

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 August 2009

Public Authority: Newcastle College
Address: Scotswood Road
Newcastle upon Tyne
Tyne and Wear
NE4 7SA

Summary

The complainant requested a considerable volume of information about the process and amounts paid in bonuses to members of staff in the public authority. The public authority provided the basic information and the total annual amounts paid; but claimed that the individual posts that received bonuses and the amounts paid to individual Senior Post Holders were exempt from disclosure. The complainant complained to the Commissioner about the public authority's failure to provide information for these two parts of his request. After the Commissioner began investigating this case, it was established that the public authority was relying on section 40(2) of the Act to exempt the requested information from disclosure. The Commissioner found that there were procedural breaches of sections 10(1), 17(1), 17(1)(b) and 17(7) of the Act. However the Commissioner has determined that the public authority was correct in applying section 40(2) in relation to both parts of the request he was investigating. The Commissioner requires no remedial steps to be taken in this case.

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.

The Request

2. On 28 May 2007 the complainant requested the following six pieces of recorded information in accordance with section 1(1) of the Act:

- '(i) The total amounts paid by Newcastle College in the form of Performance Related Payments to staff for each of the last three years.*
- (ii) The number of staff in receipt of Performance Related Payments for each of the last three years.*
- (iii) The roles which have attracted Performance Related Payments for each of the last three years.*
- (iv) The amounts paid to Senior Post Holders in the form of Performance Related Payments for each of the last three years.*
- (v) A copy of the current guidelines for performance related payments.*
- (vi) A copy of any previous guidelines and amendment for performance related payments, used during the last three years.'*

For clarity in the request section of this notice, the Commissioner has elected to number the elements from (i) to (vi).

3. On 11 June 2007 the public authority acknowledged receiving the request for information. On 25 June 2007 the public authority provided some information that was relevant to the request, which comprised a table entitled 'Performance Related Payments to Staff' for each of the last three years. This provided some information for elements (i) to (iii) of the request:

- (i) the total annual amounts paid by the public authority in the form of performance related payments to staff other than senior post holders.
- (ii) the number of staff other than senior post holders in receipt of performance related payments.
- (iii) a brief job description of the sort of jobs that attracted performance related pay and the number of staff who received payments.

It also provided, for element (iv), a sheet entitled 'Performance Related Payments to Senior Post Holders' which showed the total amounts paid to senior post holders in the form of performance related payments for each of the last three years. This included incremental payments and bonuses.

Finally, it provided some information for elements (v) and (vi):

- o the Performance Related Pay Guidelines 2003-4 (for staff other than Senior Post Holders);
- o the Performance Related Pay Guidelines 2005-6 (for staff other than Senior Post Holders);

- extracts from staff contracts, showing that the incremental payment increases were subject to satisfactory performance;
 - the Performance Appraisal Scheme for Senior Staff;
 - the Remuneration Policy for Senior Staff.
4. On 4 July 2007 the complainant informed the public authority that he was dissatisfied with the information provided to him. He raised three issues:
- The first issue was that he believed that his request distinguished between normal increments of salary (made subject to performance development reviews) and Performance Related Payments. He told the public authority that he only wanted the latter and asked for it to provide a different table that excluded the normal increments.
 - The second issue was that he believed that he had requested the amounts paid in Performance Related Payments to each Senior Post Holder, rather than the total amount paid to all Senior Post Holders. He asked the public authority to provide this information for each of the last three years.
 - The third issue was that he wished for confirmation that the guidelines for 2005-2006 were the same as those in place for 2006-2007.
5. On 12 July 2007 the public authority responded to the complainant's submissions.
- In relation to issue one it produced a new table of Performance Related Payments, excluding incremental pay awards, which included staff other than Senior Post Holders.
 - In relation to issue two it informed the complainant that it did hold the requested information. It said that it had considered the request carefully and that it felt that it would be unlawful to disclose this information to him. It informed the complainant that the payments were linked to the appraisal process and the amount paid is linked to the performance of the individual and is therefore personal data. It said that the individuals concerned believed that the public authority would maintain the confidentiality of the information and that to release this information would be unfair and so would contravene the first data protection principle. It also said that the information which it had provided ensured that it was open about the financial implications of operating the scheme and about how decisions are made. It said that it did not feel that further disclosure would serve the public interest.
 - In relation to issue three it confirmed that the guidelines for 2005-6 had not changed for the year 2006-7.
 - It also provided details of its own complaints procedure.

