IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0024**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEALFROM:

Information Commissioner's
Decision Notice No: FS50259954
Dated: 16 December 2009

Appellant: MATTHEW DAVIS

Respondent: THE INFORMATION COMMISSIONER

Additional Party: THE OLYMPIC DELIVERY AUTHORITY

Heard at: Fox Court, London

Date of hearing: 10 November 2010

Date of decision: 4 January 2011

Before
CHRIS RYAN
(Judge)
and
JACQUELINE BLAKE
IVAN WILSON

Attendances:

For the Appellant: Mr Davis represented himself
For the Respondent: Ms Joanne Clement.
For the Additional Party: Mr Timothy Pitt-Payne

Subject matter: Personal data s.40

Cases: *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin)

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0024**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 16 December 2009 is substituted by the following notice:

SUBSTITUTED DECISION NOTICE

Dated: 4th January 2011

Public authority: **THE OLYMPIC DELIVERY AUTHORITY**

Address of Public authority: **One Churchill Place,**
Canary Wharf,
London,
E14 5LN

Name of Complainant: **Mr M Davis**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the decision notice dated 16 December 2009 shall stand, save that the Public Authority is found to have failed to deal with the Complainant's request for information in accordance with the Freedom of Information Act 2000 in so far as it refused to disclose the following information:

1. The maximum amount of performance-related bonus that the Public Authority's chief executive, Mr David Higgins, could have been awarded under the terms of his contract.
2. The maximum amount of performance-related bonus that the Public Authority's director of communications, Mr Godric Smith, could have been awarded under the terms of his contract.
3. In relation to each of the remaining six members of the senior management board (being Denis Hone, Ralph Luck, Alison Nimmo, Howard Shipley, Hugh Sumner and Simon Wright) the percentage of the maximum related pay award they actually received.

.

Action Required

Within 35 days from the date of this Substituted Decision Notice the Public Authority should disclose the wrongly withheld information identified above to the Complainant.

Dated this 4th day of January 2011

Signed:

Chris Ryan
Tribunal Judge

REASONS FOR DECISION

Introduction

1. This Appeal concerns information about the performance-related payment scheme applying to the Chief Executive of the Olympic Delivery Authority ("ODA") and other members of its senior management board. We have concluded that the disclosure of some, but not all, of the requested information would breach the data protection principles established under the Data Protection Act 1998 ("DPA"). That part of the requested information was therefore exempt information under section 40 of the Freedom of Information 2000 ("FOIA"). The remaining information was not exempt and should have been disclosed.

The Request for Information

2. On 11 May 2009 Mr Mathew Davis, the Appellant in this Appeal ("Mr Davis"), sent an email to the ODA requesting, by reference to its published accounts for the period 2007/08, the following information:
    1. The maximum amount of performance-related bonus that the ODA's chief executive, Mr David Higgins, could have been awarded under the terms of his contract.
    2. A list of Mr Higgins' performance targets.
    3. Any performance-related pay targets that were not completed by Mr Higgins to 100% satisfaction.
    4. The maximum amount of performance-related bonus that the ODA's director of communications, Mr Godric Smith, could have been awarded under the terms of his contract.
    5. A list of Mr Smith's performance targets.
    6. Any performance-related pay targets that were not completed by Mr Smith to 100% satisfaction.
    7. In relation to each of the remaining six members of the senior management board the percentage of the maximum related pay award they actually received.

8. The performance target(s) responsible for those individuals not getting 100% of the bonus available to them, if they did not do so.

