IN THE FIRST-TIER TRIBUNAL **Case No. EA/2009/0121**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL:

Information Commissioner's
Decision Notice No: FS50167506
Dated: 25 November 2009

Appellant: **OFSTED**

Respondent: **THE INFORMATION COMMISSIONER**

Heard at: Royal Courts of Justice, Strand, London

Date of hearing: 5th and 6th December 2011

Date of decision: **20 February 2012**

Before

CHRIS RYAN
and

MARION SAUNDERS
DAVID WILKINSON

Attendances:

For the Appellant: Joanne Clement
For the Respondent: Jonathan Swift QC

Subject matter:

Audit functions s.33
Public interest test s.2
Personal data s.40

Cases: Common Services Agency v Scottish Information Commissioner [2008] UKHL 47
The Queen on the Application of Department of Health v Information Commissioner [2011] EWHC 1430

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 25 November 2009 is substituted by the following notice:

For the reasons set out below, Ofsted should disclose, in the form set out in its letter to the Information Commissioner dated 9 August 2011, grading scores recorded in Evidence Forms completed during lesson observations during its inspection of Bishop Vesey's Grammer School in November 2006.

REASONS FOR DECISION

The request for information and the Decision Notice

1. In November 2006 The Office for Standards in Education, Children's Services and Skills ("Ofsted") carried out an inspection of Bishop Vesey's Grammar School in Sutton Coldfield, West Midlands. The inspection was carried out under section 5 of the Education Act 2005 and the resulting report was subsequently published on the Ofsted web site and made available to the school for onward transmission to teachers and parents.

2. On 7 February 2007 the parent of one student at the school sent Ofsted a request for information under the Freedom of Information Act 2000 ("FOIA"). It asked for any information Ofsted had about the school, in addition to what had been included in the published report.

3. Under FOIA section 1 Ofsted, as one of the public authorities listed in Schedule 1 of FOIA, is required to respond to an information request stating whether it holds the information and, if so, communicating the information to the person making the request. However, the obligation may not arise if the requested information falls within one of the exemptions set out in Part II of FOIA.

4. Ofsted disclosed the Pre-Inspection Briefing it provided to the school's head teacher before the inspection took place and the Performance and Assessment Report it prepared on that occasion. However, it refused to disclose the Evidence Forms which individual inspectors had used to record the information they assembled during the course of the inspection. The forms are used for a variety of evidence-gathering activities including lesson observations, analysis of pupils' work and discussions with pupils and staff. Each form includes a series of boxes in which, where appropriate, the inspector will record a grade. The issues to be graded are "Standards", "Progress", "Personal

Development", "Teaching", "Curriculum", "Care, guidance & support" and "Leadership & management".

5. Ofsted's refusal was based on the exemptions set out in FOIA section 33 (prejudice to audit function) and section 41 (information provided to it in confidence). However, after the requester had complained about the refusal to the Information Commissioner, Ofsted dropped those grounds and relied instead on FOIA section 40 (personal data of a third party).

6. During the Information Commissioner's investigation Ofsted agreed to disclose a quantity of information derived from the Evidence Forms. But it argued that those Evidence Forms that dealt with lesson observations should not be disclosed because they contained the personal data of various people including school staff, pupils and other individuals. Ofsted appears to have concluded, from further dialogue with the Information Commissioner, that the Information Commissioner would support its argument that lesson observation scores were exempt under section 40 and would not have to be disclosed. However, in the event, the Information Commissioner, reached a slightly different conclusion. In a Decision Notice dated 25 November 2009 he concluded that lesson observation Evidence Forms did contain personal data, so as to bring the Data Protection Act 1998 into play, and that the disclosure of what amounted to a detailed performance assessment of the teacher concerned would not be fair to him or her and would thus be in breach the 1st Data Protection Principle. It would also be unfair to the extent that it disclosed pupil's personal data. It followed, he said, that the information was exempt information under FOIA section 40(3)(a)(i). However, he then went on to consider whether, by removing individuals' names from Evidence Forms recording lesson observations, the information would become anonymous and could thus be disclosed without breaching any data protection principle. He was criticised during the Appeal for having failed to seek any further contribution from Ofsted in the course of exploring this possibility. However, he concluded that, although anonymisation could not be achieved with respect to the main body of the Evidence Forms, the grading information itself, once removed from the rest of the information on the Evidence Forms, could be disclosed without allowing any individual to be identified. It would then cease to be personal data so that the application of data protection principles would not arise and it would not be capable of being treated as exempt information.

