

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 22 September 2009

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

#### Summary

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The complainant asked the Olympic Delivery Authority (“the ODA”) for copies of internal audit reports. The relevant reports were entitled “Report on General IT Controls” and “Olympic Security Governance and Strategy Review”. The ODA applied section 36(2)(b)(i) and (ii) to withhold both reports. During the Commissioner’s investigation, the ODA decided to disclose a redacted version of the IT report because some of the issues were no longer “live” by the time of the Commissioner’s investigation. The ODA also sought late reliance on section 24(1) and 38(1)(a) and (b) in relation to the security report and section 40(2) in relation to names in both reports.

The Commissioner accepted that section 36(2)(b)(i) and (ii) was engaged by the IT report but found that the public interest favoured disclosure of all of the information. The Commissioner also accepted that section 36(2)(b)(i) and (ii) was engaged in respect of all the information in the security report. He agreed that the public interest favoured maintaining the exemption in respect of all the information apart from the contents page and part of the executive summary.

Regarding the information that could not be withheld under section 36(2)(b)(i) and (ii) from the security report and to which the ODA had applied the exemptions under section 24(1) and 38(1)(a) and (b), the Commissioner found that these exemptions had been incorrectly claimed. Regarding information from the IT report that was not exempt under section 36(2)(b)(i) and (ii) and to which the ODA had applied the exemption under section 40(2), the Commissioner found that this exemption had been incorrectly claimed. The Commissioner found breaches of section 10(1), 1(1)(b), 17(1) and 17(1)(b).

#### 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 FOIA"). This Notice sets out his decision.

## The Request

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2. On 24 December 2007, the complainant wrote to the ODA and made the following request for information:

*"Please can you also let me see, by sending me a copy by post, the contents of the internal auditor's report for the ODA".*

3. The ODA responded on 9 January 2008 and explained that there is no single internal auditor's report. It set out the different audit reports it produces and it asked the complainant to specify which one he was interested in.

4. The complainant then wrote to the ODA on 16 January 2008 requesting information in the following terms:

*"I am seeking your latest audit report within the Strategy and Governance category and the Information Technology category".*

5. The ODA wrote to the complainant on 8 February 2008. It stated that in accordance with section 17(2), a public authority may extend the 20 day time period if it has not reached a decision as to the application of exemptions to the information requested. It stated that it considered that the exemption under section 36 may apply to the information. It stated that the qualified person, who in this case, is the Chairman of the ODA, was in the process of considering the request but required more time in order to make a decision. It stated that it hoped to finalise the decision as soon as possible the following week.

6. The ODA completed its response on 11 February 2008. It stated that the qualified person was of the reasonable opinion that disclosure of the internal audit reports would or would be likely to inhibit the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation and development of the business operation, strategy and processes of the ODA. It added that the qualified person was also of the opinion that the release of the information would prejudice open and meaningful provision of advice regarding the evaluation and analysis of business operations and strategies. It set out its considerations in the public interest test and concluded that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

7. The complainant sought an internal review on 1 March 2008. He made various complaints about the response he had been given.

8. The ODA completed its internal review on 28 March 2008. It addressed the complainant's various concerns but ultimately stated that it maintained its position

that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

## The Investigation

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### Scope of the case

9. On 19 April 2008, the complainant contacted the Commissioner to complain about the way his request for information dated 16 January 2008 had been handled. The complainant asked the Commissioner to consider whether the ODA had correctly refused to provide the information to him. He also raised a number of other procedural points.
10. For clarity, as the ODA disclosed some information from the IT report during the Commissioner's investigation, this information has not been considered in the Analysis, Procedural Requirements and Decision sections of this Notice.

### Chronology

11. The Commissioner wrote to the complainant on 16 September 2008 to set out his understanding of the complaint. He also wrote to the ODA on the same day and asked for information to help him to consider the application of the exemption. The Commissioner also asked whether the passage of time meant that the ODA could now disclose the information.
12. The ODA replied to the Commissioner on 14 October 2008. It provided copies of the two audit reports in question, information regarding the qualified person's opinion and further supporting arguments in favour of maintaining the exemption.
13. The Commissioner wrote to the ODA on 28 November 2008. He highlighted that some confusion had arisen over which limbs of the exemption had been applied by the qualified person. The Commissioner pointed out that it had appeared from the initial response that the qualified person had been of the opinion that section 36(2)(b)(i) and (ii) applied but in the internal review, reference had been made to section 36(2)(c). The Commissioner asked the Council to clarify which sections were being relied upon and to clarify whether the risk of harm was such that prejudice "would" occur or "would be likely to" occur. He asked for some further supporting arguments in favour of maintaining the exemption. The Commissioner asked the ODA to clarify whether there were any issues within the reports that had now been resolved due to the passage of time and if that was the case, why this information could not be disclosed.
14. On 15 December 2008, the ODA telephoned the ICO and stated that it had decided to disclose some information. At this point, the ODA also raised the possibility of applying the exemption under section 24(1) of the FOIA relating to national security.