6. On 23 July 2007 the complainant responded and informed the college that he wished to make a number of complaints about the handling of his request for information. There were four complaints, detailed below.
 1. The public authority took too long to apply an exemption to the information.
 2. The public authority was unhelpful and obstructive by combining the incremental pay awards with the Performance Related Pay awards, which disguised the relevant information.
 3. The public authority had failed to provide full and accurate information for elements (ii), (iii) and (iv):
 - o in relation to element (ii) the two tables previously supplied were inconsistent and the information appeared unreliable;
 - o in relation to element (iii) the public authority had only provided generic roles instead of a breakdown of every role that had received Performance Related Pay;
 - o in relation to element (iv) the totals were not the requested information and the public authority had misapplied the Data Protection Act.
 4. The public authority failed to inform him of his right to appeal to the Information Commissioner's Office.
7. On 30 July 2007 the public authority acknowledged receiving his complaint. It explained that it saw the internal review as the third part (the second part having been exhausted in its response contained in paragraph 5 above) of its complaint procedure and that if it did not resolve the issues the complainant could approach the Information Commissioner instead of the Local Learning and Skills Council. On 1 August 2007 the College informed the complainant that his complaint had been allocated to a member of staff.
8. On 9 August 2007 the public authority informed the complainant of its decision. The Commissioner regards this as the public authority's internal review response. The public authority dealt with each of the complaints in turn:
 1. It informed the complainant that at the time of the response on 11 June 2007, it believed that it had provided all the information that was requested. It was only on 4 July 2007 that the complainant clarified his request and it became apparent that he was requesting information that was exempt from disclosure. It therefore believed that the timing of the application of the exemption (12 July 2007) was not unreasonable.
 2. It informed the complainant that it did not believe that the initial request for information specified only bonuses since it understood

the term 'Performance Related Pay' as meaning all payments relating to performance. Once it became aware of what was requested it had provided a different table of information. It said that it had learnt from this mistake and in future requests it would seek further clarification.

3. It tried to provide reassurance in relation to elements (ii), (iii) and (iv).
 - In relation to element (ii) the public authority acknowledged that the two tables appeared inconsistent, but explained that this was because the Senior Post Holders were counted in the second table but not the first. It provided a new table, which separated out the Senior Post Holders and other staff.
 - In relation to element (iii) the public authority informed the complainant that it had reviewed the situation and had changed its position. It provided some additional information about the sort of roles that attract bonuses; these were positions with management contracts. It informed him that the new list was presented at a summary level (the type of posts that attract bonuses) instead of being a list of job titles to prevent individuals from being identified. It stated that further detail would breach the confidentiality of the performance appraisal process and was exempt from disclosure as personal data.
 - In relation to element (iv) the public authority informed the complainant that it was satisfied with its position about the payments to individual Senior Post Holders. It said that disclosure would breach the confidentiality of the performance appraisal process, and the information was personal data that was exempt from disclosure.
4. Finally, it informed the complainant that if he was dissatisfied with this review he could complain to the Commissioner.

The Investigation

Scope of the case

9. On 28 September 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider a number of points, including the following:
 - The public authority has a large turnover in the tens of millions and the vast proportion of this money is provided by the Learning and Skills Council (LSC) that distributes public funds. The LSC is transparent about how it distributes its funds to and it makes little sense that the public authority would be more secretive than it, in distributing the same funds.

