IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2015/0009

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50540656
Dated: 6 January 2015

Appellant:	**Mark Joseph McCarthy**
First Respondent:	**The Information Commissioner**
Second Respondent:	**The Office for Standards in Education, Children's Services & Skills ("OFSTED")**

Heard at: **Civil & Family Court, Liverpool.**

Date of hearing: **27 May 2015**

Date of decision: **26th June 2015**

Before

Chris Ryan
(Judge)
and
Jean Nelson
Paul Taylor

Attendances:

The Appellant appeared in person.
The First and Second Respondents did not attend.

Subject matter: Absolute exemptions
Personal data s.40

Cases: *The Queen on the Application of Department of Health v Information Commissioner* [2011] EWHC 1430
Corporate Officer of the House of Commons v Information Commissioner and others [2008] EWHC 1084 (Admin).

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0009**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed

REASONS FOR DECISION

Introduction

1. This is a case in which the Second Respondent ("Ofsted") breached the terms of the Freedom of Information Act 2000 ("FOIA") in the course of handling a request for information submitted to it by the Appellant on 5 November 2013 ("the Request"). The Information Commissioner failed to react to that breach during the course of an investigation which he subsequently carried out, at the request of the Appellant, into Ofsted's handling of the Request.

2. We nevertheless find ourselves having to agree that the Decision Notice, which the Information Commissioner issued at the conclusion of his investigation, is in accordance with the law and that the Appellant's appeal against that Decision Notice must be refused. This is because the effect of Ofsted providing the Appellant with all the information he had asked for in the Request would have been to put into the public domain the personal data of various individuals, without justification. However, had Ofsted complied with FOIA section 16, (which imposed on it an obligation to provide advice and assistance to the Appellant), it might well have been possible to amend the Request in a way that would have ensured that the information released would have been anonymised to a degree where nobody's personal data would have been disclosed. Similarly, agreement might have been reached on the scope of disclosure had the Information Commissioner considered the effect of non-compliance with section 16 during his investigation.

The relevant law

3. FOIA section 1 imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

4. One of those exemptions is set out in FOIA section 40, which provides that information is exempt information if it constitutes the personal data of a third party the disclosure of which would contravene any of the data protection principles.

5. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

> *"'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"

6. The judgment of Cranston J in *The Queen on the Application of Department of Health v Information Commissioner* [2011] EWHC 1430 establishes that:
    a. information ceases to be personal data if, before disclosure, it has been anonymised in a way that its disclosure would not lead to the identification of a living individual;
    b. the fact that the data controller continues to hold information that would enable an individual to be identified would not alter the status of the information as disclosed; provided that
    c. it was reasonably unlikely that members of the public would have access to other information enabling them to penetrate the anonymity and identify one or more individuals.

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

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

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

    "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

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

8. A broad concept of protecting individuals from unfair or unjustified disclosure (in the event that their personal data has been publicly requested) is a thread that runs through the data protection principles, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it - C*orporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

9. In determining whether or not disclosure of the names would be contrary to the data protection principles we have posed the following questions:
    i. would disclosure at the time of the information request have been necessary for a relevant legitimate purpose; without resulting in
    ii. an unwarranted interference with the rights and freedoms or legitimate interests of those affected.

    And if our conclusion on those points would lead to a direction that the information should be disclosed we would ask:

    iii. would disclosure nevertheless have been unfair or unlawful for any other reason?

10. FOIA section 16 reads as follows:

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

11. Under FOIA section 50(1) a person who has made an information request:

> *"…may apply to the* [Information Commissioner] *for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1* [of the FOIA]"

If the Information Commissioner investigates the complaint he is required, under section 50(3)(b) to:

> *"serve notice of his decision (in this Act referred to as a 'decision notice') on the complainant and the public authority."*

Sub-section (4) then reads:

> *"Where the* [Information Commissioner] *decides that a public authority-*
> *(a) has failed to communicate information … in a case where it is required to do so by section 1(1), or*
> *(b) has failed to comply with any of the requirements of sections 11 and 17... the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken."*

(Section 11 requires the public authority to provide information in the format requested, if it is reasonably practical to do so, and section 17 requires it to identify any exemption on which it may rely in refusing disclosure.)