7. The Information Commissioner set out in a confidential annex the information which he required to be disclosed, adopting a layout comprising 12 tables, each in the following form:

Lesson Observation [number of lesson]	
Standards	[score]
Progress	[score]

Personal Development	[score]
Teaching	[score]
Curriculum	[score]
Care, guidance & support	[score]
Leadership & Management	[score]
Overall quality of the lesson	[score]

The order in which the tables were displayed followed the chronological order of the lessons that the inspectors had observed. We will refer to the information in this form as "Chronological Lesson Scores".

8. The Information Commissioner concluded that Ofsted had been entitled to withhold the content of the lesson observation Evidence Forms, but that it had failed to comply with FOIA section 1 by withholding the Chronological Lesson Scores.

The Appeal

9. Ofsted appealed to this Tribunal on 21 December 2009. Although it complained about the Information Commissioner's failure to afford it the opportunity to comment on the method adopted to achieve anonymisation, it did not rely on what it characterised as unfairness in the Information Commissioner's processes. It acknowledged that the rehearing that was to take place in the course of the appeal should cure any unfairness at the previous level of decision-making. However, it invited the Tribunal not to place any reliance on any conclusion stated within the Decision Notice, because of the process that had been followed by the Information Commissioner.

10. The only error on which Ofsted relied in its Grounds of Appeal was the Information Commissioner's conclusion that the presentation of data in the confidential annex to the Decision Notice had effectively anonymised the grading information, so that it did not comprise personal data. Ofsted asserted that, in consequence of that error, the effect of the Decision Notice was to require personal data to be disclosed, when it should in fact have been treated as exempt information under FOIA section 40.

11. Ofsted also raised a further exemption at this stage, which it had not relied on during the course of the Information Commissioner's investigation. This was that the schools inspections process was properly characterised as an audit function, so that the exemption provided by FOIA section 33 (prejudice to audit functions) applied, and the public interest in maintaining that exemption outweighed the public interest in disclosure. In the Information Commissioner's Response, dated 18 January 2010 he joined issue with Ofsted on each of the Grounds of Appeal.

12. On 9 August 2011 the Treasury Solicitor, acting on behalf of Ofsted, wrote an open letter to the Information Commissioner proposing what it described as a compromise, offering to disclose grading information in a form which it said would significantly reduce the possibility of any identification of individual teachers occurring. It proposed that the grading scores from the 12 observed lessons should be assembled into a table in the following form:

Grade totals	Standards	Progress	PD	Teaching	Curriculum	Care etc	L&M	Overall Quality
Grade 1	0	2	0	2	0	1	0	2
Grade 2	7	4	3	4	2	3	0	4
Grade 3	0	6	1	6	2	2	0	6

We will refer to the information in this form as "the Compromise Grading Format".

13. The Information Commissioner replied on the same day expressing the view that the Chronological Lesson Scores format would not enable the individual teachers to be identified and declining Ofsted's offer to disclose the Compromise Grading Format.

The relevant statutory provisions

14. The fundamental obligation of a public authority to disclose information requested from it is set out in FOIA section 1 The relevant part reads:

> *"(1) Any person making a request for information to a public authority is entitled—*
>
> > *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> >
> > *(b) if that is the case, to have that information communicated to him."*

15. The section 1 obligation may not arise if the information in question falls within the scope of one of the exemptions set out in FOIA Part II.