- The information requested about the Senior Post Holders is not information about the private lives of the individuals but is directly about their public role. It should not therefore be exempt under the personal data exemption.
 - The information requested was not given in confidence and therefore it is unclear why disclosure would be a breach of confidence.
 - It would be in the public interest to release the bonus details of the Senior Post Holders. The complainant informed the Commissioner that some other colleges do release this information as a matter of course and provided evidence.
 - He felt that the information that was provided before the internal review was deliberately formatted to conceal the information that he wanted.
10. On 3 December 2008 the Commissioner wrote to the complainant to set the scope of this investigation. This was:
- '1. The amounts paid to Senior Post Holders in the form of Performance Related Payments [PRPs] for each of the last three years [previously element iv].
 - 2. The roles which attracted PRPs for each of the last three years [previously element iii].'
11. The 'last three years' in this case is interpreted by the Commissioner in this context as the academic years 2003-4, 2004-5 and 2005-6. This interpretation is not disputed by any of the parties in this case.
12. On 12 December 2008 the complainant indicated that he was satisfied with the scope set out in paragraph 10 above.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

14. On 4 December 2008 the Commissioner wrote to the public authority. He asked to be provided with the relevant recorded information. In relation to the first element of the scope, he asked the public authority if it meant to rely on section 40(2) of the Act and if so, to comment on its application. In relation to the second element of the scope, the Commissioner asked the public authority to explain its current position and to inform him if it felt that any exemptions applied.
15. On 12 December 2008 the complainant wrote detailed submissions to the Commissioner. He informed the Commissioner that the College uses the 'Casterbridge Model Accounts' that contains a 'Statement of Corporate Governance and Internal Control.' He stated that this Statement requires as a minimum that the upper limits of bonus payments for this group of staff are set

- and disclosed. He informed the Commissioner of his concerns at the inadequacy of other methods of accountability and that he felt that the public authority as the largest college in the UK should be more transparent. He informed the Commissioner that the seniority and sums of money involved meant that the arguments about lack of fairness were difficult to understand in this case. He also informed the Commissioner that he was dissatisfied that someone that was interested in the outcome may have conducted his internal review.
16. On 12 January 2009 the public authority responded to the Commissioner's letter dated 4 December 2008. It provided the Commissioner with the recorded information that was relevant to the request. It clarified what 'Senior Post Holder' meant and confirmed to the Commissioner that it was relying on section 40(2) of the Act for both parts of the request. It informed the Commissioner that it would make sure it cited the exemption that it was relying on when dealing with future requests for information. It then detailed its arguments about section 40(2) and these arguments are within the analysis section below. Finally, it offered to create a list of all roles that could possibly attract Performance Related Payments as a potential informal resolution to the second part of the outstanding information. This would provide a level of accountability without exposing which individuals had received bonuses.
 17. On 16 January 2009 the Commissioner put this proposal to the complainant. On 19 January 2009 the complainant responded with his own proposal:

*'I am willing to accept a list of all the roles that could have attracted PRPs for each of the 3 years preceding my request, for all staff other than the Executive Team Members (Senior Post Holders). If the College is prepared to release this information along with the Senior Post Holder roles which **did** attract PRPs for each of those years I would accept this as a resolution to part 2 of this case.'*
 18. On 20 January 2009 the Commissioner asked the public authority to provide a further explanation, and whether it was prepared to release the information as suggested by the complainant.
 19. On 26 January 2009 the public authority responded to the Commissioner's letter. It provided additional submissions about the expectations of the Senior Post Holders. It informed him that there was a transitional year in 2004-5 where the salaries were mapped to the nearest higher point of the pay scale. This was why there were no bonuses paid to other staff in this year. It informed the Commissioner that it was not prepared to accept the complainant's potential informal resolution. This was because individuals would be identified and this would be against the spirit of what its suggested informal resolution was attempting to achieve. It also informed the Commissioner that it had asked the Senior Post Holders and that they were not prepared to consent to the disclosure of this information to the public.

