

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 December 2009

Public Authority: The Olympic Delivery Authority
Address: One Churchill Place
Canary Wharf
London
E14 5LN

Summary

The complainant requested information concerning the top possible bonuses of the public authority's Executive Management Board, their performance targets and how the bonuses paid related to them. He particularly wanted to be informed of the performance targets that had not been satisfied, if there were any such targets. The information about the actual bonuses paid was already declared to the public in the public authority's accounts. The public authority provided the performance targets of one individual and informed the complainant that it believed that the remainder of the information was exempt by virtue of section 40(2). It upheld its position in its internal review. The Commissioner having considered the withheld information has decided to uphold the application of section 40(2) in this case. He requires no remedial steps to be taken.

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 Olympic Delivery Authority has the responsibility to ensure the development of infrastructure for the 2012 Olympic Games. The Olympic Delivery authority has noted the salaries paid to its top executives in its 2007/8 accounts (on page 67). They were as follows (all figures are in thousands):

Individual (and role)	Salary	Performance Related Payments	Taxable benefits	Employer's Pension contributions	Total
David Higgins (Chief Executive)	373	205*	-	46	624
Dennis Hone (Director of Finance and Corporate Services)	269	58	-	31	358
Ralph Luck (Director of Property)	230	37	5	25	297
Alison Nimmo (Director of Design and Regeneration)	217	47	-	26	290
Howard Shiplee (Director of Construction)	274	52	-	31	357
Godric Smith (Director of Communications)	186	35	-	22	243
Hugh Sumner (Director of Transport)	217	42	-	26	285
Simon Wright (Director of Infrastructure and Utilities)	217	47	-	26	290

*This payment was declared in the accounts early, but was payable only on the completion of the Demolish, Dig and Design phase of the programme of work. This was a collection of ten milestones to be completed by the closing ceremony of the Beijing Olympics in 2008. The public authority informed the public that it had met and exceeded those milestones at that time (on August 28 2008) and that this phase was complete.

3. The complainant's request in this case was to understand the reason for paying the bonuses in the Performance Related Payments part of this table.
4. The Olympic Delivery Authority is a public authority for the purposes of the Act. It was added to Schedule One of the Act, by paragraph 23 of Schedule One of the London Olympic Games and Paralympic Games Act 2006.

The Request

5. On 11 May 2009 the complainant made the following request for information in accordance with section 1(1)(a) of the Act [the Commissioner has changed the numbering of the request to enhance the clarity of this notice]:

'According [to] the ODA's accounts for 07/08 David Higgins received a performance related bonus of £205,000.

- 1. Was this the maximum he could have been awarded under the terms of his contract? If not please state what the maximum could have been.*
- 2. In relation to his performance targets please provide me with a list of what these targets were in a similar fashion to previous Freedom of Information response [APP0008] and if he was not awarded 100% of his performance related pay state which targets were not completed to 100% satisfaction.*

According [to] the ODA's accounts for 07/08 Godric Smith received a performance related bonus of £35,000.

- 3. Was this the maximum he could have been awarded under the terms of his contract? If not please state what the maximum could have been.*
 - 4. In relation to his performance targets please provide me with a list of what those targets were in a similar fashion to that provided in relation to Mr Higgins and if he was not awarded 100% of his performance related pay state which targets were not completed to 100% satisfaction.*
 - 5. In relation to each of the remaining six members of the senior management board please state what percentage of the maximum related pay award they actually received. If they did not receive the maximum please state the performance target/s responsible for them not getting 100%.'*
6. On 8 June 2009 the public authority provided the complainant with a response. It stated it was applying section 40(2) to questions 1, 3, 4 and 5. It stated that it believed that a data protection principle would be contravened by the release of this information. In relation to question 2 the public authority provided a summary of the performance objectives of the Chief Executive. However, it did not provide information about which targets were met and whether he had received 100% of his bonus. It has said subsequently that it was applying section 40(2) to this information.
7. On 17 June 2009 the complainant requested an internal review from the public authority. He explained that he believed that the public authority had erred as it had set the dividing line between accountability and senior individuals' privacy too far towards privacy.