15. The ODA responded to the Commissioner on 19 December 2008. In its letter, it stated a change of position. It now maintained that all of the information was exempt but if the Commissioner remained unconvinced, it would reluctantly consider disclosure of a redacted version of the IT report. The ODA also acknowledged that it had not been clear which limbs of the exemption were being relied upon. It clarified that it was not seeking to rely on section 36(2)(c) because its reasons for withholding the information fall within the scope of sections 36(2)(b)(i) and (ii). It clarified that the argument was that prejudice “would be likely to” occur. The ODA elaborated on the rationale for withholding the information. It also stated that it considered the names of staff members who were no longer employed by the ODA were exempt under section 40(2). It expressed the view that to disclose the names would breach the Data Protection Principles in the Data Protection Act 1998 (“the DPA”). Regarding the application of section 24(1), the ODA stated that it was considering the rationale for withholding the information under this exemption and that it was also giving urgent consideration to obtaining a ministerial certificate.
16. The Commissioner wrote to the ODA on 13 January 2009. He asked some further questions to help him to consider the request, including why the ODA could not disclose information relating to resolved issues within the reports.
17. The Commissioner wrote to the complainant on 14 January 2009 and asked him to confirm his continued interest in pursuing the complaint.
18. The complainant replied to the Commissioner on 15 January 2009 confirming that he still wished to pursue his complaint.
19. The ODA replied to the Commissioner on 23 January 2009. It stated that upon further consideration, it was now prepared to accept that public disclosure of the information is only a problem as long as the issues are still live. It confirmed that it was willing to disclose a redacted version of the IT report but stated that it could not disclose any information from the security report as it is more recent and all the issues are ongoing. It responded to other questions posed by the Commissioner. The ODA stated that it was still not in a position to provide rationale for relying on section 24(1).
20. On 26 January 2009, the ODA wrote to the complainant and supplied a copy of the redacted version of the IT report.
21. The Commissioner wrote to the ODA on 18 February 2009. He asked the ODA to provide some information to help the Commissioner to understand what the position was at the time of the request, including what relevant information, if any, was in the public domain. He also explained to the ODA that he required supporting arguments for the exemption under section 24(1) by the deadline set.
22. The ODA replied to the Commissioner on 19 February 2009. It stated that it would provide a full response shortly and provided an update on its progress regarding the application of section 24(1). It explained that it was seeking advice and guidance from the central government Clearing House.

23. On 6 March 2009, the ODA provided a full response to the Commissioner's questions. The ODA stated that at the time of the request, all the issues in the IT report were still live except for the issues in section B of the report under the heading "IT Control Environment". Section B of the report was part of the information provided to the complainant during the Commissioner's investigation with some small redactions. The ODA acknowledged that it may have erred in not providing the information that was no longer "live" at the time of the request. On the subject of relevant information in the public domain, the ODA stated that although there was no information in the public domain addressing the issues in the same level of detail as the reports, it felt that information in the public domain was sufficient to meet the demands and requirements of the public interest.
24. The Commissioner wrote to the ODA on 11 March 2009. He expressed concern over the significant delay in submitting supporting rationale for the application of the exemption under section 24(1). The Commissioner stated that he would be likely to exercise his powers under section 51 of the FOIA to issue an Information Notice if the ODA did not provide the information.
25. The complainant wrote to the Commissioner on 16 March 2008 to seek an update. The complainant stated that he remained dissatisfied with the redacted version of the IT report. In particular he stated that the ODA had not explained to him why the redactions had been made and had failed to justify non-disclosure of the contents pages of the reports which was an issue that had been raised in the internal review.
26. On 20 March 2009, the Commissioner replied to the complainant. He explained why the redacted report had been disclosed and clarified that the Commissioner was considering the ODA's reliance on sections 36(2)(b)(i) and (ii). The Commissioner also explained that the ODA may also wish to rely on another exemption and he stated that if that was the case, this would be confirmed as soon as possible.
27. On 27 March 2009, the ODA wrote to the Commissioner and confirmed that it wished to rely on section 24(1) to withhold the security report. In addition, it also stated that it wished to rely on section 38(1)(a) and (b) to withhold the security report and section 40(2) to withhold the names of security personnel. The ODA provided arguments in support of the exemptions including its considerations in the public interest test. It stated that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.
28. On 2 April 2009, the Commissioner wrote to the ODA. He confirmed that he had decided to exercise his discretion in this case to consider the additional exemptions claimed because of the nature of the exemptions. The Commissioner asked the ODA to write directly to the complainant to inform him of its new grounds for withholding the information. The Commissioner also noted that the ODA had applied section 40(2) to withhold the names of some members of staff mentioned in the IT report who are no longer employed by the ODA. The Commissioner referred to guidance issued by his office and asked the ODA to reconsider whether it wished to maintain this position in light of the guidance provided.

29. On 16 April 2009, the ODA wrote to the Commissioner and provided a copy of correspondence it had sent to the complainant informing him of the new exemptions claimed. The ODA also stated that it maintained that the names in the IT report were exempt under section 40(2). It questioned what the value would be in disclosing the names.
30. On 21 April 2009, the complainant wrote to the Commissioner. He stated that he was considering the contents of the ODA's letter and would let the Commissioner have his response as soon as possible.
31. On 1 May 2009, the complainant wrote to the Commissioner. His correspondence was very lengthy and ran to 23 pages. It was however clear from this correspondence that the complainant did not accept that the information had been correctly withheld based on the explanation provided to him by the ODA.