12. The relevant part of FOIA section 57 reads:

> *"(1) Where a decision notice has been served, the complainant or the public authority may appeal to* [this Tribunal] *against the notice."*

13. Such appeals are governed by FOIA section 58, which reads:

> *"(1) If on an appeal under section 57 the Tribunal considers –*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by* [the Information Commissioner], *that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by* [the Information Commissioner]; *and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal the Tribunal may review any finding of fact on which the notice in question was based."*

<u>The Request and Ofsted's reaction to it.</u>

14. On 5 November 2013 the Appellant submitted the Request to Ofsted in an email in which he said:

> *"I would like to do some data analysis on lesson observations and the bigger sample size I have to work with, the better the analysis (3 years of data would be perfect if you have that much available). If possible I would like the following lesson observation data: the subject, the various ratings for that observation, time of day (if available?), the date (or at least month and year), type of school (VA, academy, Free etc), local authority, and a redacted version of the inspector id. I don't need to know who the examiner is, I don't need to know their official inspector id so if the inspector ids could be replaced with an anonymous number that would be fantastic as it would be very helpful if I could analyse how the same examiner rates across different schools and subjects."*

15. Ofsted acknowledged receipt of the Request on 7 November and then, on 29 November 2013, an individual with the job title of "Assistant Statistician" replied on behalf of Ofsted in the following terms:

"I have looked into your request …, and I'm now emailing back because I need you to clarify exactly which aspect of the data you are looking at. This will help me provide information tailored to the analysis you want to carry out.

The dataset you have requested at the moment is extremely large and complicated. One example of this is that lessons are observed for different lengths of time depending on the type of observation. For example, some are observed for the full lesson period, while other lessors are observed for only 10 minutes as part of a wider 'walk-round' where inspectors look at a range of teaching across different classrooms. Other lessors are observed for behaviour, but without a focus on teaching. In addition, there are a number of caveats to the data, including some instances of incomplete date, and some particular special cases. Analysing such data in a raw form would be very difficult and time-consuming for you.

For this reason, please email me back outlining what question(s) you hope to answer with this data. I will then try to source the data that best matches your request – this will hopefully make your job easier in the long run."

16. On 5 December 2013 the Appellant replied:

"I have Minitab 15 which will allow me to analyse datasets with up to 10 million rows. I expect that size is therefore not likely to be an issue.

In terms of the data, I am looking for the unusual factors that might affect classroom effectiveness. The Ofsted data is a relatively neutral source of data and as such it should be a very useful source to identify any 'unexpected' key input variables to overall effectiveness of lessons. For example, I might expect time of day to affect behaviour but does that necessarily imply that learning is also affected to the same degree?

As long as I know each field is, I am probably happier having the data in an unrefined form."

17. We pause to comment, at this stage, that the correspondence demonstrates that:
    a. The Appellant was looking to carry out data analysis across a large body of data to see if he could identify trends and/or patterns at a high level of generality;
    b. He expressly stated that he anticipated that the data would not identify any individual;
    c. He realised that data might need to be redacted to the extent necessary to protect information about individuals; and

d. He was happy to have the scope of the Request reduced (he accepted that the relevant dates could be replaced by an indication of just month and year) if that was necessary; and
e. At that stage Ofsted adopted a helpful approach in respect of the bulk of data and the Appellant's ability to manage it.

18. On 11 February 2014, well after the time limit for public authorities to respond to information requests, Ofsted wrote to the Appellant confirming that it held the requested information but claimed that it was exempt information under both FOIA section 36 (disclosure likely to prejudice the conduct of public affairs) and section 40 (disclosure of third party personal data). In respect of the section 40 exemption Ofsted expressed particular concern that release of the requested information might lead to individual schools, teachers and in some cases inspectors being identified. It considered that individual schools could be identified if the type of school were to be cross-referenced against factors such as the local authority and the date of inspection and that this could lead to the identification of teachers whose lessons had been observed, particularly in the case of small schools and/or less popular subjects. Ofsted made no suggestions as to whether the scope of the Request might be reduced in order to avoid the dangers it perceived.

19. The Appellant's written response to the refusal to disclose was set out in an email dated 16 February 2014 in which he said:

> *"… I am happy if you wish to substitute just the year or year and quarter to ensure anonymity … I have no interest in identifying individuals and I am willing to drop the request for the full date."*

20. The Appellant went on to challenge the approach adopted in relation to FOIA section 36 and Ofsted interpreted the message as a whole as a request for an internal review of its original decision. It made no comment on the scope of the Request at that stage but did make passing reference to it in a letter to the Appellant dated 27 March 2014 in which it reported the outcome of the internal review. Having considered a number of issues in respect of the Request it came to the section 40 exemption on page 5 and included the following:

> *"I do not necessarily share your view that the removal of the 'specific date' field would eradicate the prospect of an individual being identified from the data. The request also includes local authority and (redacted) inspector identifiers; these provide quite a powerful tool to track individuals and inspections. There is no guarantee that those individuals would remain anonymous, if for example they have unique or rare subject specialisms, or inspected mainly in specific local authorities".*

The letter did not address the question of whether Ofsted had complied with FOIA section 16 and, as the passage quoted above demonstrates, did not contain any advice on how the Request might be narrowed in order to maintain anonymity.