8. On 13 July 2009 the public authority provided the complainant with a response to his request for an internal review. It upheld its position. It also provided a much more detailed explanation of why it was applying section 40(2). The Commissioner has reproduced the text of this response below, as it is relevant to the analysis section of this notice:

'In respect to the information that we have withheld, I am required to consider (under section 40 FOIA) whether disclosure of the following personal data would contravene any of the data protection principles in the Data Protection Act:

- 1. The performance targets of Mr Smith [for part 4 of the request];*
- 2. The maximum potential bonus awards that could have been earned by Mr Higgins and Mr Smith [for parts 1 and 3 of the request];*
- 3. Details of performance targets that were 'not completed to 100% satisfaction' by Mr Higgins and Mr Smith [for parts 2 and 4 of the request];*
- 4. The percentage of the maximum performance related pay earned by the other members of senior management and the performance target/s 'responsible for them not getting 100% [for part 5 of the request].*

9. *I have given consideration to the following relevant factors:*

- * Disclosure should only to be to the extent necessary to fulfil a legitimate public interest.*
- * Only in exceptional circumstances can disclosure of exact pay (or reasons for not earning a maximum performance related pay) be justified.*
- * More senior staff who are responsible for executive and financial functions can expect greater scrutiny of their pay than more junior employees.*
- * There could be factors that weigh in favour of greater disclosure, such as legitimate concerns about corruption or mismanagement, or situations in which senior staff set their own or others' pay.*
- * Specific individuals' concerns about disclosure of their personal salary data.*

10. *The purpose of the Data Protection Act and the data protection principles is to protect people's private information and to ensure that it is handled properly. The data protection principles provide that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met. The only condition potentially relevant to this case is condition 6(1)*

..

11. *It will be noted from the condition that personal information can only be released if there is a genuine reason to disclose it which warrants prejudice to the privacy rights and freedoms or legitimate interests of the relevant ODA staff members. I do not consider that such legitimate interests exist to justify disclosure of the additional information you have requested, especially in view of the disclosures already routinely published by the ODA in respect of the salaries and bonuses earned by the ODA's directors. I consider that the disclosure of the additional information requested would be unfair to the individuals concerned, particularly because the disclosure would be outside the reasonable expectations of the individuals concerned and there is no overriding interest in disclosure which outweighs the detriment to the individuals' privacy right and legitimate interests.*
12. *I accept that there will always be some legitimate public interest in knowing how public money is spent, and how our senior management salaries compare with those in other areas. However, these interests are met by the routine disclosure of our directors' salaries. This is not a case where there are additional public interest factors in favour of disclosure which may outweigh any detriment to the individuals concerned and justify disclosure of the type of information you are requesting, for example where:*
- * there are current controversies or credible allegations;*
 - * there is a lack of safeguards against corruption;*
 - * normal procedures regarding the payment of remuneration have not been followed;*
 - * the individuals in question are paid significantly more than the usual salary for their post; or,*
 - * the individual or individuals concerned have significant control over setting their own or others' salaries.*

There are no such factors in this case and so for the reasons above I do not consider that we are under a duty to provide any further information to you.'

The Investigation

Scope of the case

13. On 14 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- * He believes that the public have the right to know the scale of these individuals' bonus payments and the criteria for awarding them.

- * That those individuals are expected to have a closer level of public scrutiny when they are in 'exceedingly high paid public office.'
14. On 16 September 2009 the complainant confirmed to the Commissioner that he was content with the scope of this investigation being:
- * To determine whether the public authority applied section 40(2) correctly to the five elements of the request dated 11 May 2009, or alternatively whether any of this information can be disclosed to the public.

