as UK Athletics from the rigours of transparency.

6) Sections 4 and 5 of the FOI Act 2000, show it was a clear intention to extend coverage to include organisations which although not publicly owned, come under the control of a public authority. Section 5(b) of the act states: "is providing under a contract made with a public authority any service whose provision is a function of that authority". The fact that winning olympic medals is now the function of a public authority appalls the Appellant, however that is demonstrably the case as indicated below:

Government Quotes:
Bundle Page 242: "Our target is for British and English teams and individuals to sustain rankings within the top 5 countries, particularly in more popular sports".

Bundle Page 244: "There is little point in investing in infrastructure for major sporting events if we do not have the champions to win. We will only produce these champions if we have systems in place to identify and develop the stars of the future."

Funding Agreement Quotes:
Bundle Page 283:

i) To win 5 medals at the Beijing Olympics
ii) To win 12 gold medals at the Beijing Paralympics
iii) The increase, from one Olympic cycle to another, the number of medals won

UK Sport Quotes:
Bundle Page 349: "UK Sport today announced the 2010 medal targets for Britain's summer Olympic and Paralympic sports".

7) The Commissioner identifies the Tribunal decision for Network Rail Ltd v ICO (EA/2006/0061), as an example of a company limited by guarantee "and therefore broadly analogous to UKA". The Appellant refutes this assertion for the following reasons:

a) Network Rail Limited (NRL) and Network Rail Infrastructure Limited (NRIL) are both private companies Tribunal Decision Notice Paragraphs 10/11 (TDN 10/11). Although NRL was set up on the initiative of the Strategic Rail Authority, and was limited by guarantee, it served only as a parent company for NRIL which was a private company limited by shares. NRL has members, not shareholders (TDN 12). The members of NRL were Train Operating Companies, Freight Operating Companies and Public Members.

b) The analogy does not apply because in this case the FOI request was made against a public authority (UK Sport), not a private company as in the case of NRL. If the Appellant had any ability or mechanisms to demand accountability and transparency directly from UK Athletics, that avenue would have been followed.

c) NRL was a private company, set up by a public authority but accountable to its members. NRIL was a private company, set up by NRL, but accountable to its shareholders. In contrast, UK Athletics is a private company set up by a public authority and not accountable to members or shareholders. UK Athletics are only accountable to UK Sport (and Sport England) who set them up, and fund them.

d) In the case of NRL/NRIL "The government exercises no influence or control" (TDN 40). This again emphasises the difference between the case before the Tribunal today, and the NRL/NRIL decision.

e) The case of NRL/NRIL is helpful inasmuch as it highlights how "Functions of public administration" (TDN 24), can serve to define a public authority. Neither the Chair (Ed Warner) nor CEO (Niels de Vos) of UK Athletics have any experience in athletics performance related matters, which would indicate they are both employed for administrative purposes rather than a specific expertise within the sport of Athletics. In contrast, in the UK Sport Mission 2012 Consultation Response (Bundle page 327), UK Sport inform the NGB's including UK Athletics "This is not about administration, but about how we can improve the way we all identify and resolve issues which could have a detrimental impact on your performance potential". This suggests that UK Sport have established their own performance expertise as being superior to that of UK Athletics and accordingly are driving delivery themselves.

f) It would therefore seem likely that if the protocols were established in accordance with the FOI Act Section 5, UK Athletics would have been designated a public authority during 2006. This would have allowed for accountability from UK Athletics directly to the Athletics Community.

8) If, as alluded to in Paragraph 7 (notes: 1) of the Commissioner's skeleton argument, the Tribunal at the NRL/NRIL hearing observed some discomfort at the reasoning that the rail companies were not subject to the Freedom of Information Act (TDN 56), thankfully any such concerns can be avoided in this case because UK Sport, who hold the information certainly are a public authority and subject to the jurisdiction of this Tribunal.

CONFIDENTIALITY: QUALITY OF CONFIDENCE

9) In paragraph 13 of the Commissioner's skeleton argument, they quote assurances which were given in response to the Mission 2012 consultation (Bundle 328). Earlier in the same Mission 2012 Consultation Response document (Bundle Page 327) it was stated by UK Sport "It is welcome that you clearly appreciate the public scrutiny and accountability that we all face in the lead up to 2012 that comes with the additional funding, which was reinforced by the presence of the National Audit Office at all the meetings". Such words are worthy of a weight equal to a claims of confidentiality made in a letter sent by UK Athletics (Bundle Page 355) three years after the event.