3. The following information sets the request in context:
    a. The ODA is an Executive Non-Departmental Public Body which has the task of creating, to a fixed timetable, the infrastructure and facilities for the 2012 Olympic Games in London, including all necessary transport services and a sustainable legacy plan. During the year in question it was responsible for the management of assets totalling in excess of £150,000,000 and the expenditure of approximately £450,000,000 of public money. Perhaps as important as the financial aspect of its activities, the ODA has responsibility for managing to a fixed timetable delivery of the facilities for a huge world sports event, the success of which is of great potential significance to the nation.
    b. Mr Higgins is the Chief Executive of the ODA. In the year in question he received a salary of £373,000 plus a performance-related payment of £205,000 and a pension contribution of £46,000.
    c. Mr Godric Smith is the ODA's Director of Communications. He received a salary of £186,000 plus a performance-related payment of £35,000 and a pension contribution of £22,000.
    d. The other six members of the senior management board were:
        i. Dennis Hone (Director of Finance and Corporate Services), who received a salary of £269,000 plus a performance-related payment of £58,000 and a pension contribution of £31,000;
        ii. Ralph Luck (Director of Property), who received a salary of £230,000 plus a performance-related payment of £37,000 and a pension contribution of £25,000;
        iii. Alison Nimmo (Director of Design and Regeneration), who received a salary of £217,000 plus a performance-related payment of £47,000 and a pension contribution of £26,000;
        iv. Howard Shiplee (Director of Construction), who received a salary of £274,000 plus a performance-related payment of £52,000 and a pension contribution of £31,000;
        v. Hugh Sumner (Director of Transport), who received a salary of £217,000 plus a performance-related payment of £42,000 and a pension contribution of £26,000; and
        vi. Simon Wright (Director of Infrastructure and Utilities), who received a salary of £217,000 plus a performance-related payment of £47,000 and a pension contribution of £26,000.

4. All of the figures set out in the previous paragraph were published in the ODA's accounts for 2007/8. A series of straightforward calculations leads to the revelation that Mr Higgins' bonus represented a 55% increase on his basic salary. The equivalent statistics for each of the other named individuals are as follows:

Name	Performance Payment as Percentage of Salary
Godric Smith	18.8
Dennis Hone	21.6
Ralph Luck	16.1
Alison Nimmo	21.6
Howard Shiplee	19.0
Hugh Sumner	19.4
Simon Wright	21.7

5. Those figures give some indication of the differential bonuses enjoyed by each of the individuals concerned. But the impression that, for instance, Mr Wright achieved greater success in his endeavours than Mr Luck, would only be an accurate assessment if the maximum percentage payable was the same for them both. If Mr Luck's maximum achievable percentage increase had, for example, been 20% and Mr Wright's had been 40%, then the former would have been awarded something over 80% of the total achievable, whereas the latter would only have been awarded approximately 54%. It was no doubt for this reason that Mr Davis requested:
    a. The percentage of the possible maximum earned (in respect of Mr Hone, Mr Luck, Ms Nimmo, Mr Shiplee, Mr Sumner and Mr Wright), from which the maximum could itself be calculated; and
    b. The maximum possible performance payment (in the case of Mr Higgins and Mr Smith) from which the percentage actually achieved could be calculated.

6. Mr Davis' information request also adopted different language in respect of the possible reasons for any shortfall from the maximum. In the case of Mr Higgins and Mr Smith, he requested both the full list of performance targets and details of those that were not completed to 100% satisfaction, whereas in the case of the other executives he sought information on just those of the performance targets responsible for the individual in question not securing 100% of the maximum performance payment theoretically available. In the event, we received evidence, which is summarised below and was not challenged by Mr Davis, that the linkage between the achievement of performance targets and the calculation of performance payments is not as precise as the terms of Mr Davis' information request may have suggested. A payment of less than 100% of the maximum would not indicate that one or more of the performance targets had necessarily been missed. On the contrary, the achievement of <u>all</u> targets would, in practice, lead to the payment of only part of the maximum payable, anything above that being dependent on a judgment by those determining the final award of other aspects of performance by both the individual (referred to in the course of evidence as the "soft" criteria) and the organisation as a whole. At the suggestion of the Information Commissioner the ODA provided an explanation of this aspect of the remuneration scheme by letter some time before the Information Commissioner reached the decision from which this Appeal derives.

Partial refusal of the request for information

7. By a letter dated 8 June 2009 the ODA claimed that the contractual arrangements of the executives covered by the request and their performance assessment constituted their personal data and that its release would breach obligations owed to the individuals under the DPA. It claimed that the effect of section 40 of the FOIA was that the information requested was, therefore, exempted from the obligation to make disclosure.

8. FOIA section 40, in the context of this Appeal, provides that information to which a request for information relates is exempt information if its disclosure would contravene any of the data protection principles. The exemption is an absolute exemption (FOIA section 2(3)(f)(ii)), which means that, if it is engaged, disclosure may be refused without any consideration of the balance of public interest for and against maintaining the exemption.