Chronology

15. On 14 September 2009 the Commissioner wrote to the public authority for it to provide the withheld information for him to consider this case.
16. On 15 September 2009 the Commissioner wrote to the complainant to set the scope of his investigation. The complainant confirmed he was content with the scope the next day.
17. On 29 September 2009 the public authority provided the Commissioner with the withheld information. It also ensured that it provided an explanation of how the information can be used to answer the request. It finally provided the Commissioner with a letter from the Remuneration Committee to explain the process used to determine salaries and targets, the reasons why the expectations were engendered, additional arguments about the possible effect on targets and the public authority's work environment. These arguments will be considered in the analysis section of the Notice below.
18. On 2 October 2009 the Commissioner wrote to the public authority to ask it for a copy of its 2007/2008 annual report. It referred him to a link on its website on the same day.
19. On 9 October 2009 the Commissioner write to the public authority to acquire detailed arguments about its position. He also asked whether it would explain its performance appraisal system to the complainant as part of its obligations to provide advice and assistance.
20. He received a response on 10 November 2009. He also received further evidence and written statements. It provided an explanation to the complainant.

Findings of fact

21. The public authority as mentioned in paragraph 2 above routinely publishes the exact salaries of its executives and how their salary is broken down. The bonuses (Performance Related Payments) in this case were paid to the employees in May 2008 (apart from the payment to the Chief Executive that as stated above was made later).
22. The public authority operates a discretionary non-pensionable bonus scheme which is designed to incentivise employees and is based on the achievement of

the ODA's objectives and is measured through a performance management framework.

23. The public authority has a Remuneration Committee that has four main functions:
- * To determine the remuneration of the Chief Executive, including salary and performance related pay;
 - * To consider recommendations and proposals from the Chief Executive regarding pay, bonuses and any other matters regarding remuneration for the Directors and direct reports to the Chief Executive;
 - * To advise the Board and the Chief Executive as requested on general matters regarding the remuneration of employees; and
 - * To consider any matters relating to the ODA's pension arrangement that may require the attention of the Board.
24. The Remuneration Committee recommends the Chief Executive's pay to the Department of Culture, Media and Sports (DCMS) and the levels of remuneration of staff are subject to that department's agreement.
25. The structure of the public authority is that it has a Board whose members are appointed by the Olympics Minister. This Board is responsible for the exercise of the public authority's powers and the Chief Executive is a member of it. He is designated as Accounting Officer and is responsible to the Board for the general exercise of the Board's functions. The Executive Management Board has been appointed to assist the Chief Executive in the discharge of his responsibilities.
26. The Chief Executive was appointed by the Secretary of State. The Director of Finance and Corporate Services and Director of Transport appointments were subject to approval of the Secretary of State. The other Executive Management Board members are appointed by the Board. The terms and conditions of employment of all Executive Management Board Members are approved by the DCMS. The Chief Executive is appointed on a permanent contract and is required to give six months notice on termination and the public authority must give twelve months notice. The other Executive Management Board Members have permanent contracts with notice periods between three and six months.

Analysis

Substantive Procedural Matters

What relevant information is held in relation to the request?

27. The Commissioner appreciates that the way the request is worded may be seen to be prejudicial to the individuals themselves. It would appear to contain a presupposition that the potential failure to obtain 100% of a performance related

payment makes performance unsatisfactory. The Commissioner and the public authority understand Performance Related Payments to be made for additional achievements beyond satisfactory performance. However, the complainant is correct that if the individual has not gained 100% then their performance may be seen as imperfect. There is also a presumption that the bonuses are linked solely to performance targets and this is not the case.