10) In October 2007 which is the date of the Mission 2012 Consultation Response (Bundle Pages 327 to 333), all indications are that UK Sport were offering vague assurances of discretion as a good will gesture to the NGB's. Such gestures cannot contain the same quality of confidence as a report clearly marked as "confidential". Furthermore, at the time of the exchange, Mr Niels de Vos, the Chief Executive of UK Athletics was in receipt of a salary of £128,333 per annum, paid for out of the public purse, so should have been aware that any promises of "discretion" might be subject to the decision of a higher authority.

11) In paragraph 13b of the Commissioner's skeleton argument, reference is made to the confidentiality agreement between UK Sport and UK Athletics (Bundle Pages 369 to 372). It is unknown to the Appellant whether this agreement was backdated to incorporate the period 1st October 2006 to 6th May 2008 which is the subject of this information request. What is known is that at the time of signing this agreement both parties were aware that the freedom of information act was being used by the Appellant to scrutinise their activities. Therefore in accordance with the contract's definition of "Confidential Information" Clause 1.1(d):

> "Confidential Information does not include or (as the case may be) shall cease to include any confidential information which is required to be disclosed by applicable law or order of a court of competent jurisdiction or any government entity;"

The signed confidentiality agreement cannot offer quality of confidence in this case.

CONFIDENTIALITY: CIRCUMSTANCES IN WHICH INFORMATION IMPARTED

12) In paragraph 16 of the Commissioner's skeleton argument, it is again inferred that the information being requested by the Appellant is restricted by the introduction of Mission 2012. UK Sport's Mission 2012 would appear to be the dissemination of basic information about a variety of sports which do not register as interesting to the media and the wider public. Mission 2012 appears to be framed in a format which avoids engaging the consumer of the information, and accordingly avoids raising the profile of how public money is being spent. The Commissioner says "Mission 2010 (sic) 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".

13) Clause 12 of the Funding Agreement (Bundle page 272) requires an "annual review" with "detailed information", which could include "other matters reasonably required by UK Sport". UK Athletics are required to "respond promptly to any questions", and UK Sport have the authority to call a meeting with any officer of UK Athletics to discuss these matters in person. In addition under clause 12, UK Athletics are required to submit an "annual performance review" and an "annual financial review". Clause 12(d) allows for UK Sport to issue an assessment of UK Athletics and notify them of any concerns. UK Sport then have the opportunity to issue a 30 day warning after which all funding can be withdrawn if these concerns are not addressed. The Appellant suggests that any powers utilised by UK Sport in establishing Mission 2012 were powers included as part of the funding agreement.

14) It appears to the Appellant that Mission 2012 is an attempt by UK Sport in partnership with UK Athletics to avoid the accountability that comes with public funding.

15) In Paragraph 17 of the Commissioner's skeleton argument, three documents are listed as confirmation that information would remain confidential. Document "a" is dealt with in paragraphs 9 and 10 above. Document "c" is dealt with in paragraph 57 of the Appellant's Reply (Bundle page 65). Document "b" lists paragraphs 7, and 18 to 21 of the witness statement from Mr Peter Keen. In Paragraph 7 of Mr Peter Keen's witness statement, he implies that "honest dialogue" can only take place where "confidentiality was assured in order to build trust".

16) The job of an athletics coach is sometimes to persuade an athlete who is laying exhausted on the ground that they have the capacity to get up and repeat the exercise one more time, with additional effort. In some cases the athlete is intimidated by the effort and pain that is being asked of him, and a convenient injury can be called upon to end the suffering. The coach might consider that the athlete is being less than honest with himself, but might choose not to suggest that the injury is completely fictional. However, if the coach believed that the injury was completely fictional, then the relationship is broken, and the coach would be incapable of helping the athlete to become the best he possibly could. It then becomes a question for the coach to be honest with himself in admitting the limitations of this coach/athlete relationship.

17) The point of 16 above is to highlight the complexities which surround a motive such as honesty. The two extremes of where honesty requires the support of confidentiality are as follows: (i) At best, UK Athletics are insecure and in need of assurance that they will not be exposed. (ii) At worst, UK Sport and UK Athletics are engaged in a joint enterprise of systematic, state sponsored cheating.

18) The two extremes are not resolved by suggesting the truth lays somewhere in the middle. If the needle is one point over half way, towards systematic state sponsored cheating, the public interest in disclosure is huge. If the needle is one point under half way leaning towards a cultural insecurity within UK Athletics, then the system is not fit for purpose and UK Sport are obliged to intervene.

19) In summary, the very introduction of the "honesty" argument as being justification for confidentiality, creates a compelling case for the release of all information in the public interest.