## Analysis

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### Exemptions

#### Section 36(2)(b)(i) and (ii)

32. The ODA claimed that at the time of the request the exemption at section 36(2)(b)(i) and (ii) applied to all the information in the security report and all the information that had not been disclosed from the IT report during the Commissioner's investigation. Section 36(2)(b) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would or would be likely to inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation.
33. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to lead to the above adverse consequences. In order to establish whether the exemption was correctly applied, the Commissioner must:
  - Establish that an opinion was given
  - Ascertain who the qualified person was
  - Ascertain when the opinion was given and
  - Consider whether the opinion was objectively reasonable and reasonably arrived at
34. The ODA provided evidence to the Commissioner that on 7 February 2008, it sent an email to the qualified person at the ODA who in this case was the Chairman. It stated that it had attached a brief memo, the original request, the ODA's draft response and copies of both of the reports. The Commissioner was provided with copies of these attachments. The ODA also provided evidence that the qualified

person's opinion was given in the form of an email sent on 11 February 2008 that simply stated, "...the FOI letter is fine".

35. Based on the evidence above, the Commissioner was satisfied that an opinion was given by the qualified person on a specific date. He must therefore now consider whether the opinion could be considered to be reasonable.
36. In *Guardian and Brooke v the Information Commissioner and the BBC* (EA/2006/0011 and EA2006/0013), the Information Tribunal decided that a qualified person's opinion under section 36 is reasonable if it is both "reasonable in substance and reasonably arrived at". It elaborated that the opinion must therefore be "objectively reasonable" and based on good faith and the proper exercise of judgement, and not simply "an opinion within a range of reasonable opinions". However, it also accepted that "there may (depending on the facts) be room for conflicting opinions, both of which are reasonable". In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
37. To help the Commissioner to consider whether the opinion was reasonably arrived at, he considered the information that the qualified person had in front of them when making their decision. The Commissioner notes that the qualified person was provided with copies of both audit reports. However, the Commissioner notes that the only submission relating to any factors in support of section 36 being engaged consisted of one paragraph in the ODA's draft response to the complainant which stated the following:

"...[the qualified person] is of the reasonable opinion that disclosure of the internal audit reports would or would be likely to inhibit the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation and development of the business operation, strategy and processes of the ODA. [The qualified person] is also of the opinion that the release of this information would prejudice open and meaningful provision of advice regarding the evaluation and analysis of business operations and strategies of the ODA"

The only other supporting arguments put forward were in respect of the public interest test. There was no attempt made to identify precisely who would be inhibited and why or the extent to which this was likely. There was also no attempt to offer any counter arguments and balance these factors against pro-disclosure arguments. However, there was no evidence that the submissions made contained any irrelevant arguments.

38. The Commissioner considers that the ODA could clearly improve the level of detail it records about the rationale behind the qualified person's decision. As there was nothing recorded describing who would be inhibited and why and the extent to which inhibition was likely, the Commissioner has had to rely on the more detailed arguments presented by the ODA subsequently in support of the

opinion and this means that he cannot therefore be sure that the reasons advanced by the ODA in support of the opinion were the same reasons behind the original decision that was made by the qualified person. Despite this, the Commissioner ultimately did not consider there was evidence that the opinion was arrived at in such a way that it should be considered to be unreasonable.

39. The Commissioner also considered whether the opinion was “reasonable in substance”. The reasons that were subsequently presented in support of the opinion are that disclosure of the information would have been likely to:
- Inhibit the free and frank deliberations between the auditors and those responsible for the business areas they are auditing in future audits. This is because the prospect of disclosure would be likely to lead business managers in future audits to be less candid with auditors about failings in their departments because they would be likely to fear that they might face public criticism, either of their own or their colleagues’ work.
  - Inhibit the free and frank provision of advice by the auditors to the ODA executive management in future audits. This is because the prospect of disclosure would be likely to lead to the auditors trying to “sanitise” the information in future audits in order to try to limit harmful consequences to the ODA’s business either by damaging its reputation or exposing system weaknesses.
  - Inhibit the free and frank deliberations between the relevant business managers and ODA executive management or between the auditors and ODA executive management in future audits. This is because if there was a lack of candour from either the business area managers or the auditors this in turn would be likely to lead to inhibition of the free and frank deliberations which take place subsequently between the parties and the executive management based on the content of the audit reports because the reports would not give a full and open account of the problems.
40. Having considered the reasons above and the nature of the information the Commissioner was satisfied that the opinion of the qualified person was objectively reasonable in that the consequences described were a real and significant risk.

### **The public interest test**

41. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
42. The Commissioner has set out a summary of the various relevant public interest arguments below. In order to decide what arguments are relevant, the Commissioner has followed the Information Tribunal case of Guardian Newspaper Limited and Heather Brooke v the Information Commissioner and the BBC (EA/2006/001 and EA/2006/0013). In the latter case, it was found that relevant factors against disclosure are those that focus on the particular public



interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views and provision of advice. The public interest factors favouring disclosure can, by contrast, be more broad-ranging.