9. The ODA made one exception to its blanket refusal, in that it provided a summary of Mr Higgins' performance objectives for 2007/08 (request 2). In doing so it indicated that it considered that it would have been entitled to withhold this information also but that, considering Mr Higgins' position within the ODA, and following discussion with him, it was prepared to release it. Mr Davis responded by letter dated 17 June 2009 with a request for the refusal decision in respect of the rest of the information to be re-considered. He added:

> *"I should remind you that the job titles I have asked for are high profile publicly funded positions which come with a realisation that they should be open and transparent about the benefits they receive from the public purse. Your assessment of the dividing line between their personal privacy and their public responsibilities is wrong and I would ask you to look at the matter again."*

10. The ODA replied by letter dated 13 July 2009 setting out detailed reasons for maintaining its refusal to disclose the withheld information. It summarised its arguments by claiming that *"the level of annual publication of salary and bonus information about ODA's senior management staff…strikes the correct balance between transparency and public interest on the one hand and our privacy obligations to individuals under the Data Protection Act on the other".*

Complaint to the Information Commissioner and his decision.

11. Mr Davis complained to the Information Commissioner about the ODA's refusal on the 14 July 2009. When notifying the ODA of that complaint and providing it with some information about the manner in which he would be carrying out his investigation the Information Commissioner warned that correspondence between his office and the ODA might itself be subject to disclosure under the FOIA. On 29 September 2009 the ODA wrote to the Information Commissioner enclosing copies of the withheld information, including internal memoranda, minutes of meetings of the ODA's Remuneration Committee and materials generated in the course of the annual

appraisal of each of the individuals identified in Mr Davis' information request. All of those materials were made available to us during the course of the Appeal in a closed bundle and we went into closed session whenever it was necessary to refer to them in detail in the course of the Appeal hearing. This was for the obvious reason that making any of those materials available to Mr Davis at that stage would have had the effect of pre-judging the outcome of the Appeal itself. However, the closed bundle also included a letter dated 28 September 2009 written by Sir Roy McNulty, who was at the time its Deputy Chairman and the Chair of its Remuneration Committee. This was addressed to the member of the Information Commissioner's staff handling the complaint and explained the role of the Remuneration Committee and the reasons why its members considered that disclosure of the withheld information should not be ordered. It stated:

> *"The Committee believes that the effectiveness of the target-setting and performance appraisal processes, on which remuneration of senior staff is based, would be reduced if the targets and reasons for less than 100% bonus awards were to be made public. Making such information public would almost inevitably affect the levels at which targets are set, and would condition the basis of performance appraisal discussions."*

And later:

> *"The ODA's performance management system, like appraisal systems within most organisations relies heavily on trust, confidentiality and openness in dialogue between the individual and his or her line manager. Especially in the ODA's work environment – where there is extreme pressure on time and delivery of challenging objectives – it is vital that appraisal conversations, especially in relation to performance-based pay, can remain strictly confidential to the individuals and the organisation."*

12. We directed that Sir Roy's letter should be disclosed to Mr Davis during the course of the hearing and that he should be given the opportunity of cross examining Sir Roy on its content. We could find nothing in the letter, or in the arguments on restricting access put to us by the ODA's counsel, Mr Pitt-Payne, to justify maintaining confidentiality. In our view the procedures which the Tribunal adopts to maintain confidentiality until a decision on disclosure has been made should not be used by public authorities to keep from any other party to an appeal material which reveals arguments that may reasonably be assumed to have been taken into account by the Information Commissioner in reaching his decision on a material issue, provided they do not disclose any part of the withheld information. In the event we found Sir Roy's clarification and expansion of what he wrote provided valuable background to the arguments that were put to us.

13. At the end of his investigation the Information Commissioner issued a Decision Notice on 16 December 2009 in which he concluded that the ODA had been entitled to refuse disclosure of the withheld information because it was exempt information pursuant to FOIA section 40(2). In reaching that conclusion he decided that each item of the withheld information was personal data and that its disclosure would have contravened the first data protection principle set out in Schedule 1 of

the DPA. In the course of reaching that decision the Information Commissioner recorded that he had received written statements from the individuals whose personal data was involved, which confirmed that their expectations had been that the withheld information would not be disclosed to the public. He expressed the view that this had been a reasonable expectation to have in the circumstances.