Investigation of the Appellant's complaint by the Information Commissioner.

21. On 12 May 2014 the Appellant wrote to the Information Commissioner to complain about the way in which the Request had been handled by Ofsted. He made the following three complaints:
    a. Ofsted had failed to follow Ministry of Justice Guidance on section 36;
    b. Ofsted had "*failed to direct themselves properly to the question of personal data and have failed to follow the guidance set out in the* [Information Commissioner's] *document "Anonymisation: managing data protection risk code of practice";* and
    c. The internal review had not been carried out properly and had been used simply to justify Ofsted's original stance.

22. At the outset of his investigation the Information Commissioner wrote to Ofsted on 4 June 2014 asking for a sample of the withheld data and raising a number of questions. These included the following:

> *"…*
>
> *b. Please use specific examples from sample to clearly indicate and explain how the submitted prejudice in relation to s36 might occur despite anonymisation.*
> *c. Please use specific examples from the information to clearly indicate and explain how identification of a school, a teacher and an inspector in relation to s40(2) might occur despite anonymisation and the removal of date (the latter being acceptable to the requester)."*

23. Ofsted's response to question b. was:

> *"My initial comment here is that "full anonymisation" has not been proposed, merely the replacement of an inspector's number with another traceable number (ie this proposal represents a weak pseudo-anonymisation, which would be vulnerable to simple inference attacks)"*

Its response to question c. opened with this passage:

> *"In correspondence with Ofsted the requester has only withdrawn his request for the "full date". This is taken to mean he still wishes to be provided with month and year (as per his original request). He is entitled at any point to submit a new*

request to Ofsted for information without any date and Ofsted will be able to treat that on its merits within the 20 working days provided to consider requests for information. (Emphasis added)

Ofsted's contention is, if the month/year remains part of the request, then the majority of inspectors and a considerable number of teachers can be easily identified from these data when applied to internet resources/local knowledge. If the month/year is removed (although we have not been asked to do so) then it would still be possible to identify a sizeable minority of inspectors and, from that, some individual teacher's scores"

Ofsted went on to explain in greater detail how it anticipated individuals might be identified if the Request had been complied with.

24. The materials made available to us on this appeal contain no further correspondence between the Information Commissioner and either Ofsted or the Appellant until, on 5 November 2014, the Information Commissioner wrote to the Appellant explaining to him the conclusion that he was minded to reach. The letter recorded that the Appellant had withdrawn his request for the "full date" and that Ofsted (and, by implication, the Information Commissioner) had taken this to mean that he still wished to be provided with the month and year of relevant records or events. It then proceeded to set out in a lengthy quotation the arguments which had been put forward by Ofsted in correspondence in support of its contention that individuals could be identified if the information sought in the Request were to be released. At the end of the letter the Information Commissioner concluded, on that basis, that Ofsted had been entitled to refuse the Request because the requested information would not have been sufficiently anonymised to protect individual teachers and inspectors.

25. There was no attempt by the Information Commissioner, either at this stage or, so far as we have been able to ascertain, at any other time during the investigation, to explore whether Ofsted had advised the Appellant on possible narrowing of the scope of the Request to achieve anonymity.

26. The Appellant was not happy with the Information Commissioner's informal statement of his views. In correspondence he asked for a formal Decision Notice to be issued and criticised the Information Commissioner for not having put to him for comment the arguments on anonymity which Ofsted had submitted. He reiterated that he was content for the identity of teachers to be protected, although he doubted that inspectors were entitled to the same degree of protection. He also complained that the Information Commissioner had not attempted to mediate between himself and Ofsted and had *"failed to engage with me (and possibly OFSTED) in the search for an appropriate solution that would have fulfilled all statutory obligations".*

The Information Commissioner's Decision Notice

27. The Information Commissioner's Decision Notice was duly issued on 6 January 2015. As foreshadowed in correspondence it concluded that, even after the Appellant had withdrawn from the Request his stipulation for the full date of events/records, a considerable number of teachers and the majority of inspectors could be easily identified from the requested data when the information it contained was combined with local knowledge and information available on line. The requested information would therefore be *"insufficiently anonymised for it to be taken outside the definition of personal data."* The Information Commissioner went on to find that disclosure would breach the data protection rights of the individual teachers and investigators identified and that it was therefore exempt information under FOIA section 40(2). Having reached that conclusion he considered that it was not necessary for him to consider whether the information would also have been exempt under section 36.