### **Public Interest arguments in favour of disclosing the information**

43. The “default setting” of the FOIA is in favour of disclosure. This is based on the underlying assumption that the disclosure of information held by public authorities is in itself of value and in the public interest in order to promote accountability and transparency.
44. The ODA recognised that there is a public interest in being as transparent and accountable as possible with information about the Games. It is clearly established that the Olympic Games project involves the spending of a significant amount of public money<sup>1</sup> and in the Commissioner’s view the sums support a strong level of public interest in transparency and accountability. This is even more so given that both reports requested by the complainant concern specific aspects of the Games that will involve significant expense.
45. The Commissioner also notes that the ODA recognised that there is a significant public interest in ensuring that the ODA has effective internal audit controls over the manner in which its work is performed. Disclosure of the information would help the public to understand more about the way in which the ODA conducts its internal audits. The Commissioner notes that at the time of the request there was considerable public debate about the cost of the Games and the controls in place. The Games are obviously tied in with the reputation of the UK government at home and abroad and it is in the public interest that they are successful. Effective scrutiny of how the ODA is working to ensure the success of the Games is therefore in the public interest.
46. However, it was the Commissioner’s view that the arguments presented by the ODA to the Commissioner could have been applied to any of its audit reports because they were general in nature. It is clear that there are particular arguments to be made about the significant public interest in the public understanding and considering the effectiveness of the systems in place concerning IT controls and security for the Games as successful implementation will be a fundamental component in ensuring that the project is delivered on time, on budget and in a secure manner.
47. The public interest in the public understanding and considering the effectiveness of the ODA’s IT controls is, in the Commissioner’s view, significant considering the way in which the IT systems in place will underpin many aspects of the Games. The public interest in this area is also arguably increased because the ODA is a partly government-funded public body and there have been other high-profile government IT projects that had not met expected deliverables in terms of timescales and value for money.

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<sup>1</sup> ODA website: about us – funding. <http://www.london2012.com/about/funding/index.php>

48. The public interest in the public understanding and considering the effectiveness of the security for the Games is increased by the fact that security is obviously a particularly important aspect of the Games given its high profile nature and the numbers attending.

### **Public interest arguments in favour of maintaining the exemption**

49. The ODA has argued that the inhibition to its future audits that would be likely to be caused by the disclosure of both reports would outweigh all of the above considerations. While the Commissioner cannot consider whether prejudice was likely (that is for the qualified person to decide), the Commissioner can consider the severity, frequency or extent of any prejudice that was likely.
50. The ODA argued that business managers in future audits would be likely to be inhibited from having free and frank deliberations with auditors if either report had been disclosed to the complainant for the reasons described in paragraph 39 of this Notice. The ODA argued that disclosure of the information would be likely to inhibit the free and frank provision of advice by the auditors in future audits for the reasons also described in paragraph 39. Both of these arguments then led the ODA to the conclusion that any inhibition to the auditors and the business managers would also be likely to inhibit the discussions that subsequently take place between the parties and the executive management based on the contents of the reports. During the Commissioner's investigation, the ODA also explained to the Commissioner that disclosure was only a problem so long as the issues discussed in the reports remained unresolved.
51. The Commissioner considers that there may already be some reticence amongst business managers to provide full information to auditors and as already explained, he is prepared to accept the opinion of the qualified person that managers are likely to become even more reticent in the future if faced with the prospect of disclosure of the audit reports before the issues identified had been resolved. He also accepts the qualified person's opinion that the auditors would be likely to try to sanitise future audit reports if faced with the prospect of public disclosure before the issues had been resolved. The Commissioner must therefore attach weight in the public interest test to the opinion of the qualified person that disclosure would have been likely to cause inhibition in future audits.
52. However, the Commissioner did not consider that any inhibition experienced by the business managers in future audits would likely be likely to occur with the same level of severity, frequency or extensiveness as stated by ODA though the circumstances of each report must be considered.
53. The Commissioner took into account that business managers rather than junior staff are involved in this case. Business managers have significant responsibility for their area of work and will therefore be more accountable for any problems within their department. Not providing full and frank accounts of any weaknesses as a reaction to information disclosures may fall below the quality of advice or information recording that is expected from senior staff members and this could in certain circumstances lead to action related to employees' performance or negative press. The Commissioner believes this would generally counter balance

the reluctance of some managers to provide full and frank information. It is also clear that the auditors would not rely solely on what the managers say about their departments. The ODA explained to the Commissioner that internal audits are based on employee interviews and documentary evidence that are discussed with management. Again, this creates a counter pressure on managers to provide full and frank information to auditors. Assuming that the audit process is adequately robust, the Commissioner considers that the auditors would be able to factor in to their considerations the occasional reluctance of some to provide full and frank information.