The Appeal to the Tribunal

14. Mr Davis launched an appeal from the Information Commissioner's Decision Notice on 18 January 2010. His Grounds of Appeal were very short. The material part read:

> *"…the information requested is NOT of a personal nature but relates to their professional operations and the overall performance of the organisation. I believe the* [Information Commissioner] *has miscalculated the balance between personal and professional information and as such the processing of such data would NOT be unfair or unlawful"* (emphasis as in the original).

Although it might appear from this that Mr Davis did not accept that the withheld information constituted personal data he made it clear by the time of the hearing that he accepted that it did. The only issue for determination, therefore, was whether or not the Information Commissioner had been right to conclude in the Decision Notice that disclosure of the withheld information would breach the first data protection principle. If he was wrong then FOIA section 40 would not be available to exempt the withheld information from disclosure and the ODA would not have been entitled to refuse disclosure of any of the withheld information.

15. The Tribunal ordered the joinder of the ODA as an additional party and heard evidence and argument at a hearing on 10 November 2010 at which Mr Davis represented himself, the ODA was represented by Mr Pitt-Payne QC and the Information Commissioner by Ms Joanne Clement. Ms Clement, in seeking to persuade us that the decision reached by her client was correct, supported most of the arguments put forward on behalf of the ODA.

The relevant law

16. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

> *"Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-*
>
> *(a) at least one of the conditions in Schedule 2 is met …"*

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

> *"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."

The term "processing" has a wide meaning (DPA section 1(1)) and includes its disclosure.

17. It follows that, even if an element of personal data handling falls within one of the Schedule 2 conditions, it may still fail to satisfy the general test of fair and lawful processing. We therefore have to decide, in respect of each element of the withheld information,:
    i. whether disclosure at the time of Mr Davis' information request would have been necessary for a relevant legitimate purpose; without resulting in
    ii. an unwarranted interference with the rights and freedoms or legitimate interests of each relevant ODA executive; and, even if those tests are satisfied
    iii. whether it would have been fair and lawful.

    A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through each of those issues, including the determination of what is "necessary" for the purpose of the first question.

Evidence

18. Two witness statements were filed on behalf of ODA. The first was by Mr David Higgins who, as mentioned above, is the Chief Executive of the ODA. His evidence included the following topics:
    a. The ODA's role and objectives and the manner in which it is accountable to the Department for Culture, Media and Sports ("DCMS"), the Olympic Board (comprising the Minister for the Olympics, the Mayor of London, the Chairman of the British Olympic Association and the Chairman of the London Organising Committee of the Olympic Games) and to other funders. The evidence explained that the regime for accountability agreed between the ODA and the DCMS includes target setting for the Chief Executive and a requirement for him to operate an open and fair annual appraisal system for staff and a performance-related pay scheme.
    b. The role of ODA's Board and, in particular for the purposes of this Appeal, the Remuneration Committee, which is authorised to decide the Chief Executive's remuneration and to consider and comment on the Chief Executive's recommendations on pay and bonuses payable to those who report to him (including the individuals identified in Mr Davis' information request).
    c. The inclusion in the ODA's annual accounts of the report of its Remuneration Committee, which includes the information about the remuneration of the individuals affected by Mr Davis' information request. Mr Higgins added the comment that the level of information provided goes further than many public authorities which disclose more limited information which does not identify individual recipients.
    d. The process by which the ODA's accounts are audited by the National Audit Office and the absence of any criticism by that

body of the 2007/08 bonus arrangements covered by Mr Davis information request.

e. The process by which proposals for 2007/08 bonus payments to the individuals covered by Mr Davis' information request were formulated by Mr Higgins, submitted to the Remuneration Committee and approved by it. The evidence was supplemented by a small amount of closed evidence explaining and commenting on the content of the withheld information.
f. The manner in which Mr Davis' information request was handled and a clarification of how the performance-related pay system works. Mr Higgins explained that, as mentioned above, it was not based on a mechanical process in which the extent of the employee's achievement of each element of performance target was given a percentage "score", which was then applied to determine what proportion of the maximum available bonus should be paid. The true position, he said, was that the proper level of bonus was a matter of discretion and judgment, informed by the individual's performance against agreed objectives, but not mechanically determined by it. It was also said to take account of the performance of the ODA as a whole and "budget availability". Mr Higgins added that it was entirely possible for a senior employee to meet all of his or her objectives in full and to a satisfactory level, and yet not receive the maximum bonus. He suggested that Mr Davis' information request betrayed a misunderstanding of the scheme, to the extent that it suggested that if an individual did not receive his or her full performance-related bonus then this must mean that he or she had failed to meet one or more of the objectives set. Additional information was provided on this aspect of the matter in closed evidence.

