



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2014/0060**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50524339  
Dated: 20 March 2014**

**Appellant: John Hemming**

**Respondent: The Information Commissioner**

**Heard on the papers: Kidderminster Magistrates**

**Date of Hearing: 5 September 2014**

**Before**

**Chris Hughes**

**Judge**

**and**

**Gareth Jones and Paul Taylor**

**Tribunal Members**

**Date of Decision: 18 September 2014**

**Date of Promulgation: 19<sup>th</sup> September 2014**

**Subject matter:**

Freedom of Information Act 2000

## **REASONS FOR DECISION**

### Introduction

1. Between 2009 and 2012 Mr Hemming MP asked for information on a number of occasions from Ofsted concerning serious incident notifications and serious case reviews following a child death. Ofsted obtains this information from forms completed by local authorities when they become aware of such an event. The information in this notification is “raw data” gathered as soon as the local authority becomes aware of the issue and does not therefore reflect the actual facts of the case as later established. This “validated data” will therefore differ from the “raw data” in ways which cannot be known in advance. The “raw data” may therefore be materially inaccurate and misleading.
2. There was correspondence between Ofsted and Mr Hemming in 2010 about the information supplied. On 2 September 2010 information was supplied to him in response to a request of 5 August 2010:-

***“Validated data***

***The attached spreadsheet comprises data on the notifications of child deaths and the instigation of serious case reviews covering May, June and July 2010. This data has been validated by Ofsted’s Inspection data and Information team and comprises the information held by Ofsted as at 2 September 2010”***

3. In August 2011 he raised the question of Ofsted’s provision of “validated data” of serious review incidents. On 25 August 2011 Ofsted responded:-

*“.... I have examined the correspondence you have had with Ofsted on this matter. My understanding is that you have previously been provided with the data Ofsted held on this issue, but that Ofsted had explained that it was not entirely satisfied with the accuracy of those statistics.*

*Following from this Ofsted undertook to attempt to “validate” the source information and create new, more accurate statistics, covering the period prior to September 2009. [name redacted] wrote to you explaining that this matter was not subject to the FOI Act. As you are aware this has been a process of examining and analysing source records, to check and record the categorisation of those records. The process*

*should lead to the production of “new information” in the form of “validated” statistics covering this period*

4. Ofsted, in response to his complaint about this to the ICO, informed the ICO on 20 September 2011 that Mr Hemming had accepted how Ofsted intended to supply data for May June and July. He had written to them on 6 August 2010 stating: *“I can accept the data for May, June and July and wait for the adjusted later figures...”* (bundle page 59). Ofsted set out the difficulties it had experienced in generating a coherent and consistent data set for a longer period of time. Mr Hemming subsequently withdrew his complaint to the ICO.
5. Mr Hemming wrote again to OFSTED on 2 October 2013:-

*“Can I please have an updated copy of the serious incident notifications in the same form as I have had it recently. If this isn’t clear please come back to me.”*
6. Ofsted’s Chief Statistician replied to Mr Hemming on 30 October (bundle page 26):-

*”[name redacted] has passed me your request for an updated copy of the serious incident notifications relating to child deaths, in the same form as you have received it previously. We recognise that these data are of public interest and so we decided that we should take steps to publish the data on a regular basis. We are currently carrying out an exercise to extract and present the data we hold, to ensure consistency and to consider what steps might be taken to improve the reporting of these data going forward. I am sure you will support a move to publish these data regularly. We will publish the first data set once the data are fit for publication; we hope that this will be around Spring 2014. As the data are now intended for publication they are outside the Freedom of Information Act. We cannot give you the unvalidated data as this may be misleading....*
7. Mr Hemming asked for a review and on 11 December 2013 Ofsted replied setting out in greater detail its stance. It explained that there was inconsistency in reporting by local authorities and that *“The work required by Ofsted to make this data accurate and meaningful is, in fact, complex and time consuming.”* It explained that FOIA could not require Ofsted to validate raw data. It went on to state that if a request was made for the raw data it could be resisted under s.22 – information intended for future publication, in circumstances where it was reasonable to withhold information prior to publication. In this case the public interest lay in ensuring the accuracy of the data.

8. Mr Hemming complained to the ICO. The ICO investigated and found that the validated data was different from the raw data and that validating the data was in its early stages and incomplete. The ICO concluded (decision notice paragraph 18:-
- “Given the validated data was not held at the time of the request, only the raw data, and the fact that Ofsted had not completed the process of validating the data, the Commissioner considers that on the balance of probabilities Ofsted was right to assert that the requested information was not then held.”*

#### The appeal to the Tribunal

9. Mr Hemming appealed arguing that paragraph 18 was wrong in two respects; he had been obtaining lists since 2009: *“some of those lists have been validated data and some have been of the raw data”*. Some of the data would have been validated *“hence Ofsted should have provided that data which had been validated/quality assured.”* He argued that validation was an updating process and that the data should not be covered by s.22 as there was a public interest in disclosing the data and his request was made prior to the decision to publish the data and that therefore at that stage data was available.

#### The questions for the Tribunal

10. The first substantive question for the Tribunal is the proper construction of the request; was it for validated or unvalidated data or both? Although Mr Hemming has argued that it was for all data, the written evidence before the Tribunal did not support him on that point. In September 2010 Ofsted set out the data it was supplying him with – validated data. Although he subsequently complained at Ofsted’s handling of his request there is no evidence that after that data it supplied him with anything other than validated data. Since his request was phrased as *“in the same form as I have had it recently”* it is clear that the data he had had recently – between 2010 and 2012, was validated.
11. Given therefore that the request was for validated data, the second substantive question is was such data held – in the context of Mr Hemming’s argument, Ofsted should have released such parts of the material as had been validated. The evidence however is that the review of the submitted data was at an early stage. One consequence of this is that data may be “declassified” where the submission did not

meet the criteria for submission as a notification (letter: Ofsted to ICO 7 February 2014 bundle pages 40-43). Effectively therefore at this stage of the validation process the data is not held.

Conclusion and remedy

12. The Tribunal is satisfied that the ICO as a matter of fact correctly concluded that the request was for validated data and the data was not validated at the date of request. Accordingly the ICO was correct to conclude that the data was not held. The Tribunal is therefore satisfied that the decision notice is correct in law and dismisses the appeal.
13. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 18 September 2014