Findings of fact

20. The public authority's 'Senior Post Holders' are its Principal, who also holds the title of Chief Executive, and its four Vice-Principals.

21. The term 'Senior Post Holders' derives from the Instrument and Articles of Government for Further Education Colleges. Senior posts are those for which the Corporation of each College assumes direct responsibility for appointment, grading, suspension, dismissal and the determination of pay and conditions. In judging performance, the chair of the Corporation assesses the Principal's performance and the Principal of the College is responsible for all the other staff, including the other Senior Post Holders.
22. A Remuneration Committee oversees the appraisal process for 'Senior Post Holders' and made recommendations to the Corporation concerning bonuses. The members of the Remuneration Committee are non-executive members of the Newcastle College Corporation.
23. The payment of bonus payments to Senior Post Holders is discretionary and directly connected to the individual meeting their performance targets. The parameters of the bonuses for Senior Post Holders are set out in the document 'Performance Appraisal Scheme for Senior Staff' and the arrangements are administered in accordance with the 'Remuneration Policy for Senior Staff'. It states that the Principal may achieve a bonus equivalent to 10% of their salary while the other Senior Post Holders may achieve a bonus equivalent to 5% of their salary. The bonuses are paid on achievement of performance targets. Each Senior Post Holder has three individual targets and one collective target. For each target they achieve 25% of the bonus becomes payable. This scheme functions independently of their general employment contracts.
24. Performance related payments are also available to other members of staff who have managerial responsibilities and they are discretionary too. They are also based upon the achievement of targets and they are paid in accordance with the public authority's 'Performance Related Pay Guidelines.' Each member of staff can have up to six targets and their overall level of achievement is judged against them.

Analysis

Procedural matters

25. The issue that was central to the complainant's initial complaint to the Commissioner was that the public authority misread two aspects of his request for information and as a result provided misleading information to him.
26. The Information Tribunal ('the Tribunal') in *Berend v the Information Commissioner and London Borough of Richmond upon Thames (LBRT)* [EA/2006/0049 & 50] provided guidance on what the Commissioner's approach should be where there are possibly multiple meanings of a request.
 - First, he should decide whether the complainant's and/or the public authority's interpretations of the requests are objective readings of them.

- Secondly, in the event that both are objective readings, he should decide whether the public authority was aware of the possibility of there being other readings, that meant that it should exercise its duty to provide advice and assistance under section 16.
27. An objective reading of a request is one that can be reached by a reasonable person in possession of all the facts of the case.
28. In this case the Commissioner has identified two ambiguities within the request that have led to there being the possibility of multiple objective meanings:
- (i) The definition of 'Performance Related Payments' (PRP). This definition was essential to both parts of the scope of this case. The public authority initially read it to include both the incremental pay increases and bonuses together (so all payments made that relate to performance). The complainant felt it should only mean the amount paid in bonuses. The distinction in interpretation is that the complainant visualises PRP as an 'all merit' pay progression system, while the public authority visualised PRP as a 'basic plus merit' pay progression system. The Commissioner feels both are valid definitions of the term.
- (ii) The syntax of the request in part one of this investigation. There are two possible interpretations of '*the amounts paid to senior post holders... for each of the last three years*' [emphasis added]. The public authority read this request as requesting a breakdown of the annual amount paid to all the senior post holders combined. This meant it provided three figures: one for each year. The complainant believed that he had requested the annual amount paid to each senior post holder individually for the three years in question.
29. The Commissioner is satisfied that the interpretations of both the public authority and the complainant were objective readings of the relevant parts of the request.
30. In relation to the second step of the *Berend* formulation, the Tribunal have indicated that there is no requirement for a public authority to look behind a clear request for alternative meanings. However should a public authority appreciate that there is more than one objective meaning to the request, it should move to clarify the situation in line with its obligations under section 16(1). It stresses however that this is a subjective determination of what the public authority saw when responding to the request and is not something that can be constructively imposed on the basis that the public authority ought to have seen more than one meaning.
31. In this case, the Commissioner is satisfied that the public authority was not aware of the second interpretation at that time, and he therefore does not find a breach of section 16.
32. He notes in addition that the public authority responded to the correct interpretation once it was highlighted to it by the complainant; that the public authority in its internal review dated 9 August 2007 acknowledged that it should