The appeal to this Tribunal

28. On 8 January 2015 the Appellant lodged with this Tribunal a Notice of Appeal against the Decision Notice. Ofsted was subsequently joined as a Second Respondent to the Appeal. But although both Respondents submitted written Responses to the appeal and cooperated in the preparation of bundles of relevant materials for our use, neither of them attended the hearing which the Appellant had requested.

29. Grounds of Appeal that were incorporated in the Notice of Appeal raised the following issues arising from the Decision Notice and the conduct of the Information Commissioner's investigation:

    a. The Information Commissioner had, in the Appellant's view, wrongly applied the test for determining whether information had been sufficiently anonymised for it to be no longer considered as personal data and for having reached an incorrect conclusion on the point.

    b. If that argument failed and it was determined that the requested information did constitute personal data then, while the Appellant conceded that personal data relating to individual teachers should not be disclosed, he argued that, in light of the different role performed by an inspector, there was a legitimate expectation that his/her work should be open to public scrutiny. In addition, he said, disclosure would serve the purpose of exposing the effectiveness of the quality assessment processes adopted by Ofsted.

    c. The Information Commissioner had failed to conduct his investigation in a fair manner in that he had obtained further

information from Ofsted, which he then adopted as support for the conclusion he reached, without first giving the Appellant an opportunity to comment. The Appellant specifically argued that:

"I suggest that had equality of access to the Commissioner been granted that it is very possible that a compromise would have been possible without recourse to the Tribunal."

d. The Information Commissioner had failed to mention in his Decision Notice (or to follow up with further action) the admitted failure by Ofsted to respond to the Request in a timely manner, which constituted a breach of FOIA section 17.

e. No decision had been made in respect of the exemption claimed under FOIA section 36.

f. In the course of making his case on anonymity the Appellant also raised the issue of Ofsted's failure to help him refine the Request at the outset under its duty to provide advice and assistance. On this he said:

"I further submit that there has been a section 6 [we think a mis-type for 16] *failure by OFSTED to assist me in finding a suitable compromise that would provide the key parts of the data requested in such a manner as to prevent a member of the public using the data to identify living individuals."*

30. As will become apparent below, we have decided that the information identified in the Request constituted exempt information because it was personal data and its disclosure would have breached the data protection principles. It is not therefore necessary for us to go further and consider whether FOIA section 36 also applied. Nor do we feel it necessary or appropriate for us to consider further the apparent breach of FOIA section 17 – this has been admitted by Ofsted and, although it is perhaps surprising that it was not even mentioned in the Decision Notice, it is not for us to direct the Information Commissioner on what further steps he might or should take to ensure future compliance by Ofsted. As regards the conduct of the investigation, the terms of FOIA section 58 are clear in limiting our jurisdiction to an examination of the decision reached by the Information Commissioner, not the route by which he arrived at that decision. Clearly, if the Information Commissioner fails to unearth relevant information or arguments as a result of his decision not to engage in dialogue with both the public authority and the requester, he may increase the likelihood that his decision will contain an error of fact or law. At that point we have jurisdiction to remedy the error, but we do not have jurisdiction to interfere in the investigatory process. We, therefore, intend to deal, in turn, with just issues a., b. and f. of those set out in paragraph 29 above.

Would the requested information be sufficiently anonymised that it did not constitute personal data?