19. The second witness statement filed on behalf of the ODA was that of Sir Roy McNulty who, as mentioned above, is the Deputy Chairman of the ODA and the Chair of its Remuneration Committee. He explained the decision-making arrangements for determining the bonus arrangements for Mr Higgins, including (in a closed section of the witness statement), the role played by the ODA Board and the DCMS as the government ministry ultimately responsible for organising the Olympic Games. On this topic we need only say that the process appears to have been carefully structured, with a view to ensuring external accountability, and to have been operated with thoroughness on the part of both the ODA and the DCMS.

20. Sir Roy McNulty's witness statement included, in either its text or exhibits, a certain amount of closed material. Not all of it justified that treatment. In particular:
    a. The letter on which we commented in paragraph 11 above, which Sir Roy wrote to the Information Commissioner was referred to in a redacted paragraph, with the comment that he continued to maintain the views that it expressed.
    b. Sir Roy exhibited to his witness statement a signed statement from each of the individuals affected by Mr Davis' information request. They had apparently been prepared as part of the ODA's submissions to the Information Commissioner during the course of his investigation and were substantially identical in

form. As closed evidence, they were obviously not made available to Mr Davis even though they had been made available to the Information Commissioner and appeared to have been taken into account by him in reaching his decision. Each statement recorded that the signatory did not consent to the public disclosure of the information affecting him or her and that he or she held an expectation (which each described as "legitimate") that information recorded during the course of the performance review process would remain private. Each statement then went on to express an opinion on the legal and practical consequences of disclosure. It did not provide any indication of the signatory's claimed expertise to justify the legal opinion. The value of the signatory's expressed fears as to the practical consequences of disclosure was heavily undermined by the manner in which it was presented to the Tribunal and the fact that, as mentioned, Mr Davis had no opportunity to test the evidence in cross examination. Mr Pitt-Payne urged us to accept the statements as part of the body of evidence put forward by the ODA, although he left us to decide what weight they should be given in the circumstance. We expressed our dissatisfaction with this part of the ODA's case presentation during the hearing and refer to the evidential weight of the statements in paragraph 34(c) below.

c. The witness statement itself contained several passages dealing with the ODA's internal processes, which had been redacted. It was not appropriate for the whole of that material to have been kept from Mr Davis and, but for the fact that it was fairly and thoroughly summarised in the skeleton argument filed on the ODA's behalf by Mr Pitt-Payne, we would have had more to say on the topic during the hearing. As it was Mr Davis received the summary information a few days before the hearing instead of several weeks before, when the evidence was served in inappropriately redacted form.

21. Both Mr Higgins and Sir Roy McNulty attended the hearing of the Appeal where they were cross examined by Mr Davis and counsel for the Information Commissioner. They also answered some questions put to them by the Tribunal panel in both open and closed sessions. Their answers were in all cases thorough and balanced and provided considerable assistance to us in understanding the case.

22. Mr Davis' cross examination of Sir Roy concentrated particularly on the transparency of the ODA's remuneration scheme and the perceived impact disclosure of the requested information would have on its operation. Some of Mr Davis' questioning strayed into more general criticism of the concept of performance-related pay in the public sector, both generally and in the context of the ODA's particular role. On the whole, however, he concentrated his questioning on issues that were relevant to the issues. In particular he took Sir Roy to the public disclosure of performance-related pay schemes by other public authorities and suggested that they exhibited a greater degree of transparency than the ODA.

23. One of the organisations put forward as comparable for these purposes was Scottish Water which includes in its annual accounts the maximum incentive attainable by its board members, as well as the performance against identified targets and the resulting calculation of bonus based on the level of attainment achieved. Sir Roy expressed the view that the Scottish Water scheme was quite different in that the targets were fewer in number, simpler in nature and were not tailored to individual roles, but applied to all board members. He added that the method of assessing individual bonuses was also more mechanistic in the Scottish Water model, in that it appeared from the public information to involve a straight application of the percentage achievement "score" to the maximum attainable bonus. He expressed the view that schemes of that nature are more likely to set targets that are very likely to be achieved in order to avoid giving the impression that a missed target represents a degree of failure by the organisation and its management. Sir Roy said that his personal preference was to have a system that set more stretching targets and he suggested that the success of the ODA to date in delivering facilities ahead of schedule demonstrated the value of a model under which the organisation as a whole performs well, even though some of its executives may not have fully achieved each of his or her "stretched" targets. However, he feared that the more detailed disclosure that would result if Mr Davis' information request had been complied with would undermine the process because of the possible perception, on the part of the media and the public, that a missed target represented culpable failure.