have clarified what was requested at the beginning; and that it has stated that it would learn from this experience in the future.

- .33. Where there is more than one objective reading of the request and the situation was not clarified by the public authority then the Commissioner will usually find that there is a breach of section 1(1)(b) in relation to the material that was not covered. In this case, however, when the public authority it made its second response and conducted its internal review it had clarified what the complainant believed he had requested. The Commissioner therefore has not found a breach of section 1(1)(b) in this case. However, because the public authority responded outside the date of statutory compliance (on 12 July 2007) to the complainant's objective reading of the request it has breached section 10(1).

34. Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.”*

35. The time for complying with section 1(1) is contained within section 10(1) and states:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

36. A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.

37. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 69, the Tribunal confirmed that failing to issue a refusal notice within twenty working days is a breach of section 17(1) of the Act. It stated in relation to the case it was looking at that:

“...the Council failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of [the] request. It therefore failed to comply within its duty under s17(1) of FOIA within the time limit prescribed by that section.”

38. From the reasoning above the Commissioner has found that the complainant's objective meaning was not addressed within twenty working days from the date of the request. The Commissioner therefore finds a breach of section 17(1).
39. The Commissioner also notes that while the public authority did not want to release the personal information of the staff members, it did not mention any exemption in either its refusal notice or internal review. It should have in fact stated that it felt that it was not obliged to disclose the information because of the section 40(2) exemption. In failing to cite the exemption that it was relying upon fully it has breached section 17(1)(b) of the Act.
40. Section 17(7) of the Act states that the refusal notice must contain both the details of the right of an internal review and of the right of appeal to the Commissioner under section 50 of the Act. In this case the public authority failed to inform the complainant of his right of appeal to the Information Commissioner in its first two responses to his request for information, in breach of section 17(7) of the Act.
41. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemption

42. For the remainder of this Notice, the Commissioner has defined the requests as having the complainant's intended meanings, and the analysis below in this Notice is constructed on that basis.
43. In investigating cases involving a possible disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether, on a balance of probabilities, the information is held.
44. The Commissioner can confirm that, in relation to the first part of the information at issue the public authority holds some relevant recorded information for the Senior Post Holders for the years 2004, 2005 and 2006; and in relation to part two it holds recorded information for the years 2004 and 2006.
45. The Commissioner is satisfied on the balance of probabilities that there is no recorded information held in relation to part two for 2005 because there was a change to the terms and conditions for staff on management contracts and the payments were mapped to the nearest higher point on the Association of Colleges (AoC) pay scale. This meant that a discretionary payment was not paid to anyone in 2005 except the Senior Post Holders. This was evidenced by the public authority by providing examples of the contemporary documentation.

Section 40(2)

46. Section 40(2) provides an exemption for information which is the personal data of a third party. The public authority has informed the Commissioner that it was relying on section 40(2) in relation to both parts of the request addressed in this Notice.
47. Section 40(2) is contingent on two conditions that are found in sections 40(3) and 40(4) of the Act. In this case, this means that section 40(2) will apply only if the requested information is personal data under the Data Protection Act (DPA) and that the disclosure of it would contravene a data protection principle.
48. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

Is the information 'personal data'?

49. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information 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 intention of the data controller or any other person in respect of the individual.'