54. The Commissioner also did not consider that any inhibition experienced by the auditors would be likely to be as severe, frequent or extensive as stated by the ODA. As pointed out by the ODA itself in a letter to the Commissioner dated 23 January 2009, the Risk and Audit Team work to professional standards. The auditors are carrying out a professional function and it seems doubtful, in view of their accountability to the executive management, that many of the auditors would want to risk providing a less than full report if that would be against what the executive management wanted them to do. As discussed in the above paragraph in respect of business managers, this could lead to performance management action or negative press if weaknesses in the audit subsequently came to light and it could fall below the professional standards expected. There are also subsequent discussions between appropriate management and the executive team about the contents of the audit reports so this adds to the risk that any sanitization would be discovered. The Commissioner believes that this would be more of a pressing concern for the auditors and would act as a counter balance to any urge to “sanitize” the reports.
55. In addition to the above, the Commissioner considered the timing of the request. The relevance of the timing is that the ODA had specifically stated that disclosure of the information was only a problem as long as the issues in the reports were still unresolved.
56. The Commissioner appreciates the possibility for inhibition to increase in circumstances where auditors and business managers are concerned about the disclosure of information relating to unresolved issues. The business managers might be more concerned about facing public criticism at a time before they have had chance to consider fully the findings of audits and take appropriate action to address any problems identified by the audit. The Commissioner can also appreciate that the level of inhibition may increase if auditors were concerned that the disclosure of information relating to unresolved issues could damage the ODA's reputation or expose system weaknesses that may make it vulnerable in any way.
57. The IT report is dated May 2007 and a copy was requested by the complainant on 16 January 2008. The Commissioner notes that all the actions were to be completed by the time the request was made even allowing for a few months slippage. While the Commissioner appreciates that the ODA has stated that the withheld information concerns actions that remained incomplete at the time of the request and that disclosure of such information would be likely to cause inhibition in future audits, the public interest in not disclosing the information had in the

Commissioner's view diminished in relation to the IT report because the ODA had had a significant amount of time to make the changes it needed to by the date of the request. This ought to reduce the level of inhibition experienced by auditors and business managers in future audits because they would be able to see that in this case the information was disclosed only after the deadlines had elapsed significantly.

58. The Commissioner particularly considered whether it would be in the public interest for the ODA to withhold a small amount of information that it had redacted from section B of the IT report concerning IT security. However, the Commissioner was not satisfied that continuing to withhold this information would be in the public interest as the ODA had claimed in correspondence to the Commissioner that it had disclosed all of section B because the issues were no longer "live" and it was evident from reading this section that the redacted material related to issues which had in fact been resolved. The Commissioner also notes that section 36(2)(i) and (ii) have been claimed and the prejudice must be relevant to those limbs. Any disruption to implementation may have been more relevant to section 36(2)(c) "otherwise prejudice the conduct of the public affairs", a limb the ODA did not claim.
59. In contrast to the IT report, the security report was dated 8 January 2008, only a matter of days before the request was made. The ODA was therefore still considering the issues raised by the report at the time of the request and the Commissioner accepts that a chilling effect on the frankness and candour would be more severe if the audit report was disclosed so soon after completion and also before further internal consideration. The Commissioner therefore accepts that there was a greater risk of a severe inhibitory effect if the security report had been disclosed at the time.
60. The ODA submitted a particular argument about why the timing of the request supported withholding the information. It explained that at the time of the request, the ODA was a relatively young organisation that had only been in existence since 2006. It had therefore not had the time to put in place systems that would be comparable to organisations that had been established for much longer. Presumably the argument here is that the auditors would be more concerned about harmful consequences resulting from disclosure of the information and the business managers would be more fearful of criticism. The Commissioner accepts that this could be the case.
61. Moving on to other factors, the Olympic Games project involves significant expenditure of public funds and the sums involved arguably increase the need to ensure that there is no inhibition in the ODA's future audits. This is even more so if there is inhibition in future audits concerning aspects of the Games that will involve large expenditure such as IT and security.
62. The Commissioner also notes that the projects analysed in the reports form a critical part of the overall Olympic Games' delivery programme. While this means that there is more public interest in disclosure, conversely it also increases the public interest in ensuring that there is no inhibition in important areas such as IT and security in future audits. Successful implementation of IT controls and

security for the Games will be a fundamental component in ensuring that the project is delivered on time, on budget and in a secure manner. The Games are tied in with the reputation of the UK government and it is in the public interest that they are successful. Inhibition in the audit processes could lead to weaknesses in these important systems not being dealt with efficiently and effectively. In relation to the security report, the Games is a high profile event that will attract a great number of people from the UK and other countries and that will increase the need to ensure that security is of the highest possible standard. The need to ensure that information concerning any weaknesses is as free and frank as possible also increases in proportion to this risk.

63. Having carefully considered the nature of the information in both reports and the timing of the request, the Commissioner was not convinced by the ODA's general arguments relating to the level of inhibition but in relation to the security report the Commissioner was satisfied that a significant inhibitory effect was more likely. He acknowledges the importance of this type of audit information and also subsequent internal discussion being completely free and frank and the consequences if it is not. He accepts that this should be given significant weight when conducting the public interest test.