DETRIMENT OF THE PARTY COMMUNICATING THE INFORMATION

20) In Paragraph 19 of the Commissioner's skeleton argument, it is said of the Appellant "he appears to hope that the content of the information is such as to shame it [UK Athletics] out of existence". The Appellant would wish to take this opportunity to address his motivations for pursuing this case. The publication of the Foster Review in May 2004 (Appellant's Reply Bundle Pages 56 and 57) represented the nationalisation of the sport of Athletics. The AAA's of England were cast aside along with 125 years of history in upholding the rules of athletics. Using a football analogy, this had the effect of getting rid of the referee's association, and bringing them under the same roof as Manchester United.

21) Continuing the football analogy, the idea was to bring together the best players, and coaches to Manchester United in order to win the World Cup. If any players from other clubs showed potential, they would be brought under the care of Manchester United who would have sole responsibility for bringing home the Jules Rimet trophy. Manchester United would not only select the players, but also the referees. They also dictate the fixture list, and judge all disputes.

22) In this analogy, Manchester United represent UK Athletics. The target of winning the World Cup represents the winning of Olympic Medals. The consequences of the strategy was predictable. Domestic athletics has been undermined to the extent that international success has been eroded as can be seen in the witness evidence of Mr Rob Whittingham.

23) A second strand of the Appellant's motivation for pursuing this course of action is the story of Adam Bowden. The Appellant met Adam as 15 year old in the summer of 1998, in his capacity as Hertfordshire County Team Manager. Adam announced that he intended to win an Olympic Gold Medal, and break the world record in the Steeplechase. He received no public funding but in 2006, Adam was selected to represent England at the Melbourne Commonwealth Games. In the absense of any of the public funding distributed by UK Sport reaching Adam and his family the Appellant instigated an appeal which raised over £5,000 to allow Adam to go warm weather training in South Africa prior to the Commonwealth Games. Two years later at the age of 25 Adam won the British trials for selection to the 2008 Beijing Olympic Games. He had achieved the qualifying standard so was a legitimate candidate for selection. Adam was not selected, and no other athlete was selected to take his place. The reasons for Adam's non selection are covered in detail Paragraph's 60, 61 and 62 of the Appellant's reply (Bundle pages 65 and 66).

24) It matters not whether the Appellant has a personal grievance against UK Athletics and UK Sport. What matters is that young children coming into the sport, who achieve everything that is required of them, are being prevented by a state sponsored bureacracy from participating at the highest level of their sport. In the Olympic Cycle from 1993 to 1996, when no public funding was available, just 6 athletic events were without British representation. In the Olympic Cycle from 2005 to 2008 when UK Athletics received over £30 million pounds of public funding, 42 athletic events were without British Representation. This information alone should be sufficient to shame UK Athletics out of existence. The Appellant is not "hopeful" that the "confidential" information will reveal dark secrets. The Appellant merely wishes to understand how UK Athletics and UK Sport can spend so much money on athletics, without many international athletes, or grass roots athletic clubs seeing any benefit. The Appellant hopes that the Tribunal will agree that such invisible spending establishes a compelling case for disclosure in the public interest.

DISCLOSURE WOULD GIVE RISE TO AN "ACTIONABLE BREACH" OF CONFIDENCE.

25) In Paragraphs 20 to 24 of the Commissioner's skeleton argument, it is shown that a compelling public interest in disclosure represents a defense against an "actionable breach of confidence". The Appellant has already addressed this issue in his skeleton argument, in particular paragraphs 51, 52, and 59 to 68. The Tribunal are invited to read either Bundle Pages 340 to 342 or 343 to 345. The penultimate paragraph quotes Victor Conte as saying "I certainly have more information that I would like the opportunity to provide to you and UK Sport, but I will leave that for another time". [Note the Times reproduction of the letter refers to UK Athletics instead of UK Sport]. No knowledge of this additional sharing of information has reached the public domain, however what is clear is that both UK Sport and UK Athletics were offered guidance on how to cheat without getting caught.

26) It is worth at this stage reminding the Tribunal that the UK Athletics head of coach development is a gentleman named Kevin Tyler. Kevin Tyler, who is a Canadian national, was a training partner of Ben Johnson's at the time he was stripped of his Olympic Gold Medal during the 1988 Olympic Games. Kevin Tyler was named by Ben Johnson's coach, Charlie Francis as being an athlete he provided performance enhancing drugs to. Kevin Tyler never tested positive for performance enhancing drugs, and appears to have never been directly questioned about the Charlie Francis allegation. At the time Charlie Francis named many of his athletes as receiving performance enhancing drugs, and several of the high profile individuals were later convicted.