28. Section 16(1) (full copy in the attached legal annex) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the section 45 Code of Practice in relation to the provision of advice and assistance in that case.
29. The Commissioner has asked the public authority to explain its system to the complainant and is content that it has now done so. While there is no obligation imposed by the section 45 Code of Practice to contextualise or explain a request that was clear on face value, the Commissioner believes that it would have been sensible to have provided an explanation to remove confusion in this case. As this is not a requirement of the section 45 Code of Practice, it is not a breach of section 16(1) of the Act.
30. The Commissioner has examined the performance objectives of Mr Higgins and is content that the information provided to the complainant with his consent was accurate.
31. The Commissioner is satisfied that the public authority has correctly identified the relevant recorded information that is caught by the request and it is the following seven items that he will consider in the remainder of this notice:
 1. The performance targets of Mr Godric Smith;
 2. The maximum potential bonus awards that could have been earned by Mr Higgins;
 3. The maximum potential bonus awards that could have been earned by Mr Smith;
 4. Details of performance targets that were 'not completed to 100% satisfaction' by Mr Higgins;
 5. Details of performance targets that were 'not completed to 100% satisfaction' by Mr Smith; and
 6. The percentage of the maximum performance related pay earned by the other members of senior management:
 - * Dennis Hone.
 - * Ralph Luck.
 - * Alison Nimmo.

- * Howard Shiplee.
- * Hugh Sumner.
- * Simon Wright.

7. The performance target/s 'responsible for the individuals in item 6 above not getting 100%', if they did not do so.

32. The Commissioner will consider the application of section 40(2) for the remainder of this Notice.

Exemption

Section 40(2)

33. The public authority has argued that the disclosure of any of the seven categories of information would involve disclosing personal data and that doing so would contravene one of the data protection principles of the Data Protection Act 1998 ("DPA"). As such it would be exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i). It explained that it has provided accountability by publishing the bonuses and the performance targets of the Chief Executive with his consent.
34. The complainant has argued that all of this information should be disclosed. He has explained that the amount of public money involved in this project that is invested on the salary of the individuals ought to make them expect that the public will be able to review their performance and understand why the sums are being paid. The complainant has also indicated that given the Olympic Project is controversial it is important that the nation receives good value for money and the public requires the information requested to understand it.
35. The public authority's main arguments centred on the application of the first data protection principle. It believes that disclosure of the personal data in question would be unfair and would not satisfy one of the conditions for processing listed in Schedule 2 of DPA. It also has provided detailed arguments about why it believes that none of the conditions in Schedule 2 of the Act are satisfied.
36. In analysing the application of section 40(2), the Commissioner therefore considered:
- a) whether the information in question was personal data; and
 - b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

Are the seven items of information personal data?

37. Personal data is defined in section 1 of DPA as data '*which relate to a living individual who can be identified—*
- (a) *from those data, or*

(b) *from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'

38. The Commissioner notes that the withheld information consists of particular individual's performance targets and the payment connected to their performance in their roles. In this case, the Commissioner is satisfied that the seven categories of withheld information all relate to living individuals. The Commissioner accepts that the information is personal data as defined by the DPA. For clarity, the information is the personal data of the individual whom it concerns.

Would disclosure contravene the first data protection principle?

39. The first data protection principle has two main components. These are as follows:
- A requirement to process all personal data fairly and lawfully; and
 - A requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
40. Both requirements must be satisfied to ensure compliance with the first data protection principle. If one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle.
41. It is important to note that any disclosure under the Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed this approach. In particular the Commissioner is influenced by paragraph 52 that was worded as follows: "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52):
- http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf
42. The Commissioner will consider the operation of the first data protection principle to each of the seven categories of information in turn:

Item 1 – the performance targets of Mr Godric Smith

Would disclosure be fair and lawful?

43. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individual's reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - Whether this expectation would be removed by any accompanying expectation that this sort of information would be available;
 - Whether disclosure would cause any unnecessary or unjustified harm to the individual; and
 - Legitimate interests of the public in knowing about the process that is in force and the necessity for the public to have confidence in the remuneration strategy of the public authority.
44. The public authority stated that disclosure of the withheld information would be unfair. It informed the Commissioner that it believed that the release of the withheld information would be unfair to the data subject. It does not think that the data subject would have had a reasonable expectation of the withheld information being released in this case. Instead there was an expectation of confidentiality and privacy especially given that the performance targets relate directly to the work that is done by the data subject. The Commissioner, having looked at the nature of the information, is convinced that the reasonable expectations are present and this would lead to the possibility that the release of this information would be unfair. In addition the Commissioner has received a written statement from the individual involved and this confirms that his expectations were that this specific information would not be disclosed to the public. The Commissioner considers this to have been a reasonable expectation in this case.
45. The Commissioner has also considered the submissions of the public authority's Remuneration Committee and appreciates its comments about the need for trust, confidentiality and openness in the dialogue between line manager and employee. The Commissioner acknowledges that this is important and notes that the statement reflects that this is a mutual understanding. In addition the contract of employment is silent about the disclosure of this information. The potential undermining of the process has to be considered to mean that disclosure would be unfair to the individual.
46. The public authority has also asked the Commissioner to take into account specifically the environment in which the withheld information was obtained. In this case it explained that the objectives were personally agreed with the Chief Executive on a confidential basis. The information was created as part of a human resources process in an employment environment, relating to Mr Smith's performance. It explained that there was never any doubt about the confidentiality of the process and that all parties understood how it was operating. The Commissioner is satisfied that the process provides additional evidence supporting the conclusion that the release of the information will be unfair.
47. The Commissioner's guidance on the application of section 40 suggests that when considering what information third parties should expect to have disclosed

about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

48. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act. This approach is supported by the Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives' (at paragraph 78).

49. The Commissioner also believes that a distinction can be drawn between the information which senior staff should expect to have disclosed about them compared to what information junior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds. In relation to this part of the investigation, the Commissioner notes that the request is for information about a relatively senior figure. In this case while the individual may have fewer responsibilities than the Chief Executive he still has considerable responsibilities. This must be considered as a factor that suggests that the release of the information might not be unfair.
50. The Commissioner has considered whether there would be an accompanying expectation that this sort of information would be made available. The Commissioner believes that the way the objectives are phrased makes them fairly generic. The arguments concerning privacy surrounding them are therefore less convincing. In addition the targets have been fixed and it is the performance against them which may be expected to be protected more. However, the statement shows that the individual's expectation in this case is that the information will not be disclosed. His statement was that the information is personally sensitive, private and confidential and that was his understanding throughout the process. It also confirmed that there are no terms within his contract of employment that would envisage that this information would be disclosed. It explained that confidence may be likely to be reduced in the performance appraisal process and that its effectiveness would accordingly be undermined. This statement is crucial in this case.

51. The Commissioner has considered in detail the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified harm to the individual involved. Having considered the nature of the information the Commissioner was not originally convinced that such harm would occur. However, the statement he has received expresses concern of unwarranted harm and he must take this evidence into account.
52. In finally considering the legitimate interests of the public, the Commissioner notes that the public authority is in a unique environment and that it is important that there is understanding about how the hosting of 2012 games will be delivered. It is equally important to understand the expectations of how the individuals will ensure that this is so. The Commissioner believes that this is a strong factor that suggests that the release of this limited information may be fair. He does note however that the public authority is open about the milestones that it has set itself as an organisation and that the public can easily see for itself how far these objectives have been met from information in the public domain.
53. In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject. The central reason for this conclusion is that the legitimate expectations of the individual are clear that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
54. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle it is not necessary to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
55. However, the Commissioner has decided in relation to this item, that further analysis can be usefully provided to explain his position in relation to the conditions of Schedule 2 of the DPA. He also does not believe that any of those conditions are satisfied, but will use this opportunity to explain why this is so for this item. Mr Smith has explicitly not provided his consent and therefore condition 1 is not satisfied.
56. The only other relevant condition in this context is condition 6(1). This states that:

“the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
57. In deciding whether condition 6(1) would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas* [EA/2007/0060]. In that

case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests in disclosing the information,
- the disclosure must be necessary for a legitimate interest of the public,
- even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

58. The public authority provided detailed arguments about condition 6(1). It explained that it understood that there were legitimate interests in disclosing the information. However, it stated that it believed strongly that disclosure was not necessary in this case, particularly given what has already been disclosed, and even if it were, it would be an unwarranted interference that would prejudice the individual's rights, freedoms and legitimate interests. This was evidenced by a statement from the individual.
59. The complainant did not provide detailed arguments about why disclosure would satisfy condition 6(1). However, the Commissioner understands that he believes that the nature of the role means that the public has a legitimate interest in understanding exactly what performance is expected for such a large sum of public money.
60. The Commissioner will therefore go on to consider each of the three tests above in turn.

Legitimate interests

61. The public authority acknowledged that the public may have legitimate interests in disclosure of the information. It explained that the complainant, as a member of the public, has the prima facie right to request the information under the Act. It explained that the public was entitled to accountability about how these sums were spent and acknowledged that it would add to the demonstration of value for money.
62. The complainant has established that there are legitimate interests for the public in knowing this information. The Commissioner is satisfied that this test is satisfied and that the legitimate interests of the requester, and therefore of the public in general, is served by disclosure.
63. The Commissioner is satisfied that the following legitimate interests of the public may require disclosure in this instance:
- There is a wide legitimate interest in accountability and transparency. Clearly the public will have a greater understanding in the event the information was disclosed.
 - Given the large sums of public money invested in salaries there is a legitimate interest in the public in understanding the requirements of the role of the Director of Communications.

Necessity

64. The Commissioner's view is that when considering necessity disclosure must be necessary to meet some of the legitimate interests above. There must not be a less intrusive means of meeting that end. He has therefore taken into account existing mechanisms and whether they satisfy these interests.
65. The Commissioner notes that the public authority has released the exact amount of money that it has paid to the individual. In addition it has now explained the nature of its performance related pay system. The Commissioner notes that these performance targets are negotiated with the Chief Executive in confidence and that their scope is checked by the Remuneration Committee. This enables the objectives to achieve the organisation's wider goals and that the wider goals and timelines are communicated to the public on its website. He notes that the communications on the website are clear and enable the public to follow the progress of the preparation for the games.
66. However, the information online provides no indication of the individual's specific responsibilities apart from the fact that they have a set job title. The Commissioner believes that the disclosure of the objectives themselves would provide additional accountability. He believes that it is correct that the disclosure of these objectives would be necessary for those legitimate interests in this instance.

Unwarranted Interference

67. The Commissioner must then go on to consider the collective weight of the necessary legitimate interests and whether disclosure would cause an unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
68. The Commissioner finds that there are necessary legitimate interests identified above and that they carry some weight on the facts of this case.
69. However, the statement from Mr Smith is unequivocal. It states that the information is personally sensitive, private and confidential and that was his understanding throughout the process. It also confirmed that there are no terms within his contract of employment that would envisage that this information would be disclosed. It explained his view that confidence would be likely to be reduced in the performance appraisal process and that its effectiveness would accordingly be undermined. Mr Smith states that he believes that the release of this specific information would cause unwarranted interference and the Commissioner understands in this context why it is so. The Commissioner believes that this clearly means that condition 6 cannot be satisfied in this case and therefore that there are no conditions that can be satisfied in this instance.

Conclusion

70. In view of all of the above, the Commissioner has found that the release of the information would be both unfair and fails to satisfy a condition in Schedule 2 of the DPA. This means that its release would contravene the first data protection principle. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

Item 2 – the maximum potential bonus available to Mr Higgins

Would disclosure be fair and lawful?

71. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individual's reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - Whether this expectation would be removed by any accompanying expectation that this sort of information would be available;
 - Whether disclosure would cause any unnecessary or unjustified harm to the individual; and
 - Legitimate interests of the public in knowing about what the process that is in force is and the necessity for the public to have confidence in the remuneration strategy of the public authority. This includes the nature of the performance management system.
72. When considering the individual's reasonable expectation, the Commissioner has looked in detail at the appraisal process at the public authority. As explained above the Chief Executive's pay is decided by a Remuneration Committee before being ratified by the Department for Culture, Media and Sport. The Commissioner acknowledges that the process is grounded in confidentiality and that the environment necessitates this confidentiality in order to ensure best value for the nation. The Commissioner is aware that there may be a 'softening' effect on targets in the event of the percentage of performance related bonuses being released. The Commissioner is satisfied that the individual's expectations were that the information concerning salary would be published but whether the maximum was or was not obtained would not be. The Commissioner is satisfied that this expectation is reasonable and is convinced that the disclosure of this information would be unfair.
73. The Commissioner has considered that the individual is both senior and that clearly whether or not he received all the performance related payments connects to his public life. However, he feels that information additional to the actual salary will connect directly to his level of performance and that this would go against the

expectations above. He notes that a summary of his performance objectives has been released with his consent and this provides some information about the role that he fulfils in the organisation.

74. The Commissioner does not feel that there is any competing expectation that the information should be released. He does not believe that other organisations are likely to publish information about what they have not paid, when to do so has the possibility of releasing personal information against the expectations of their staff.
75. The Commissioner believes that the release of this information could be likely to cause unnecessary and unjustified harm to the individual. He believes that this provides more evidence that the release of the information would be unfair.
76. In finally considering the legitimate interests of the public, the Commissioner notes that the public authority is in a unique environment and that it is important that there is understanding about how the hosting of 2012 games will be achieved. However, the Commissioner believes that the public interest has already been satisfied in disclosing the full amount of payments issued to the individual. He does not feel that the legitimate interests of the public exceed the reasonable expectation of the individual in this case.
77. In balancing up the factors, the Commissioner feels that the disclosure of this information would be unfair to the data subject. His principal reason is that the reasonable expectations of the data subject would be that the information would be kept private and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
78. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
79. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

Item 3 – the maximum potential bonus available to Mr Smith

Would disclosure be fair and lawful?

80. This item requires separate analysis from item 2 above because the appraisal process is different for less senior members of staff, the reasonable expectations are different in this case and the performance objectives have not been provided already to the public (as this is the information at issue in item 1 of this case).
81. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individual's reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - Whether this expectation would be removed by any accompanying expectation that this sort of information would be available;
 - Whether disclosure would cause any unnecessary or unjustified harm to the individual; and
 - Legitimate interests of the public in knowing about what the process that is in force is and the necessity for the public to have confidence in the remuneration strategy of the public authority. This includes the nature of the performance management system.
82. The arguments about reasonable expectations have already been rehearsed at paragraphs 44 to 49 of this notice. These arguments are equally relevant for the Commissioner's consideration of 'item 3'.
83. The arguments about unnecessary or unjustified damage to the individual are stronger than those in item 1. In this case the information could be perceived to enable direct commentary on items of personal performance and it is easy to understand the unnecessary and unjustified harm that may occur. Further the statement from the individual provides some explanation of that potential damage. The Commissioner believes that these arguments support the view that disclosure of this information would be unfair to the data subject.
84. When considering the legitimate interests of the public, the Commissioner and the public authority understand that it is important that there is public confidence in the performance management system that the public authority has adopted. In particular it is important that the large sums of public money are administered in a clear fashion and that the public have confidence that the rewards made reflect the work done.
85. The Commissioner has investigated in detail the nature of the payments as he agrees that this factor is very important in this analysis. He is content that the performance appraisal system is administered with oversight at two points. Firstly the Chief Executive conducts the performance appraisal and then the amount is independently reviewed by the Remuneration Committee before it is paid. In addition the payments are connected to a policy that is applied uniformly across the public authority. While it has an element of weighted discretion within it, it does operate within broad indicative parameters and is connected to performance. These parameters have also been approved by the Department of Culture, Media and Sport. The Commissioner is satisfied after considering the withheld information, the arguments, the policy and the parameters that there is considerable oversight in this case. He does accept that revealing the withheld information would provide an element of further oversight, but that this interest is considerably outweighed by the harm of going against the individual's reasonable expectations in this case.

