

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 19 July 2010**

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
76 Marsham Street  
London  
SW1P 4DR

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Department for Transport (DfT) for information relating to the latest bonus of the Chief Executive of an agency of the DfT. The DfT explained that some of the information requested was publicly available. It explained that the annual reports of the DfT and the relevant agencies contain salary and bonus information relating to the individual concerned within a £5,000 band. The complainant was directed to this information. The specific information about the bonus was refused under the exemption contained at section 40(2) of the Act. The Commissioner considers that the DfT correctly applied the section 40(2) exemption to withhold the information relating to the bonus of the individual concerned and requires no further action to be taken.

### The Commissioner's Role

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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

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2. The complainant made a request on 10 November 2009 to the DfT. The complainant asked the DfT to provide the following information: -  
  
"Please tell me whether the performance bonus paid to Rosemary Thew this year was bigger than last year, the same or less."  
  
The complainant asked for the information to be provided in electronic format.
3. On 8 December 2009 the DfT responded to the complainant's request for information. The DfT explained that information on senior remuneration, which includes any bonuses that may or may not be paid, is included in the DfT's publications, those being the Annual Report, the Resource Accounts and the Agency Reports and Accounts. It explained that these documents provide information about the remuneration of the individual concerned. It provided the complainant with links to these.
4. The DfT explained that the requested information was being withheld under the exemption contained at section 40(2) and 40(3) of the Act as this information constituted personal data, the disclosure of which would breach the first data protection principle under schedule 1 of the Data Protection Act 1998.
5. As the complainant was dissatisfied with the response he had received, on 10 December 2009 he asked the DfT to carry out an internal review.
6. On 20 January 2010 the DfT wrote to the complainant with the result of the internal review it had carried out. It clarified that in accordance with the Information Commissioner's guidance on the disclosure of salaries, the pay scales published are narrowed to the nearest £5,000.
7. The DfT confirmed that the bonus information requested would constitute the personal data of an identifiable individual and would fall within the scope of the exemption contained at section 40 of the Act. It explained that disclosure would breach the first data protection principle under schedule 1 of the Data Protection Act 1998. It explained that the disclosure of the requested information would amount to an unwarranted intrusion into the individual's privacy and personal affairs, and that no exceptional circumstances had been identified to warrant closer scrutiny of this individuals' bonus.

## The Investigation

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### Scope of the case

8. As the complainant was dissatisfied with the result of the internal review carried out by the DfT he made a formal complaint to the Information Commissioner's Office (ICO) on 5 February 2010.
9. The Commissioner has therefore considered whether or not the DfT answered the complainant's request in accordance with all of its obligations under the Act and whether it correctly applied the exemption contained at section 40(2) of the Act in withholding the requested information.

### Chronology

10. On 14 April 2010 the Commissioner wrote to the DfT to ask for further arguments in support of its application of section 40(2) to withhold the requested information.
11. On 19 April 2010 the DfT responded to the Commissioner. It explained that salary and bonus details within a £5,000 band are disclosed in the DfT's and its agency's annual reports. It provided further arguments as to why the requested information was exempt under section 40(2).
12. The DfT explained that bonus payments are individually negotiated based upon performance and will differ from year to year. Where an individual is entitled to a bonus payment the Department will hold separate details of what it has paid. When paid, this figure together with the gross salary figure will be included as the whole 'salary' in the £5000 range as defined in the published Annual Report & Accounts. It explained that it wished to withhold the requested information in reliance on the exemption contained at section 40(2) by virtue of section 40(3) of the Act. It explained that this was because it considered that disclosure would contravene the first data protection principle as it would be unfair to release details of the size of any such bonus payment made. It clarified that by publishing this information it could also be seen as an indication of performance. It explained that the individual concerned has an expectation that their performance and any resulting bonus will not be made public.

## Analysis

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### Exemptions

#### Section 40(2)

13. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*“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.”*

14. Section 40(3)(a)(i) of the Act states that:

*“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 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),”*

15. The full text of section 40 can be found in the legal annex attached to this decision notice.
16. In this case the DfT has argued that the bonus paid to Rosemary Thew constitutes the personal data of the individual and is therefore exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i) as to release the information would breach the data protection principles. The DfT has provided the complainant with the relevant salary within a £5,000 band. It has explained that these figures within a £5,000 band would include any bonus payments received. The complainant does not believe that this satisfied his request.
17. In order to reach a view on the DfT’s arguments the Commissioner has first considered whether the withheld information is the personal data

of a third party. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
18. In this instance the information requested is about the bonus paid to a named individual. This is information which relates to a living individual who can be identified. Therefore the Commissioner considers that the withheld information in this case does constitute the personal data of Rosemary Thew.
19. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The DfT has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 must be met.
20. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner is mindful of his Guidance on when salaries should be released which is referenced earlier in this Notice. The Commissioner has specifically considered the following:

### **Reasonable Expectations of the Data Subject**

21. The DfT has argued that whilst the individual concerned had an expectation, given her senior position, that information about her earnings within a £5,000 band would be made publicly available, she did not have an expectation that the exact amount of her salary or level of bonus would be disclosed.
22. The Commissioner notes that his Guidance on this issue states that "Those who are paid from the public purse should expect some information about their salaries to be made public. However, salary information also relates to their personal financial circumstances and this deserves some protection. You should carefully consider a number of factors before deciding to release exact salaries."

23. Those factors are:

- Should the individual expect their role to be subject to public scrutiny?
- Should the individual reasonably expect that their salary could be released in response to an FOI request?
- Would it be intrusive to release an exact salary, or to give the salary to within a smaller range than the advertised band?

24. The Commissioner has taken the above into account when assessing the reasonable expectations of the individual concerned. The Commissioner considers that due to the seniority of the individual in this case they would expect their role and salary to be subject to public scrutiny. Indeed the DfT has confirmed that the individual involved does expect their role and particularly their salary to be subject to public scrutiny. Furthermore, again, due to the seniority of the individual involved in this case, the Commissioner considers that they would expect that not only would some salary details be disclosed in response to an FOI request but also that some salary details would be routinely published. The DfT has explained that it routinely publishes salary details, which are inclusive of bonus payments, within a £5,000 band and that this is the information the individual concerned would expect to be disclosed. To provide specific information on any change in salary or bonus payments may be seen as a reflection of an individual's performance at work. Therefore the Commissioner considers that the individual concerned would not expect bonus details to be disclosed and that this would support the DfT's arguments that it would be intrusive to release this information.

25. In relation to the latest bonus paid to Rosemary Thew, if indeed such a bonus has been paid, the DfT argued that the individual concerned has an expectation that their performance and any resulting bonus will not be made public. The Commissioner is mindful of his decision in case reference FS50178463 in which he stated 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 individual has been consulted and does not wish this expectation to be overridden, which suggests that disclosure is likely to be unfair". The Commissioner is similarly aware in this case that the relevant individual has refused consent to disclosure. In the Decision Notice referred to above the Commissioner also stated that, "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". Bearing the

DfT's arguments in mind and the Commissioner's previous Decision Notice highlighted above the Commissioner does not consider that the relevant individual would have expected the fact that they had or had not received a bonus to be disclosed nor an indication of the amount of bonus if indeed one had been paid.

### **The Legitimate Public Interest**

26. The DfT has argued that the legitimate interests of the public are adequately met by publishing salary and bonus details within £5,000 bands. It explained that it did not believe that further disclosure would be necessary to serve the public interest. Furthermore it explained that it believed that disclosure of the bonus information would be unwarranted by reason of prejudice to the rights and legitimate interests of the data subject in maintaining a degree of privacy in terms of their bonus details.
27. The Commissioner is again mindful of his Guidance in relation to this issue. In particular the Guidance states that "Disclosure should only be to the extent necessary to fulfil a legitimate public interest. This may involve narrowing down advertised scales, for example to the nearest £5,000. Only in exceptional circumstances is disclosure of exact pay likely to be justified." The Guidance also states that "Only in exceptional circumstances will disclosure of an exact salary be appropriate. Where there are additional public interest factors, this may mean that disclosure of the precise salary is necessary and may outweigh any detriment to the individual concerned. This could arise where:
  - there are current controversies or credible allegations;
  - there is a lack of safeguards against corruption;
  - normal procedures have not been followed;
  - the individual in question is paid significantly more than the usual salary for their post; or,
  - the individual or individuals concerned have significant control over setting their own or other's salaries."
28. As the Commissioner was not aware that any of the exceptional circumstances listed above could be met in this case he asked the complainant whether he had evidence that any of the exceptional circumstances could be met.
29. The complainant suggested that two of the exceptional circumstances were present in this case. He explained that the first circumstance he believed was met was that there were current controversies. He explained that there was substantial media coverage relating to "fat

cat" salaries and bonuses. Therefore he argued that there is especial continuing interest and controversy over those senior managers whose pay is funded by the tax payer. He explained that Rosemary Thew is a senior manager whose wages are funded by the tax payer. He argued that there is speculation that a civil service wide pay freeze will be imposed. He suggested that all of the main political parties have discussed the issue of civil service wage constraint. He suggested that in the past such restraint had not applied to senior management. Therefore he concluded that without knowing if Rosemary Thew's bonus had increased or decreased, it would not be possible to determine whether she will be or is being treated in the same way as her more junior staff. He argued that whether restraint is for all or just the worst paid is a matter of great controversy.