16. The parts of FOIA section 33 that are relevant to the issues arising on this appeal read:

> *(1)This section applies to any public authority which has functions in relation to—*
>
> > *(a)the audit of the accounts of other public authorities, or*
> >
> > *(b)the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.*

(2)Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

17. The effect of FOIA section 2(3) is that section 33 creates a qualified exemption. In the case of information falling within such a qualified exemption FOIA section 2(2)(b) provides that the information must still be disclosed unless "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

18. The relevant parts of FOIA section 40 read:

(1) …

(2)Any information to which a request for information relates is also exempt information if—

*(a) it constitutes personal data [*of anyone other than the requester], *and*

(b) either the first or the second condition below is satisfied.

(3)The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the 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.

(4)The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

…

(7)In this section—

- *"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;*
- *"data subject" has the same meaning as in section 1(1) of that Act;*
- *"personal data" has the same meaning as in* section 1(1) of that Act.

19. Section 1(1) of the Data Protection Act 1998 ("DPA") defines "personal data" as meaning:

"…data which relate to a living individual who can be identified –
i. from those data, or
ii. from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."

20. The first of the data protection principles is the only one that is relied on in this Appeal. It reads:

"Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless –
i. at least one of the conditions in Schedule 2 is met, and
ii. in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

21. The only one of the Schedule 2 conditions that is relevant to this Appeal is condition 6(1), which 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 of legitimate interests of the data subject"

22. The effect of FOIA section 2(3)(f) is that the exemption created by section 40 is an absolute one so that, if we decide that the information in dispute falls within it, we do not need to give further considerations to the public interest. However, it is clear from the provisions that we have quoted, that a balance must be struck, when assessing whether or not the exemption is engaged, between the legitimate interests of the public in receiving information and the rights of the individual not to suffer unwarranted interference in his or her personal rights and freedoms.

The appeal procedure

23. The Tribunal's role is to consider whether or not the Information Commissioner's decision was "in accordance with the law" (FOIA section 58(1)). If it considers that it was not it may issue such other notice as it considers appropriate, in substitution for the Decision Notice. The Tribunal may review any finding of fact on which the Decision Notice was based.

24. At an early stage of the appeal process Ofsted's appeal was stayed to await the outcome of the appeal to the High Court from another Tribunal decision. The outcome of that appeal was announced in the report *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin). At that stage this Appeal was revived. Directions were given, on an agreed basis, leading to a hearing on 5 and 6 December 2011. Prior to the hearing an agreed bundle of documents was provided together with witness statements signed by three of Ofsted's officers. The Tribunal was also provided with unredacted copies of those of the Evidence Forms from which the grading scores set out in the confidential annex to the Decision Notice had been extracted.

25. The Ofsted witnesses were Richard McGowan (Head of Information Rights), Frank Norris (Divisional Manager for Education) and Ian Hartwright (a senior manager in the Development and Strategy Directorate). None of the witnesses had taken a direct part in the school inspection at issue. Each witness attended the hearing and was cross examined on his evidence.

26. Mr McGowan dealt with the history of the information request and the Information Commissioner's investigation into its refusal. He went into particular detail on how the issue of lesson observation scores had been debated between the Information Commissioner and Ofsted, in both this case and a previous one, and criticised the Information Commissioner for having concluded his Decision Notice without giving Ofsted any opportunity of commenting on the anonymisation process he ultimately adopted. In light of Ofsted's decision not to rely in this appeal on any perceived unfairness in the Information Commissioner's

process (see paragraph 9] above), the relevance of Mr McGowan's evidence is questionable.