24. Sir Roy McNulty was also taken to the published accounts of the Civil Aviation Authority ("CAA")for the year ended 31 March 2008. Sir Roy was the Chairman at the time and it was put to him that under his chairmanship the CAA had operated a performance-related pay scheme that was more transparent than that operated by the ODA, in that the accounts of the former disclosed both the percentage of basic annual salary available and the performance-related pay actually received, enabling the portion of the maximum to be calculated in each case. Sir Roy explained that the CAA system was based on the performance of the organisation against its business plan and within budget, with no expectation of outperformance. He said that the nature of the ODA's operations, and the inclusion in its scheme of more stretching targets for individual elements of each executive's role, meant that the CAA ought not to be treated as an appropriate comparator.

25. Mr Davis also questioned Sir Roy on his view that the executives in question would have a reasonable expectation that none of the information covered by the information request would be made public. His answer was that, while he had not carried out a scientific survey across the public sector, his own experience of working within four or five public bodies over a number of years was that it was the normal custom and practice for performance targets and assessment of achievements against them to remain confidential. He reiterated that he considered the CAA and Scottish Water to be special cases with the result that the level of disclosure made by those organisations would not have altered the expectation of the relevant ODA executives. In making that assessment he relied particularly on the fact that, whereas

the other organisations set a few general targets for the organisation as a whole, the ODA went into much greater detail, imposing targets that were greater in number and were designed to test the detailed performance of each individual's role. He expressed concern that the disclosure of that level of detail, on both the setting of targets and the assessment of the executive's level of achievement against them, would undermine the whole process. This would include the conduct of appraisals, because the executives would adopt a more defensive attitude if they anticipated that any suggestion that even the most stretching target had not been fully achieved would lead to public criticism. This would not only make the appraisal process more difficult but would serve to encourage the setting of less testing targets that were more likely to be achieved.

26. In answer to a question from the Tribunal on this issue, Sir Roy said that he did not differentiate between any of the elements of information requested by Mr Davis in reaching his conclusions on either transparency or the executives' reasonable expectations – it was his view that it was the general practice not to disclose even the maximum achievable bonus when it was based on individual, as opposed to corporate, achievement.

27. During Mr Higgins' cross examination he reinforced Sir Roy McNulty's views on the high level of transparency within the ODA and on the likely impact that disclosure would have on the appraisal process. He said that he would expect the executives who reported directly to him to become more circumspect about the challenges ahead if they feared that the measurement of their efforts in meeting them would subsequently be published in the ODA's accounts in a manner which would also provide a comparative assessment of their performance against that of their colleagues. He thought that there might also be a temptation for all those affected, including himself, to seek to negotiate a more favourable assessment of achievement, rather than accept the percentage awarded.

28. As previously indicated, Mr Higgins also provided more information during cross examination, and in answering questions during a closed session, about what he described as the "soft" criteria that were taken into account when exercising judgment on the appropriate level of performance-related pay. He accepted that the stage before that process began involved a degree of calculation, but explained that this did not mean that the process as a whole was mechanical or mathematical because, once the achievement against identified targets had been assessed, consideration was given to the overall contribution of the individual within the team, as well as the level of success enjoyed by the team as a whole. He did concede, however, that the targets themselves had become less personal, and more closely aligned with the objectives of the organisation, as progress was made towards the ultimate goal of Olympic delivery.

29. In answer to a question from the Tribunal during closed session (but in terms that we can summarise without disclosing a confidence) Mr Higgins accepted that each of the executives concerned would be aware of the maximum available to his or her colleagues and would

therefore be able to make a precise calculation of his or her relative success in terms of bonus awarded. He maintained that keeping secret the maximum attainable was still important because the remuneration scheme had been devised as a whole and any relaxation of its confidentiality would create nervousness and render the operation of the process more difficult.