27) East Germany in the 1970's and 1980's are known to have engaged in systematic state sponsored drugs cheating. One known method of avoiding detection was to withdraw athletes from competition claiming injury when it was felt they would fail a drugs test. On 21st February 2011 it was reported in the Guardian newspaper that within an 8 day period, five top British Athletes were withdrawn from competing on Saturday 26th February 2011 through injury. The confidentiality between UK Athletics and UK Sport has the impact of escalating a minor story into one which rings alarm bells.

28) In response to paragraph 27 of the Commissioner's skeleton argument, the Appellant would ask the Tribunal to recognise that such concerns do represent a compelling public interest defence against an actional breach of confidence.

29) In paragraph 27 of the Commissioner's skeleton argument, it is suggested that the Appellant’s concerns be dismissed as a disagreement with UK Athletics and UK Sport on how best to spend public money in athletics. If UK Sport and UK Athletics had collected their huge salaries and then sat on their hands and did nothing, the Appellant would not have become so engaged. In contrast, if analogies were to be drawn with more legitimate public service expenditure, situations like the fire brigade burning down homes, or nurses poisoning the patients, or the police mugging passers by would be fair comparisons with what UK Athletics have done to the sport of athletics. UK Athletics, funded by UK Sport have delivered demonstrable damage to the sport, and all they have to show for nearly £200 million pounds of spending over 10 years is a confidentiality agreement.

REPLY TO ADDITIONAL PARTY'S SKELETON ARGUMENT

30) Paragraph 6 of the Additional Party's skeleton argument includes a reference to the original information request being "all reviews quarterly or annually, received from UK Athletics since the UKS Performance Update Quarter Two". This reference fails to identify the year which is 2006/2007. The request for all quarterly or annual reports relates to the 19 month period between 1st October 2006 and the 6th May 2008. The Appellant would have expected to receive the following reports:

3rd Quarter 2006/2007	- 1st October 2006 to 31st December 2006
Annual Report 2006/2007	- 1st January 2007 to 31st March 2007
1st Quarter 2007/2008	- 1st April 2007 to 30th June 2007
2nd Quarter 2007/2008	- 1st July 2007 to 30th September 2007
3rd Quarter 2007/2008	- 1st October 2007 to 31st December 2007
Annual Report 2007/2008	- 1st January 2008 to 31st March 2008

In the event, UK Sport only claim to have received 2 quarterly reports from UK Athletics from 1st October 2007 to 31st March 2008. The failure of UK Sport to explain why they have not monitored UK Athletics for the year from 1st October 2006 to 30th September 2007 serves to reinforce the belief of the Appellant that they are a single entity, despite the legal status of the companies to the contrary. The Appellant therefore concludes that the relationship between UK Sport and UK Athletics is a sham.

31) In paragraph 11 of the Additional Party's skeleton argument they request that the Tribunal "strictly limit the hearing to relevant issues".

32) The Appellant brings to this hearing numerous examples of sincere concerns which he believes create a compelling case for full disclosure in the public interest. Not least that Great Britain might be accused of systematic state sponsored cheating. The Appellant would hope that each and every item of evidence is properly considered, and the total evidence weighed. The Appellant has tried to add context to how we as a nation have arrived at this place. It has been acknowledged how the good intentions expressed by Tony Blair in paragraph 3 of the Appellant's skeleton argument became distorted by the emphasis that UK Sport placed on winning Olympic medals. UK Sport have stolen the sport of athletics using public money as an aggressive weapon, and UK Athletics as a trojan horse. UK Sport have destroyed the values of the sport, creating an environment where winning at any cost is celebrated by the corporate slogan of “no compromise”. In contrast, the taking part is given the derisory status of fighting obesity. The Appellant does not expect the hidden information to reveal dark secrets, or any secrets that would be of value to anyone but a historian. However the Appellant does hope that by prizing open these files, the dams will burst and light will be shone into the dark places at the pinnacle of our sport. The Appellant understands the concern of the Additional Party, that they are being put on trial. However, if that is how they feel, the best way they can clear their name is to embrace transparency to the extent that every British track and field athletics medal won at future Olympic Games, can be attributed to hard work, sensible rest, good technique, and having applied each of these qualities more intelligently than their other competitors.