31. In addressing the issue of anonymisation the Grounds of Appeal included the following paragraph:

> *"I submit that in this case that the chances of the public identifying any living individual in this data would be extremely remote for the following reasons:*
> *a. Only* [Local Education Authority] *level data was requested not individual school data as in OFSTED v The Information Commissioner EA-2009-0121.*
> *b. It has been conceded that exact dates are replaced by year quarters or even just the year to prevent the public being able to identify individual schools.*
> *c. It has been conceded that rare subjects (such as Latin) could be excluded or summarised at a national level where the inclusion of these subjects at LEA level would lead to the public being able to identify individual schools.*
> *d. Further compromises such as not identifying school type could be made to ensure that it is not possible for the public to identify an individual school and thereby making it not even remotely possible to identify either an individual teacher or inspector."*

32. The Information Commissioner submitted a Response to the Grounds of Appeal in which he placed reliance on the decision of a differently constituted panel of this Tribunal in the earlier Ofsted case referred to above. That case does not bind us, but it was based very firmly on *The Queen on the Application of the Department of Health v Information Commissioner* ([2011] EWHC 1430), a decision of the High Court, which does bind us. In that case, as we have indicated above, Cranston J interpreted the statutory definition of personal data as meaning that if the Information Commissioner found, as a fact, that data released to the public was in a "fully anodised" form, such that the chances of the public identifying a living individual from it was extremely remote, (taking into account any other information already in the public domain), then it was open to him to conclude that the data did not, in that form, constitute personal data.

33. The Information Commissioner invited us, on this basis, to conclude that he had been correct in finding that individuals could be identified from the information requested, when that information was combined with other information that members of the public would either have or would be able to access.

34. Ofsted filed its own Response. This included an explanation of how a member of the public could identify individuals by combining the withheld information with information filed on Ofsted's own website. This was a more comprehensible explanation than that included in

Ofsted's correspondence with the Information Commissioner during his investigation. It sought to demonstrate that, even if the requested information were to be confined to just the month or year of an event or a record, when combined with the identity of the relevant local authority and a code name for each inspector, it would be possible to identify individual schools and teachers, as well as the inspectors themselves.

35. The Appellant sought to challenge the logic of these arguments, both in written submissions and during the oral hearing. However, we accept that individual teachers and inspectors could be identified from the withheld information if it were combined with other information available to the public. In our view, therefore, the Information Commissioner was right to conclude that the information requested constituted the personal data of teachers and inspectors.

36. We also accept that the same outcome would arise even if the scope of the Request were to be narrowed in the way suggested in paragraph 34 above.

Would disclosure breach data protection principles?

37. The Appellant accepted that the disclosure of teachers' personal data would not be justified but argued that the legitimate public interest in the identification of inspectors was sufficient that it did not constitute an unwarranted intrusion into their privacy because of the public role they perform in assessing educational standards and the importance of the public being able to monitor their performance of that role.

38. It became apparent during the hearing that any level of disclosure that would enable an inspector to be identified would also be likely to lead to the identification of the teachers subjected to that inspector's review. We have not therefore tried to differentiate the two classes of individual who would be affected by disclosure.

39. In considering the degree of interference with personal privacy we place considerable weight on the fact that teacher identification would put into the public domain information about the performance of the relevant individual in his or her chosen occupation. That is a matter that the individual is entitled to expect would be considered only in private discussion between the individual and his or her head teacher or other superior – he or she would not expect it to be placed in the public arena where it would be available to colleagues (including those that had not been subject to an inspector's visit) as well as pupils and their parents). The individual's reasonable expectation of privacy would be increased by the fact that the outcome of a single class visit would not be a sufficient (or, therefore, fair) basis for assessing the individual overall performance.

40. We set against those criteria the legitimate public interest in the quality of teaching available in the nation's schools. However, that factor is

diluted because of the publicity given to the report that Ofsted publishes in respect of each school inspection, a report that gives a more balanced view for public scrutiny than the individual reports made in respect of each class visit. These factors do not, in our view, outweigh the individuals' right to privacy.

41. We conclude, on balance, that disclosure would amount to an unwarranted interference with the individuals privacy and that the Information Commissioner was therefore correct to conclude that disclosure would breach the data protection principles and that the information should therefore be treated, pursuant to FOIA section 40(2), as being exempt from Ofsted's disclosure obligations.

Did Ofsted breach FOIA section 16 and, if so, does that have any impact on our decision on disclosure of the requested information?

42. Although Ofsted's first response to the Request (as summarised in paragraph 15 above) did attempt to assist the Appellant, it addressed only the question of whether the information requested was so extensive that it would overload the Appellant with data. When it came to send its substantive response to the Request (by the letter of 11 February 2014 – paragraph 18 above) Ofsted made no attempt to explore the possibility that a modified form of the Request might generate data that was sufficiently anonymised to protect individuals. In particular it did not respond to the clear indications given by the Appellant that he was prepared to be flexible and to adjust the scope of the Request if necessary. The Appellant's attitude in this respect was evident again in his communication of 16 February 2014 (paragraph 19 above) in which he again made clear that he had no interest in identifying individuals and was willing to adjust the scope of the Request to avoid this happening. Ofsted's letter reporting on the outcome of its internal review (paragraph 20 above) made passing reference to the issue of scope reduction but, again, contained no advice or assistance and no criticism of those who had dealt with the Request at the outset.