86. In balancing up the factors, the Commissioner feels that the disclosure of this information would be unfair to the data subject. His principal reason is that the reasonable expectations of the data subject would be that the information would be kept private and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
87. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
88. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

Item 4 - Details of performance targets that were 'not completed to 100% satisfaction' by Mr Higgins

89. As explained in paragraphs 27 to 29, the request was based on a misunderstanding of the performance pay system. The Commissioner understands that it is possible that performance targets can be completed to full satisfaction and yet the full bonus not awarded. This is because the bonus is awarded to encourage achievement beyond those objectives.
90. The public authority has now explained that the award of the performance related bonus is not attached solely to objectives. Instead it is structured within broad indicative parameters that encompass a range of performance ratings and the award was made on a discretionary basis including other factors such as organisational performance and budget availability.
91. For the purposes of this case, the Commissioner is interpreting items 4, 5 and 7 as the additional activities that would be required in order for any of the individuals concerned to have obtained 100% of the bonus, if they did not do so. The Commissioner has advised the public authority in future cases to provide advice and assistance to enable the requestor to modify their request themselves.
92. Given the outcome for item 2 in this case, the outcome for item 4 will inevitably be decided the same way on the same factors outlined in paragraphs 71 -79 above.
93. However, the Commissioner does understand that there is an additional public interest in understanding if an individual has not met any objectives, which objectives those are and whether or not it would undermine the project as a whole. He does not believe however that this factor changes the balance in this case. He still believes that the weight of the factor of the reasonable expectations of the individual would mean that the disclosure of this information would be unfair to the data subject.

94. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.

95. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

Item 5 - Details of performance targets that were 'not completed to 100% satisfaction' by Mr Smith

96. For the same reasons as for items 3 and 4 above, the Commissioner believes that the disclosure of this information would be unfair to the data subject. Disclosure would therefore contravene the first data protection principle. The Commissioner upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

Item 6 - The percentage of the maximum performance related pay earned by the other members of senior management.

97. The Commissioner has also received equivalent statements (to that of Mr Smith) from the other members of senior management. He therefore finds that disclosure of this information would be unfair to the data subjects for the same reasons as for item 3 above. Disclosure would therefore contravene the first data protection principle. The Commissioner upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

Item 7 - The performance target/s 'responsible for the individuals in item 6 above not getting 100%', if they did not do so.

98. The Commissioner has considered the withheld information and notes there is no difference between its substance and that of items 3 and 4 above. He therefore finds that disclosure of this information would be unfair to the data subjects for the same reasons as for those items. Disclosure would therefore contravene the first data protection principle. The Commissioner upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to this part of the withheld information.

The Decision

99. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- *The public authority applied section 40(2) correctly to all seven items of information that it withheld in this case.*

Steps Required

100. The Commissioner requires no steps to be taken.

Right of Appeal

101. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 16th day of December 2009

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Freedom of Information Act 2000

Section 1 - 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 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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority—
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- ...

Section 16 – Duty to provide advice and assistance

- (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
- (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.
- ...

Section 40 – Personal information

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the

disclosure of the information to a member of the public otherwise than under this Act would contravene—

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—

(a)

is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b)
is recorded with the intention that it should be processed by means of such equipment,

(c)
is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d)
does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—

(a)
from those data, or

(b)
from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a)
organisation, adaptation or alteration of the information or data,

(b)
retrieval, consultation or use of the information or data,

(c)
disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)
alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.