#### **Balance of the public interest arguments**

64. The Commissioner must, if he accepts that the opinion of the qualified person was reasonable, attach weight to that opinion in the public interest test. The Commissioner accepts that there is a significant public interest in ensuring that the ODA's staff are able to discuss freely and frankly where its weaknesses lie during internal audits. If there was inhibition during this process, it could ultimately put the Games project at risk of not being delivered on time, on budget and in secure manner and this is the ODA's core function. The Commissioner appreciates that as a relatively young organisation, the nature of weaknesses identified during audit will not be comparable to organisations that have been in existence for much longer and he therefore appreciates that this might increase the level of inhibition. The Commissioner also accepts that as the majority of the issues identified in the reports were still unresolved at the time of the request this might also increase the level of inhibition, especially in view of the fact that IT and security are fundamental components in ensuring the success of the Games. Against this he also has also taken into account the argument that there is an expectation that auditors and those involved will continue to do their work robustly, even in the face of disclosure. This will, to some extent mitigate the severity, frequency and extent of any prejudice.
65. In relation to the IT report, the Commissioner did not take the view that the arguments in favour of maintaining the exemption outweighed those in favour of disclosing the information. The likelihood of inhibition was set at the lower threshold and, as explained above, the Commissioner was not satisfied that the inhibition would be likely to be severe, frequent or extensive. He also notes that a significant period of time had passed by the time the report was requested and this diminished the public interest in maintaining the exemption even further because it should have increased the expectation amongst staff that disclosure was more likely. The Commissioner particularly considered the redacted material

relating to IT security but he was not satisfied that it should be withheld because the ODA's argument to the Commissioner had been based on the fact that the information was only a problem as long as the issues remained unresolved. It was clear from the report that the redactions related to issues which had in fact been resolved.

66. In the balance, the Commissioner attached significant weight to the public interest in the ODA being accountable and transparent to the public. It is important for the public to understand and consider the effectiveness of the IT systems in place given the high profile nature of the Games, the high costs involved and the background of previous high profile and problematic IT project implementations. The Commissioner also considered that it would help the public to understand and assess the effectiveness of the audit process itself. He was not convinced by the ODA's assertions that the information that was in the public domain already satisfied their obligations to be as transparent and accountable as possible in this area.
67. In relation to the information in the security report apart from the contents page and part of the executive summary under the heading "objective and background", the Commissioner is of the view that the public interest in maintaining the exemption outweighed the public interest in disclosing it. The likelihood of inhibition was set at the lower threshold but the Commissioner was satisfied that the likely inhibition had the potential to have a more severe effect than disclosure of the IT report. In reaching this different finding for the security report he has considered the timing of the request and the content of the information.
68. He notes that disclosure would have helped the public to understand and consider the effectiveness of the ODA's security, which again would be an expensive and fundamental component of the Games. However, the Commissioner has also taken into account that in contrast to the IT report, only a few days had passed since the creation of the information and in the Commissioner's view this could increase the level of inhibition in future audit reports. Further, because of the nature of the information and the potential for any inhibition to impede the effectiveness of the security for the Games, the Commissioner accepts that any inhibition when communicating this type of information in future audits would be a risk to the secure delivery of the Games and tips the balance of the public interest test in favour of non-disclosure for this information.
69. The Commissioner took a different position with regard to the contents page and part of the executive summary of the security report. The same points in favour of disclosure that have been summarised in the above paragraph equally apply here however in the case of the contents page and part of the executive summary, the Commissioner does not consider that the nature of the information tips the balance in favour of non-disclosure. He considers that the level of inhibition would be significantly reduced because of the general nature of this information. The Commissioner also considers that there is a significant public interest in the public understanding the scope and range of the matters that were considered in the audit.

70. The Commissioner therefore concludes that the public interest in maintaining the exemption does not outweigh the public interest in disclosing all the information being withheld from the IT report.
71. The Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosing all of the information from the security report with the exception of the contents page and part of the executive summary. In relation to the contents page and part of the executive summary, the Commissioner considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosing it.

### **Other exemptions claimed**

72. The Commissioner decided that the contents page and part of the Executive Summary of the security report were not exempt under section 36(2)(b)(i) and (ii) because the public interest in maintaining the exemption of this information did not outweigh the public interest in disclosing the information. As the Commissioner decided that this information could not be withheld under section 36(2)(b)(i) and (i), he therefore needs to consider whether any of this information was also exempt under the other exemptions claimed by the ODA in relation to this report, namely section 24(1) and 38(1)(a) and (b).
73. The Commissioner considered the security report on a section by section basis and as the names of security personnel formed part of the sections that the Commissioner found could be withheld under section 36(2)(b)(i) and (ii), he did not therefore find it necessary to consider the application of the other exemptions claimed to this information.
74. The Commissioner found that the IT report could not be withheld under section 36(2)(b)(i) and (ii) and he therefore needs to consider the application of section 40(2) to names in the IT report that the ODA is seeking to withhold.