33) In paragraph 12 of the Additional Party's skeleton argument, they refer to the "dissatisfaction" of the Appellant with the way the sport is being run. This does no justice to the true position of the Appellant which is about the values of sport. The price of suspicious attitudes towards athletics is that participation levels are down, and performance standards are down. We as a sport are are losing more than just medals. The destruction of an honourable sport is being perpetrated by individuals who have no previous interest in athletics, and are being paid for out public funds. The Appellant suggests that the public might have an interest in looking behind the mask.

34) Also in paragraph 12 of the Additional Party's skeleton argument, they refer to how the Appellant has accused them of being guilty of wrong-doing, having lied to Parliament and conducted themselve in an inappropriate fashion. References to bundle pages are not included in the Additional Party's statement, however the evidence supporting the lying to Parliament (Bundle 69, Paragraph 74) is no longer admissable due to Parliamentary privilege (Bundle Pages 77 to 78) so the Appellant will not comment. The reference to "inappropriate fashion", the Appellant speculates might refer to how Sir Andrew Foster's review into athletics was presented by UK Sport and Sport England as being "independent", when it clearly was working to the "Game Plan 2002" agenda (Bundle Page 92, Paragraph 16). As regards the "wrong doing" by the Additional Party, it is not clear what they are referring to, however possibly it is the failure to collect annual and quarterly reports from UK Athletics for the year from 1st October 2006, referenced in paragraph 1 above (the Commissioner's argument). If the Additional Party can identify any unsubstantiated accusations of lying, wrong doing or inappropriate behaviour, the Appellant would not hesitate in acknowledging the error, and apologise.

35) The Appellant is less than impressed with Paragraph 13 of the Additional Party's skeleton argument. The Appellant was accused of "unsubstantiated speculation" in the Commissioner's Response document (Bundle Page 42, Paragraph 55), to the Appellant's initial appeal (Bundle page 21). The comment was made by the Commissioner on 28th October 2010, 2 weeks prior to receiving the Appellant's reply. The Appellant is grateful to the Tribunal for accepting his appeal based on a document, which with hindsight he recognises to be a sincere, but possibly incoherent rant. The Appellant has since clarified and substantiated every comment, and looks forward to dealing with specific issues of complaint from the Additional Party in future, rather than the rhetoric of the injured innocent.

36) In paragraphs 15, 16 and 17 the Additional Party suggests that the Appellant "seems to have become muddled as to what he is actually requesting". The Additional Party can be reassured that the Appellant is thinking very clearly. Reference to paragraph's 79 and 80 of the Appellant's skeleton argument dated 23rd February 2011 should resolve the Additional Party's confusion.

37) The Appellant would take this opportunity to emphasise again that all reference to Mission 2012 is regarded as being a "red herring", or "smoke and mirrors" as the wider athletics community prefer to call it. Such tactics work very well with a disinterested media. This request is seeking the information submitted in accordance with the 2005/2009 funding agreement, which catches all reporting by UK Athletics, of which Mission 2012 should be just one part.

38) The Tribunal is invited to refer to the replies previously given to the Commissioner's skeleton argument as follows.

39) Paragraphs 19 and 20 of the Additional Party's skeleton argument are answered by paragraphs 3 to 8 above in reply to the the Commissioner's skeleton argument.

40) Paragraphs 21 to 26 of the Additional Party's skeleton argument are answered by paragraphs 9 to 24 above in reply to the the Commissioner's skeleton argument.

41) Paragraphs 27 to 29 of the Additional Party's skeleton argument are answered by paragraphs 25 to 28 above in reply to the the Commissioner's skeleton argument.

42) It is noted that paragraph 30 of the Additional Party’s argument relies on a statement by their witness Mr Peter Keen. This statement is claimed to create a compelling public interest argument for maintaining confidentiality. If this statement includes reference to knowledge which might only be understood at the highest achievers in sport, the Tribunal is invited to question the Appellant's witness's on any matters which might allow for a broader understanding of the mindset of an Olympic Champion leading into competition.

43) The Appellant concludes by reminding the Tribunal that athletics is merely a sport. However the values of sport are universal. They touch the courtroom in the same way they touch the playing field. The rules are applied, and every man and women has an equal opportunity. On 19th January 2011, Mr Adam Sowerbutts, Solicitor for the Commissioner sent an email to all parties. It expressed a simple value of honesty and fairness which spoke to the Appellant in a way that the mountains of information distributed by the Additional Party over 7 years never has. This hearing is about being able to look our guests in the eye, as they arrive to participate and spectate at the 2012 Olympic Games. It is also about the parents of the ten year old child visiting an athletics tracks for the first time, and coaches being able to look them in they eye, knowing that they have just made the best decision ever for their children.

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