27. Mr Norris relied on his experience as an inspector to explain how teachers might be identified, or misidentified, from the release of information in the form ordered by the Information Commissioner. He speculated on the harmful impact this could have on a school and various individuals. He explained the inspection process and the role of lesson observations within it. This, he said, was not to focus upon the quality of particular teachers and their individual performances, as observed during the inspection but to provide evidence on strengths and weaknesses of the teaching overall. He stressed that, in this context, grading scores, once divorced from the inspector's evaluation recorded elsewhere on an Evidence Form, may be quite misleading. He also explained the importance of maintaining confidentiality, particularly as to grades, so as to encourage open communication between inspectors, staff, pupils and parents. He considered that the information ordered to be disclosed in this case had not been fully anonymised because of the number of people who knew the date when the school in question had been inspected and had been able to observe at least parts of the inspectors' movements on the day. Mr Norris was concerned that the sharing of such "observation details" could well lead to the identification of some or all of the twelve teachers whose lessons had been observed.

28. Mr Hartwright's evidence addressed the impact of disclosure on Ofsted's audit function and the public interest factors for and against disclosure. He did so in the context of a brief outline of the inspection process and indicated the extent to which this involved "value for money" assessments, even though the inspectors' role was not to carry out a financial audit. Mr Hartwright then went on to explain why, in his view, release of grading scores would harm the inspection process. It would undermine the authority of reports, discourage co-operation between schools and inspectors, impair inspection methodology, and the presentation of Ofsted reports. He also thought that it might discourage a flexible approach to inspections and lead to the public being misled. Mr Hartwright concluded that the release of the inspectors' "workings", in the form of lesson observation grades, would provide a "partial, un-moderated and unbalanced view of an inspection" and, removed from its full context, would "invite readers [of the full report] to draw misleading and incorrect conclusions."

29. It was not entirely clear from Mr Hartwright's witness statement whether his concerns related to the disclosure of <u>any</u> grading scores. He certainly indicated that his concerns would not be entirely allayed by disclosure in the form of the Compromise Grading Format referred to above.

Issues to be decided on the Appeal

30. The issues that we have to decide are as follows:
    a. Whether the Chronological Lesson Scores constitute personal data, notwithstanding the attempt to anonymise them by presenting them in the form indicated in paragraph 7 above.
    b. If the Chronological Lesson Scores do constitute personal data whether disclosure would be contrary to the data protection principles so as to make them exempt information under FOIA section 40(2).
    c. In any event, would disclosure of the Chronological Lesson Scores prejudice, or be likely to prejudice, the exercise of any audit function carried out by Ofsted, so as to make them exempt information under FOIA section 33.
    d. If the Chronological Lesson Scores do fall within the section 33 exemption would the public interest in maintaining that exemption outweigh the public interest in disclosure.

    We will deal with each of those issues in turn.

Are the grading scores personal data?

The scope of the debate

31. It is common ground between the parties that:
    a. the Evidence Forms relating to lesson observations did constitute personal data, because it would be possible to identify the specific class to which each one related and, from that, the individual teachers and pupils present during the observation; and
    b. the disclosure of such forms would be contrary to the first data protection principle in respect of the individual teachers, because they formed a detailed performance assessment and the teacher would not hold a reasonable expectation that such assessment material would be disclosed. It would also breach the principles in respect of the pupils present at the time.

32. Where the parties disagree fundamentally, however, is whether the grading scores, once extracted from the relevant Evidence Forms and presented in the form of the Chronological Lesson Scores, have been anonymised to the degree where they fall outside the definition of personal data. There was no suggestion before us that any individual could be identified from the Chronological Lesson Scores on their own. It is therefore only DPA section 1(1)(ii) that we need to consider i.e. whether identification would be possible from that information and *"other information which is in the possession of, or is likely to come into the possession of, the data controller*."