### **Section 38(1)(a) and (b)**

75. The ODA claimed that at the time of the request, all the information in the security report was exempt under section 38(1)(a) and (b). These sections provide that information is exempt if its disclosure would or would be likely to endanger the physical or mental health of any individual, or endanger the safety of an individual.
76. The ODA argued that disclosing any of the information in the security report would provide harmful organisations or individuals who are technically well equipped and specialised in security matters to plot activities circumventing security controls and potentially attack the Olympic Park. The ODA also stated that it considered that in all the circumstance of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

77. The contents page for the security report is very brief and simply states the general headings under which the report has been divided. The Commissioner does not consider that disclosure of the headings would reveal information that would or would be likely to endanger the physical or mental health or safety of any individual because of their very general nature.
78. The part of the Executive Summary that the Commissioner decided was not exempt under section 36(2)(b)(i) and (ii) contains information about the objective and background to the audit report. Having considered this information, the Commissioner does not accept that its disclosure would or would be likely to endanger the physical or mental health or safety of any individual as it simply outlines broad areas the report covers and gives some general background.

### **Section 24(1)**

79. The ODA claimed that at the time of the request, all the information contained in the security report was exempt under section 24(1). This exemption provides that Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
80. The ODA essentially presented the same argument that it had presented for the application of section 38(1)(a) and (b), namely that disclosing any of the information in the security report would provide harmful organisations or individuals who are technically well equipped and specialised in security matters to plot activities circumventing security controls and potentially attack the Olympic Park.
81. For the reasons already outlined above, the Commissioner does not consider that exemption from section 1(1)(b) is required for the purposes of safeguarding national security in relation to the contents page and part of the executive summary under the heading "objective and background".

### **Section 40(2)**

82. The ODA claimed that the names of some members of staff mentioned in the IT audit report were exempt from disclosure under section 40(2). Section 40(2) provides that if the information requested includes third party personal data and either the first or second condition in section 40(3) is satisfied, a public authority shall not disclose the personal data. Section 40(3)(a) provides that personal data shall not be disclosed if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.
83. The ODA stated that it was seeking to withhold the names because they are personal data and disclosure would breach the first and/or sixth Data Protection Principle. The Commissioner understood from the ODA's correspondence that at the time of the request, one of the staff members was no longer employed by the ODA and two are not employed at the date of the Commissioner's decision. All were in senior posts.



84. Personal data is defined in the DPA and will include any recorded information relating to an identifiable living individual. In light of this definition, the Commissioner accepts that the names mentioned in the report are personal data.
85. Having satisfied himself that the information was personal data, the Commissioner then considered whether disclosure would contravene any of the Data Protection Principles. The Commissioner considers that the most relevant Principle in this case is the first Principle which provides that personal data shall only be disclosed to the public if its disclosure would be fair and lawful and shall only be disclosed if one of the conditions in Schedule 2 of the DPA is met. The Commissioner's considerations have focused on the question of whether the disclosure would be fair and he finds that the most relevant condition in Schedule 2 is condition 6. If condition 6 was not satisfied, disclosure would not be fair.
86. Following the Information Tribunal decision in *Corporate Officer of the House of Commons v Information Commissioner and Leapman, Brooke and Thomas* (EA/2007/0060, 26 February 2008), the Commissioner has approached condition 6 as a three part test:
- there must be a legitimate public interest in disclosure
  - the disclosure must be necessary to meet the public interest and
  - the disclosure must not cause unwarranted harm to the interests of the individual
87. The staff members concerned are mentioned in the IT report in connection with their professional employment with the ODA. The Commissioner therefore considers that there is a legitimate public interest in disclosure in order to achieve transparency in accordance with the general aim of the legislation, in terms of openness and transparency in relation to actions taken by public bodies. In the context of this case the weight of this public interest is further supported by the senior levels of the posts in question and their responsibilities related to the issues considered by the report. The disclosure would be necessary to meet this public interest.
88. The only reason advanced by the ODA as to why disclosure would cause unwarranted harm to the interests of the staff members focuses on the fact that they are no longer employed by the ODA. The ODA stated that at the time of the request, only one of the individuals was no longer employed by the ODA. Since the request must be considered according to the circumstances at the time, the argument that disclosure would be unfair to the two staff members who subsequently left the ODA is irrelevant. In any case, the Commissioner was satisfied that disclosure would not cause unwarranted harm even if the staff members had left the employment of the ODA by the time of the request. The report makes it clear that the staff members concerned were senior heads of department. The Commissioner's guidance on the section 40 exemption which is available on his website at [www.ico.gov.uk](http://www.ico.gov.uk) states the following on page 8:

*“Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public facing role.*

*The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair”.*

89. As the staff members were acting in their professional capacity and were senior, the Commissioner considers that disclosure would not be unfair to them. He does not agree with the ODA's position that disclosure becomes automatically unfair simply because the staff members leave the employment of the ODA and as explained, if the staff members had not left by the time of the request the argument is in any case irrelevant. In the Commissioner's view, senior staff should expect a higher level of accountability to continue even once those staff members have moved on to different employment.
90. For the reasons above, the Commissioner considers that the names of the heads of department mentioned in the IT report cannot be withheld using the exemption under section 40(2): disclosure would not be unfair and the Commissioner finds that schedule 2 condition 6 would be met by disclosure.