Debate on the issues

30. Mr Davis described as the crux of the appeal his criticism that the Information Commissioner had miscalculated the complex balancing test inherent in the issues we have summarised in paragraph 16 above. We approach them in the same order.

31. Would disclosure serve a legitimate public interest?

    a. Mr Davis argued that both he, as the person who made the original information request, and the public at large had a legitimate interest in obtaining the requested information. This arose from the importance of the Olympic Games, the very substantial commitment of public funds involved in organising them and the inflexible end point of the planning timetable. Evidence as to whether or not intermediate targets were being achieved would be crucial in assessing whether the project would ultimately be concluded on time and on budget. Mr Davis maintained that the legitimacy of those general public interests was enhanced by what he described as the controversy over funding issues, including the possibility of a budget overrun, and the size of the remuneration packages when compared with those of other public servants. He also relied on what he characterised as a lack of transparency of the ODA remuneration scheme, which he said involved imprecise criteria for the award of performance-related payments and enabled one or more of the individuals concerned to have a degree of control over setting their own salaries.
    b. Those criticisms were largely misplaced. Our conclusion, based in part on our examination in closed session of the ODA's files, including the withheld information, is that the ODA does operates an effective remuneration scheme and that it is subjected to an appropriate level of internal and external supervision. In terms of transparency it also clearly discloses more information than many other organisations, although less than some others. We do not base our assessment of legitimate interest on any sense that there are issues of concern in the operation of the scheme or any disproportionate secrecy in its processes or results.
    c. The argument that evidence of missed targets in the early stages of the Olympic project may provide an early warning of future difficulty in achieving the ultimate goal (of all arrangements being in place for the 2012 opening ceremony) is based on a misunderstanding of the nature of the remuneration scheme, as explained above.
    d. However, we do give weight to the very substantial public interest in a project that has enormous significance, both

financial and otherwise, for the nation as a whole. That legitimate interest extends to the manner in which those deriving generous financial rewards for their efforts in managing the project perform their roles and have their remuneration linked, at an appropriate level, to their contribution. We therefore conclude that disclosure would serve a legitimate public interest. In reaching that conclusion we have given due weight to the countervailing public interest argument arising from the concerns expressed by both Sir Roy McNulty and Mr Higgins as to the potential impact of disclosure on the future operation of the ODA remuneration scheme. This reduces the public interest in disclosure more for some of the categories of information in question than for others. But it does not entirely remove the public interest in disclosure for any of them.

32. Would disclosure have been necessary to serve the legitimate interest we have identified?

a. In this connection we were referred by Mr Pitt-Payne to the decisions of the Information Tribunal and the High Court regarding freedom of information requests for the disclosure of information about MP's expense claims. In the case of *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin) the High Court acknowledged that, in the context of schedule 2 paragraph 6 of the DPA, "necessary" was required to be interpreted in the light of Article 8 of the European Convention on Human Rights. Article 8 itself provides that interference with private life shall not be permitted *"except such as is in accordance with the law and is necessary in a democratic society … for the protection of the rights and freedoms of others."* The Court proceeded on the basis that this required evidence of a *"pressing social need"* to justify the disclosure of personal data and that the resulting interference with the data subject's privacy should be "*both proportionate as to means and fairly balanced as to ends."* It also took note of the observation by the European Court of Human Rights in *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 to the effect that:
"…the adjective "necessary" within the meaning of article 10(2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" …"
b. The test set out by the High Court is binding on us. We believe that the amount of public funding involved, the nature of the project being funded and the level of remuneration paid to the executives in question does give rise to a pressing social need to disclose information about the maximum bonuses available to the individuals concerned, but that it is less easy to identify such a need in respect of the other elements of the requested information.
c. We agree with the differently constituted panel of this Tribunal (then the Information Tribunal) in *Corporate Officer of the House of Commons v Information Commissioner and others* (EA/2007/0060) that the application of the test of proportionality

to any conclusion on pressing social need requires us to consider whether the public interest in receiving the information could be achieved by other means that interfered less with the relevant individual's privacy.

d. We have considered each of the elements of withheld information and conclude that the interest identified could not be served by any means other than its disclosure.