Binding authority

33. The definition has been considered in two cases, to which we were referred. The first was *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 in which the House of Lords considered data which had been subjected to a process, called "barnardisation", which was intended to render it impossible for individuals to be identified from statistics on the incidence of childhood leukaemia within a relatively small geographical area. It is fair to say that it is a case that has presented some challenges to those seeking to derive from it clear principles on the interpretation of the statutory definition. However, in the subsequent case of *The Queen on the Application of Department of Health v Information Commissioner* [2011] EWHC 1430, Mr Justice Cranston decided an appeal from this Tribunal, which required him to determine whether certain anonymised data on abortions had been structured in such a way that it no longer constituted personal data. In the course of concluding, on the facts, that it did not, the Judge analysed the speeches in *Common Service Agency* and the principles which should properly be drawn from it. He held that he was required to treat the speech of Lord Hope as determinative for precedent purposes and interpreted it to mean that rendering personal data fully anonymous, so that, when published, the public was not capable of identifying any individuals, took it outside the definition of personal data. In reaching that conclusion Mr Justice Cranston quoted paragraph 27 of Lord Hope's judgement. It reads:

> *"27. In this case it is not disputed that the agency itself holds the key to identifying the children that the barnardised information would relate to, as it holds or has access to all the statistical information about the incidence of the disease in the health board's area from which the barnardised information would be derived. But in my opinion the fact that the agency has access to this information does not disable it from processing it in such a way, consistently with recital 26 of the Directive, that it becomes data from which a living individual can no longer be identified. If barnardisation can achieve this, the way will then be open for the information to be released in that form because it will no longer be personal data. Whether it can do this is a question of fact for the commissioner on which he must make a finding. If he is unable to say that it would in that form be fully anonymised he will then need to consider whether disclosure of this information by the agency would be in accordance with the data protection principles and in particular would meet any of the conditions in Schedule 2. This is the more difficult of the two routes I have mentioned. As the issues were fully argued I shall say what I think about them. But there is no doubt that the commissioner's task will be greatly simplified if he is able to satisfy himself that the process of barnardisation will enable the data to be sufficiently anonymised."*

34. Mr Justice Cranston then said, at *paragraphs* 51 and 52 of his own decision:

> *”51 In my view, the only interpretation open of Lord Hope's order is that it recognised that although the Agency held the information as to the identities of the children to whom the requested information related, it did not follow from that that the information, sufficiently anonymised, would still be personal data when publicly disclosed. All members of the House of Lords agreed with Lord Hope's order demonstrating, in my view, their shared understanding that anonymised data which does not lead to the identification of a living individual does not constitute personal data.*
>
> *”52 In my judgment, this conclusion maintains faith with Lord Hope's reasoning. The status of information in the data controller's hands did not arise for decision in the CSA case. It was concerned with the implications of disclosure by the data controller, and hence Lord Hope's order. The relevant part of Lord Hope's speech, the background to the order, is paragraph 27, which I quoted earlier. The opening sentence of paragraph 27 acknowledges that the Agency holds the key to identifying the children, but continues that, in his Lordship's opinion, the fact that the Agency had access to this information did not disable it from processing it in such a way consistent with recital 26 of the Directive, "that it becomes data from which a living individual can no longer be identified". That must relate to whether any living individuals can be identified by the public following the disclosure of the information. It cannot relate to whether any living individuals can be identified by the Agency, since that is addressed in the first sentence of the paragraph. Thus the order made by the House of Lords in the CSA case was concerned with the question of fact, whether barnardisation could preclude identification of the relevant individuals by the public.*

35. The judge went on to express the view that his conclusion was consistent with recital 26 to *the* European Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data). The relevant part of the recital reads:

> *"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas to determine whether a person is identifiable account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles the protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable ..."*

36. Mr Justice Cranston concluded that any other conclusion “seems to me to be divorced from reality” as it would mean that a public authority could never publish anonymised statistics about individuals if it had

access itself to information that would enable it to identify the individuals.

37. The Judge then went on to say that, although the Tribunal had been wrong to test the status of the information by asking whether the public authority could retain the key to the anonymisation, it had been:

> *"entitled to arrive at the conclusion that it was extremely remote that the public to whom the statistical data was disclosed would be able to identify individuals from it. In other words: the requested statistics were fully anonymised. It follows that the Tribunal ought to have held that the disclosure of the information to the public did not constitute the process of personal data."*

38. In light of that binding authority we see our task as determining whether, as a matter of fact, the information in dispute in this case had been manipulated to such an extent that the chances of the public identifying individuals from it would be "*extremely remote*", so that it might be considered to have been "*fully anonymised*".