43. In our view the obligation to provide advice and assistance is particularly relevant when an issue arises on anonymisation of complex data, stored electronically. A public authority is likely in those circumstances to have full knowledge of the structure of its records and be in a far better position than the requester to know how an information request might be adjusted to reduce or eradicate the risk of personal data being disclosed. Ofsted did not provide the Appellant with any significant assistance in this case and we are particularly troubled that some of its later statements suggest that it did not regard itself as being required to do so. Part of its response to questions put to it by the Information Commissioner during his investigation is quoted in paragraph 23 above and suggests that it felt that, if an information request was too wide, it was entitled to simply reject it and leave the

requester, without help, to try to reformulate it. At that stage it would take the form of a new request which Ofsted would have 20 working days to respond to (and it is to be noted that it took far longer than that in this case) and could again reject without providing assistance. This reduces a citizen's right to request information to a game, which the citizen is forced to play blindfold with the public authority declining to say whether or not successive attempts are getting any closer to the target. We were disappointed to note that the Information Commissioner continued to maintain that Ofsted had been entitled to adopt this singularly unhelpful attitude in the written Response it filed during the course of this Appeal.

44. We believe, therefore, that Ofsted plainly did not comply with FOIA section 16. We have considered whether that breach of its statutory obligation might affect our decision on whether or not to order disclosure of a more restricted body of data than identified in the Request. It was apparent to us, when discussing the matter with the Appellant at the hearing, that he was willing to limit the scope of his Request further but, in the unfortunate absence of the First and Second Respondents, it was not possible to determine for certain whether this might have resulted in the protection of personal data. However, we are faced with more fundamental difficulties than that. They include:
    a. The absence of any complaint about section 16 in the Appellant's complaint to the Information Commissioner.
    b. The fact that the Appellant did not raise the point after he had been provided with the informal indication of the Information Commissioner's conclusions (paragraph 24 above), even though he did criticise the Information Commissioner for having failed to mediate on the point.
    c. As a consequence, the Decision Notice did not contain any mention of the issue.
    d. The Appellant did not raise section 16 as one of his Grounds of Appeal, although he made passing reference in the course of expanding on another point he had raised.

45. We remind ourselves in this respect that, although the Information Commissioner has the power to investigate a breach of any of the provisions in Part I of the FOIA (which includes section 16), he is restricted under section 50(1) to considering the "*specific respect*" in which the complainant says his or her information request had been wrongly dealt with. As we have indicated, the Appellant did not raise the issue when he submitted his complaint and, although we would have expected the Information Commissioner to have raised it with Ofsted himself (if only as part of his duties to promote good practice by public authorities under FOIA section 47(1)) we are not satisfied, without the point having been debated before us, that we have the power to say, in effect, that a Decision Notice that did not rule on the point in the circumstances of this case failed to satisfy the *"in accordance with the law*" test imposed by section 58.

46. Even if we were free to rule on the point, we do not think that we would have the power to direct Ofsted to comply with a reduced-scope form of the Request. Quite apart from the practical issue we have mentioned, we are aware that the Information Commissioner does not himself have any right to require a public authority to remedy a breach of section 16 (see section 50(4)(a) and (b) quoted in paragraph 11 above). The only sanction for a section 16 breach (if sanction is the appropriate word) would be the issuing to the public authority of a recommendation as to good practice (which the Information Commissioner has the power to do under FOIA section 48) and the negative publicity that may result from the taking of that step or its mention in the report which the Information Commissioner is required to lay before Parliament each year.

47. There is, moreover, no suggestion anywhere in FOIA that a breach of section 16 is capable of leading to the disapplication of any exemption that would otherwise be available to a public authority. The scheme of the legislation appears to be to maintain a separation between the availability and operation of exemptions, on the one hand, and, on the other, the processes identified above that may follow from a finding that section 16 had been breached.

48. In the circumstances, and with some disappointment, we find ourselves forced into the conclusion that, despite the failure to comply with section 16, this is not capable of leading to an alteration of the conclusion we have previously reached, to the effect that Ofsted was entitled to reject the Request in the form in which it had been submitted.

49. Our decision is unanimous

……..

Chris Ryan Judge
2015