33. Would disclosure cause unwarranted prejudice to the rights and freedoms of the relevant executives?

a. In the case of four requests for information we believe that, not only is there no pressing social need for disclosure, but disclosure would also represent an interference with the individuals' rights, which is not warranted by the purpose we have identified as being served by disclosure. These are:
    i. the request for details of any performance targets that were not completed to 100% satisfaction by Mr Higgins (request 3 set out in paragraph 2 above);
    ii. the request for details of any performance targets that were not completed to 100% satisfaction by Mr Smith (request 6); and
    iii. the performance target(s) responsible for each of the other identified individuals not getting 100% of the bonus available to them, if they did not do so (request 8).
    iv. the performance targets set for Mr Smith (request 5),

b. We believe that in each case disclosure would involve an intrusion into an element of the individuals' lives which, while work-related, has such a direct impact on career progression and personal self-esteem that it would only be warranted if, in addition to the matters of public interest we have identified, the operation of the remuneration scheme justified significant criticism. Had we believed that some of Mr Davis' more serious criticisms of the ODA were justified it is conceivable that the further intrusion into individual privacy would have been warranted. But we have not found that to be the case.

c. Our decision on Mr Smith's performance targets has been marginal. We examined the relevant information in closed session. Although the targets were largely consistent with his job description, and were more corporate than personal in nature, we ultimately concluded that they fell just outside the scope of work-related data that a person in Mr Smith's position would reasonably expect to be exposed to public inspection.

d. In respect of the remaining requests, namely the maximum potential bonus awards for Mr Higgins and Mr Smith (requests 1 and 4) and the percentage of the maximum performance-related pay earned by each of the other identified individuals (request 7), we do not think that disclosure involves an unwarranted interference with their rights and freedoms. As we have indicated in paragraph 5 above, a certain amount of information about the comparative success against targets may be gleaned from the information that has already been published and we believe that those taking on such high profile and well remunerated positions on a project of such justified public

interest should expect greater than normal publicity about their role and pay. Although we accept that the organisations put forward as comparable were in fact different in some respects, we believe that their remuneration schemes reflect a trend towards greater transparency in performance-related pay in the public and semi-public sector. The individual executives in this case may be expected to have been aware of that trend and of its likely impact on the positions they have attained.

34. Would disclosure represent a breach of the fair and lawful processing obligation?

a. The factors we have taken into account in carrying out the balance required to determine if disclosure was necessary for a legitimate interest and in deciding whether the intrusion into the individuals' privacy was unwarranted, have relevance to this question also.
b. In addition we should take account of the requirement for adequate information to have been given to the data subject, including the purpose for which the information was collected and retained. This is to be found in the guidance on the interpretation of the first data protection principle set out in DPA Schedule 1 Part II paragraphs 1 to 4.
c. We have already mentioned the statements annexed to Sir Roy McNulty's witness statement recording the expectations of the individual executives. As the evidence was not made available to Mr Davis, despite its evident impact on the Information Commissioner's Decision Notice, and the witnesses were not offered for cross examination, we do not give significant weight to it on the issue of what the reasonable expectations may be for someone in the same or similar position. However we accept that no warning of the possible disclosure was given at the time these particular individuals were first employed and no provision for disclosure was included in their contracts of service. We also accept the evidence of Sir Roy McNulty and Mr Higgins to the effect that disclosure of information having a direct impact on the appraisal scheme would have a detrimental effect on its operation. We believe that the individuals would have been aware of this and that, even for individuals managing, at an elevated level, one of the most high profile projects imaginable, there would have been a consequential expectation that confidentiality would be maintained in respect of some elements of the requested information.
d. We do not think that reasonable expectation would extend to information about the maximum available bonus. That, it seems to us, falls the other side of the line as the sort of information that a senior manager must expect to fall within the public, as opposed to private, realm when he or she takes on the sort of roles the individuals fulfil in this case. Its disclosure does not impinge on the relationship with more senior management, or on the personal attributes that may affect an individual's work performance, for good or ill. And, although it extends beyond what the individuals will have come to expect from reading previous years' public accounts, it would not be reasonable to

expect the disclosure necessarily to be maintained at precisely that level.

Conclusion

35. We agree with the Information Commissioner that, for the reasons given, the data protection principles would have been breached by the disclosure to Mr Davis of each item of information identified in his request, save for information about the maximum bonus payable to Mr Higgins and Mr Smith and, in respect of the other individuals, the percentage of the maximum that they actually received during the year in question.

36. Our decision is unanimous

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

Signed:

Chris Ryan
Tribunal Judge

Dated: 4th January 2011