Our application of the authorities to the facts of this case

39. The Information Commissioner conceded that the identity of a teacher whose class had been inspected could be narrowed down by those in the school to the names of those teaching in the twelve classes which inspectors had been seen entering. However, he argued that there was no way of connecting a particular teacher to one of the particular tables of grading scores set out in the confidential annex to the Decision Notice, as no information was provided about the subject taught, the year group taught or any other information which would enable the raw data to be put in context. He argued that the odds of identifying a individual had to be reduced to 1:1 before it could be said that the supposedly anonymised information was in fact personal data.

40. Ofsted urged us to reject that argument. It pointed out that the information in this case was much more localised and specific than the statistical data that was under consideration in the *Common Services Agency* and *Dept of Health* cases. The starting point was that the chance of a match was high; a one out of twelve chance, even if the public would have no additional information to narrow the selection further. In fact, it said, there was a great deal more information, which we were entitled to assume that the public would have, (particularly those in the school on the day of the inspection), which created a significant risk that the process of identification could well be narrowed to a significant extent, and certainly to the level where an informed guess might be made as to the identity of a particular teacher and the association of him or her with a particular set of scoring grades. This, in turn, could lead to a degree of informed speculation which could be damaging to the individual

41. Ofsted also pointed out that a conclusion that the Chronological Lesson Scores did constitute personal data did not lead inevitably to a decision that the information would be withheld. All it meant was that the broad exercise of balancing fairness, by reference to the data protection principles, would have to be conducted before a final decision was made on the information request.

42. We are satisfied that the Chronological Lesson Scores do constitute personal data, simply by applying the test derived from *Dept of Health*, which we have set out above. In the context of a particular event (the inspection), taking place on a particular date within the restricted environment of a single school, we think that the publication of information about the grades recorded against just 12 lessons creates a real risk of identification by those having other information about, for example, the order and timing of class visits. We think the risk is some way short of "remote" and that an individual facing that degree of risk of having his or her performance assessment identified (whether accurately or not) would be entitled to be concerned. We conclude, therefore that the information has not been anonymised to a sufficient degree to take it outside the definition of personal data.

Would disclosure have been in accordance with the data protection principles?

43. There was no serious challenge to the proposition that the public has a legitimate interest in being informed about the grades given to a school during the course of an inspection. Conversely, it was also agreed that the disclosure of detailed performance assessment information in the Evidence Forms would be an unwarranted interference in the personal lives of the teachers concerned. The area of dispute between the parties was whether there was a legitimate interest in disclosure of the more limited information set out in the Chronological Lesson Scores and whether its disclosure would constitute an unwarranted interference into the rights and freedoms of the individual teachers whose lessons were observed.

44. The likelihood of identification is again a relevant factor for us to take into consideration. In the course of his decision in *Dept of Health* Mr Justice Cranston stated that the likelihood of identification was a material issue in assessing whether disclosure was fair. In other words, (when applied to this Appeal), would individual teachers have had a legitimate expectation that their performance assessments would not be exposed to the degree of risk of publication we have identified above. We think that they would and that disclosure would therefore constitute interference into a part of their professional life that they are entitled to regard as private. Against that we must consider the interests of the public in seeing the information in question.

45. The Information Commissioner invited us to conclude that disclosure of grading information about observed lessons would serve the public interest in knowing and understanding about the performance of

schools, as reflected in Ofsted reports. It would supplement the summary material set out in the relatively short reports that Ofsted publishes and would give the public a better indication as to how Ofsted had reached its conclusions.

46. Ofsted challenged the suggestion that public understanding would be improved and suggested that publishing the Chronological Lesson Scores could be positively misleading and that any advantage gained should be assessed against the likely cost, in terms of the impact it would have on the approach to inspections adopted in the future by both inspectors and school staff.