50. In relation to the first part of the information, the Commissioner notes that it consists of the role each Senior Post Holder has and the amount of bonus, if any, that was paid to them annually for the three year period.
51. In this case, the Commissioner is satisfied that a living individual can be identified from the information requested. The Commissioner accepts that the post and bonus of the individuals are the individuals' personal data as defined by the DPA.
52. The Commissioner has explored the possibility of whether it would be possible to anonymise the information to such an extent that individuals would not be identified by releasing it. The public authority informed him that such a result was not possible. This was because there were only a small number of Senior Post Holders and the framework for the bonuses is in the public domain, which would mean it was possible to identify those individuals from the payments made.
53. In relation to the second part of the information, the Commissioner notes that it consists of a list of roles of people who have received bonuses for the two appropriate years.

54. The Commissioner is satisfied that living individuals can be identified from the information requested. The Commissioner accepts that their post and whether or not they have obtained a bonus is their personal data as defined by the DPA.
55. The public authority offered a compromise of the names of all staff with a management aspect within their role, who may qualify for the bonus under the 'Performance Related Pay Guidelines.' The complainant refused to accept this compromise.

Does the disclosure of the information contravene any data protection principles?

56. Having concluded that both parts of the information fall within the definition of 'personal data', the Commissioner must consider whether disclosure of the information breaches any of the eight data protection principles as set out in schedule 1 of the DPA.
57. In this case the public authority has informed the Commissioner that it is the first data protection principle that it believes would be contravened by releasing the requested information in relation to both parts of the request.
58. The first data protection principle requires that the processing of personal data should be fair and lawful and that at least one of the conditions in Schedule 2 of the DPA must be met. The term 'processing' has a wide definition and includes disclosure of the information under the Act to a third party.

Part one

59. In considering whether disclosure of the Senior Post name against bonus payment would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
 - the individuals' reasonable expectations of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - the seniority of the individuals;
 - whether disclosure would cause any unnecessary or unjustified damage to the individual and whether the individuals have refused to consent to disclosure; and
 - legitimate interests of local residents, taxpayers and relevant stakeholders in knowing the amount of money being spent on bonus awards to senior staff of the public authority.
60. The public authority stated that disclosure of the post names against bonus payment would be unfair to the individuals concerned. Its main objection was that with the information in the document 'Performance Appraisal Scheme for Senior

Staff', which it had released to the public, it would be possible if the individual bonuses were released to establish how many of the performance targets had been achieved by each Senior Post Holder. It held the firm conviction that this would be unfair on the individuals as they never had the expectation that the information that they discuss in their performance appraisals would be released to the public. The public authority supported this view by providing the Commissioner with the relevant training slides that show that there was an expectation that the appraisal would be confidential, a letter from the Principal - Chief Executive which confirmed that the appraisals for all the other Senior Post Holders were conducted in an expectation that the bonuses would remain confidential, and the terms of reference of the Board of Governor's Remuneration Committee whose content could only be understood if there was an expectation of confidence. The reasonable expectations are a persuasive factor in indicating that the release of this information would be unfair.

61. 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.'

62. 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).

63. The Commissioner also believes that a distinction can be drawn between the level of detail of the information which senior staff should expect to have disclosed about them compared with 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 requests are for the most senior positions in the public authority. This should be considered as a factor that suggests that the release of the information might be fair.