30. The complainant explained that the second exceptional circumstance he believed was met was that the individual concerned has significant control over others' salaries. The complainant argued that in an employment tribunal case the DfT relied upon the argument that each DfT agency is wholly autonomous in matters of pay and operations. Given the DfT's position in that case he suggested that the Chief Executives of those agencies are in charge of pay and therefore have significant control over other's salaries. The complainant continued:

*"In DSA it is usual that staff are paid a bonus from something called the Group Bonus Scheme. Such a payment was not made this year supposedly owing [sic] the failures to hit targets. The agency also suffered a "lost" [sic] in trading terms. Yet despite this I suspect that the DSA chief executive's bonus was not effected [sic] and may have risen"*

*And later stated*

*"DfT claim that Chief Executives of agencies are solely responsible for setting pay rates within their agencies. Therefore the decision not to pay the Group Bonus was solely, apparently, her decision. It is surely of great public interest to discover whether the person who stopped the bonus of nearly 3,000 civil servants in the DSA actually had her bonus increased."*

31. The Commissioner considers that in relation to the complainant's first suggestion that there are current controversies, this is a general issue which affects the whole of the civil service. It is not something which is particular or exclusive to the DfT and its agencies. The Commissioner considers that for there to be the potential for the exceptional circumstance to be met the current controversy would have to relate specifically to the individual whom the request related to. In relation to



the complainant's second suggestion regarding control over others' salaries, the Commissioner is aware that many public sector organisations have control over salaries within funding constraints and other parameters. He explained that the fact that the DfT and its agencies have control over the setting of salaries is not on its own exceptional. However if there was evidence that the DfT or its agencies and in particular the individual concerned in this case had deviated from the required parameters in the setting of salaries then this may amount to an exceptional circumstance. The Commissioner has not however been provided with evidence of this in this case. In fact the DfT provided the following explanation to the complainant in relation to how bonuses are assessed for senior staff:

*"I understand your interest in one individual is for comparison with DSA staff who fall within their Group Bonus Scheme. I should point out that she comes within SCS pay arrangements, and is so considered for non-consolidated variable pay alongside other SCS staff in DfT at her grade level on the basis of relative contribution measured through delivery of annual performance objectives. Decisions are taken by the Department's SCS Remuneration Committee, which comprises the Permanent Secretary, Directors General and a non-Executive Director."*

32. The Commissioner considers that the exceptional circumstances listed in his Guidance have not been met in this case and therefore exceptional circumstances would not warrant disclosure of the increase or decrease in any bonus payment made to Rosemary Thew.
33. In relation to the increase or decrease of the latest bonus paid to the relevant individual, if indeed such a bonus has been paid, the DfT again argued that the legitimate interests of the public are adequately met by publishing salary details within £5,000 bands which would include any bonus payments made. Again the Commissioner is mindful of his decision in case reference FS50178463 in which he stated that, "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 this case overall salaries, which include bonus payments if made, have been provided to the complainant within a £5,000 band. This provides the public with an overall picture of the amount of public money being spent on the salaries of the individual concerned which includes bonus payments if made. The overall salary of the individual involved, including bonus payments if

made, has been made available and is therefore open to public scrutiny.

34. In this case the Commissioner considers that the legitimate expectations of the individual concerned have been clearly set. Salary details inclusive of bonus payments within a £5,000 band are routinely published and this goes some way to meeting the legitimate interests of the public. Therefore the overriding of the legitimate expectations of the individual concerned cannot be justified. The Commissioner therefore concludes that disclosure of whether bonus payments had been made and any increase or decrease in bonus payments if made, in relation to the individual concerned, would be unfair and therefore the exemption contained at section 40(2) was correctly applied in this case.

## **The Decision**

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35. The Commissioner's decision is that the DfT correctly applied section 40(2) in order to withhold the requested information.

## **Steps Required**

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36. The Commissioner requires no steps to be taken.

## Right of Appeal

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37. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 19<sup>th</sup> day of July 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### Section 40

(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.