### **Procedural Requirements**

91. When the ODA wrote to the complainant on 8 February 2008, it stated that it was responding because the statutory deadline had been reached. However, the statutory deadline had not in fact been reached because the request in question was made by the complainant on 16 January 2008 and the Commissioner understands it was not received until 21 January 2008.
92. On 8 February 2008, the ODA stated that it was still considering the application of the section 36 exemption. It provided its full response on 11 February 2008 within the statutory time limit. However, it failed to cite the exemption in question because it did not specify that it was relying on sections 36(2)(b)(i) and (ii) within the statutory time limit. This was a breach of section 17(1).
93. The Commissioner considered the ODA's internal review and decided that the ODA breached section 17(1)(b) by failing to cite one of the exemptions relied upon by the date of its internal review. Although it stated that paragraphs in its letter related to the exemption under section 36(2)(b)(ii), it did not cite 36(2)(b)(i). It referred instead to section 36(2)(c), which it later withdrew during the Commissioner's investigation.
94. As the ODA also claimed information was exempt using three new exemptions during the Commissioner's investigation, the ODA also breached section 17(1) for this reason.
95. As the Commissioner was not satisfied that the IT report and part of the security report had been correctly withheld, he considers that the ODA breached section 10(1) for not providing this information within 20 working days and 1(1)(b) for not disclosing it by the date of its internal review.

## The Decision

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96. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the FOIA in the following respects.

- It correctly applied the exemption under section 36(2)(b)(i) and (ii) in respect of all the information in the IT report.
- It correctly applied the exemption under section 36(2)(b)(i) and (ii) in respect of all the information in the security report
- It correctly determined that the public interest in maintaining the exemption under section 36(2)(b)(i) and (ii) outweighed the public interest in disclosing all the information in the security report with the exception of the contents page and part of the executive summary under the heading "objective and background".

97. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the FOIA in the following respects:

- It incorrectly determined that the public interest in maintaining the exemption under section 36(2)(b)(i) and (ii) outweighed the public interest in disclosing all the information in the IT report.
- It incorrectly determined that the public interest in maintaining the exemption under section 36(2)(b)(i) and (ii) outweighed the public interest in disclosing the contents page and part of the executive summary in the security report.
- It incorrectly applied section 38(1)(a) and (b) to withhold the contents page and part of the executive summary of the security report.
- It incorrectly applied section 24(1) to withhold the contents page and part of the executive summary of the security report.
- It incorrectly applied the exemption under section 40(2) to the names of heads of department in the IT report.
- It breached section 17(1) for failing to specify that it was relying on sections 36(2)(b)(i) and (ii) within the statutory time limit of 20 working days.
- It breached section 17(1)(b) because it had still not specified that it was relying on section 36(2)(b)(i) by the time of its internal review.
- It also breached section 17(1) by claiming the exemptions under section 24(1), 38(1)(a) and (b) and 40(2) for the first time during the Commissioner's investigation.
- By failing to provide upon request all the information in the IT report and the contents page and part of the executive summary from the security report, the ODA breached section 10(1) and 1(1)(b).

## Steps Required

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98. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:

- Disclose the entire internal audit report entitled “Report on IT Controls” dated May 2007.
  - In relation to the internal audit report entitled “Report on Olympic Security Governance and Strategy Review” dated January 2008, disclose the contents page and part of the Executive Summary under the heading “Objective and background” (all of page 3 and top of page 4).
99. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### Other matters

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100. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
101. During the course of the Commissioner’s investigation, the ODA sought to rely on additional exemptions which were not originally cited in the refusal notice or the internal review decision provided to the complainant. The application of additional exemptions at a late stage may suggest the initial refusal or internal review (or possibly both) was not afforded appropriate consideration. In light of this the Commissioner advises the ODA to take steps to minimise the likelihood of additional exemptions being applied during the course of future investigations.
102. The Commissioner also noted that on 8 February 2008 the ODA wrote to the complainant and stated that a public authority may, according to section 17(2) of the FOIA, extend the 20 day time period if it has not reached a decision as to the application of the exemptions to the information requested. It stated that section 36 may apply but that the qualified person needed more time in order to make a decision. Although the statutory period had not actually expired, the Commissioner would like to clarify that section 17(2) only provides that if a public authority has not reached a decision as to the application of the public interest test, it must indicate that fact in its refusal notice and state an estimate of the date when it expects to have completed its public interest test considerations. According to section 17(3), the public interest test considerations should either be provided within 20 working days or within such time as is reasonable in the circumstances. It does not mean that public authorities can extend the time limit because more time is needed to consider whether information is exempt under a qualified exemption.

### Failure to comply

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103. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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104. 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](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 served.

**Dated the 22nd day of September 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## **Legal Annex**

### General Right of Access

Section 1(1) provides that:

“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.”

### Refusal of Request

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.”

### National Security

Section 24(1) provides that:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

### Prejudice to the effective conduct of public affairs

Section 36(2) provides that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

### Health and safety

Section 38(1) provides that:

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

### Third party personal data

Section 40(2) provides that:

“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.”

Section 40(3) provides 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), 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”