64. The Commissioner has considered in detail the submissions of the public authority and in particular whether he felt that the release of the information would cause unnecessary or unjustified damage to the individuals involved. When considering the situation the Commissioner must consider the dual effect of releasing the individual bonus payments. Firstly it would show to the world those who had received bonus payments and public money; but equally it would expose those who had not received bonus payments due to potential issues with their performance. The Commissioner appreciates that there is a strong expectation of privacy attached to 'Human Resources' information that relates so directly to individual performance. He also appreciates that the individuals have been consulted and do not wish this expectation to be overridden, which suggests that disclosure is likely to be unfair.
65. The Commissioner notes that the public authority was concerned that revealing who had achieved their targets, without an understanding of what the targets were and how difficult they were to achieve, would provide a misleading picture of performance in any event. The Commissioner is not convinced by this argument. His general position is that this concern could be addressed by the public authority providing the figures with an explanation.
66. Finally, in considering the legitimate interests of the public, the Commissioner notes that the public authority has released the total amount paid to all the Senior Post Holders. The release of this figure has gone some way to account for the public money that has been spent in giving bonuses. It ensures that the amount, while not directly present in the accounts, is available for the public to contemplate, debate and scrutinise. In addition, the way that the figure is calculated is available to the public too. This allows the public to understand the underlying process. The release of the totals of bonuses paid, alongside the guidelines about what they are awarded for weakens the arguments that releasing the figures for individual Senior Post Holders would be fair. The Commissioner appreciates that it is important that the public authority can be seen to be complying with its guidelines, but does not feel that the requested information would significantly improve the public's understanding of this matter.
67. In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the first part of the relevant information would be unfair to the individual Senior Post Holders. The central reason for this conclusion is that the legitimate expectations of the individuals have clearly been set 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.
68. 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.
69. The Commissioner therefore upholds the public authority's application of section 40(2) in relation to part one of the request.

Part two

70. In considering whether disclosure of the all the posts that received bonus payments would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- the individuals' reasonable expectations of what would happen to their personal data;
 - the seniority of the individuals;
 - whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
 - legitimate interests of local residents, taxpayers and relevant stakeholders in knowing the roles that attracted bonus payments.
71. In this case the Commissioner is prepared to accept the public authority's submissions about the reasonable expectations of the individuals concerned that their personal performance in their role would be kept confidential between themselves and their employer. He notes that the provision of a list of who was given bonus payments would differentiate between those who performed above their targets and those who did not. The undermining of such reasonable expectations is a compelling reason for believing that disclosure would be unfair in this case.
72. The Commissioner notes that those who received bonuses do have management roles and therefore are reasonably senior. However, he does not feel that in this case that this demonstrates that it would be fair to differentiate publicly between those who achieved their performance targets and those who did not do so.
73. The Commissioner is satisfied that to release the requested information would be an unnecessary and unjustified intrusion especially for those in management roles who did not receive the bonus payments.
74. In considering the legitimate interests of local residents, he notes that it is public knowledge that those who have management roles can potentially earn bonuses. He notes also that the total value of these payments and the guidelines used by the public authority have both been released and can be contemplated, debated and scrutinised by the public.
75. In conclusion, the Commissioner has found that disclosure of the second part of the information would be unfair and therefore contravene the first data protection principle in this case. He therefore does not consider it 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.

76. The Commissioner therefore upholds the public authority's application of section 40(2) in relation to part two of the request.

The Decision

77. 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:

It was correct to apply section 40(2) to the relevant requested information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Section 10(1) – the public authority failed to comply with section 1(1)(b) in relation to the complainant's objective reading of the request within the statutory timescales and therefore breached section 10(1).

Section 17(1) – the public authority failed to respond to the complainant's objective reading of the requests within the statutory timescales.

Section 17(1)(b) – the public authority failed to cite which exemption it was relying on (section 40(2)) until the Commissioner investigated this case.

Section 17(7) – the public authority failed to mention the right of appeal to the Commissioner in its initial two responses to the complainant.

Steps Required

78. The Commissioner requires no steps to be taken.

Right of Appeal

79. 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 11th day of August 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

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.

...

Section 2 - Effect of the exemptions in Part II

- (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
- (a) the provision confers absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
- section 1(1)(a) does not apply.
- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
- (a) section 21,
 - (b) section 23,
 - (c) section 32,
 - (d) section 34,
 - (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
 - (f) in section 40—
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (g) section 41, and
 - (h) section 44.

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 17 - Refusal of Request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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.