47. We are not convinced that the publication of grading scores, in the form of the Chronological Lesson Scores, would have provided the public with information which, in qualitative and quantitive terms, would have increased public knowledge and understanding significantly. And certainly not to a sufficient degree that the interference in individuals' privacy, which we have identified above, would have been warranted.

48. We conclude, therefore, that the Chronological Lesson Scores do fall within the scope of the section 40 exemption. As we have already mentioned, it is an absolute exemption, so that our conclusions on the first two issues effectively determine the appeal in Osted's favour. However, we will consider the other issues, in case it is found on appeal that we were in error on one or both of the first two issues.

<u>Would disclosure prejudice or be likely to prejudice Ofsted's audit function so that the FOIA section 33 exemption would be engaged?</u>

49. Both parties agreed that the issues which Ofsted inspectors are required to consider justify a conclusion that school inspections constitute a function falling within FOIA section 33(1)(b), although they disagreed on whether the disclosure of the Chronological Lesson Scores would, or would be likely to, prejudice that function. In the course of argument they both referred to a Decision Notice issued by the Information Commissioner in 2008, but as this would not bind us and concerned complete Evidence Forms, as opposed to information extracted from them, we did not think it assisted us in making our determination.

50. Ofsted argued, largely on the basis of Mr Hartwright's evidence, that publication of grading scores would divert attention from the balanced conclusions of a published report towards the quality of teaching provided by individual teachers. It would thus undermine the standing of Ofsted reports generally and increase the risk of schools challenging inspection reports. It would also give an unfair impression of the performance of the individual teacher, given that the inspector would have been taking a number of factors into account when allocating a score, some of which might have had little or no relevance to the quality of the teaching. This, in turn, would undermine the willingness

of school staff to co-operate with inspectors and volunteer relevant information to them.

51. The Information Commissioner stressed that it had to be established that it was disclosure of the Chronological Lesson Scores that would give rise to the potential harm identified by Ofsted, not any other information relating to the inspection in question. He argued that, if publication of the Chronological Lesson Scores led to questioning or criticism of a report, on the basis that the overall conclusion appeared to be inconsistent with the lesson scores, then Ofsted could explain the role that such scores play in reaching an overall assessment. It therefore lay in its own hands to prevent the authority of reports being undermined. He argued that this would also deal with the risk of the public being mislead.

52. The Information Commissioner's argument against Ofsted's fear that co-operation with school staff would be undermined was based on the premise that the grades had been anonymised so that any views reflected in grading scores could not be attributed to any identified individual. Clearly, the degree of risk of identification may affect the likelihood of Ofsted's inspection function being prejudiced. We have already decided that the Chronological Lesson Scores do not result in an adequate level of anonymisation for data protection purposes and, although the test is not precisely the same for the purposes of section 33, we accept that teachers would be likely to regard the risk of identification as being great enough to cause them concern. It is conceivable, but by no means certain, that this would lead to a reluctance to co-operate with Ofsted inspectors.

53. As to Ofsted's fear that inspection methodology might be undermined if Chronological Lesson Scores were disclosed, the Information Commissioner relied on the inspectors' independence and resolution, which he suggested should guarantee that future inspections would be carried out, and reports written, with the same rigour and honesty as in the past.

54. Our overall conclusion, weighing in the balance the arguments we have recorded, the evidence in support of each of them and the answers given during cross examination to questions directed at this issue, is that disclosure of the Chronological Lesson Scores would create sufficient risk of prejudice to the inspection process that the section 33 exemption would be engaged.

<u>Would the public interest in maintaining the section 33 exemption have outweighed the public interest in disclosure at the time when the information request was refused.</u>

55. It is not enough to conclude, as we have done, that some prejudice to the inspection process would arise from disclosure of the Chronological Lesson Scores. The information must still be disclosed unless the

public interest in maintaining the section 33 exemption outweighs the public interest in disclosure. The issues we have to consider in that context are closely related to those taken into account above when considering whether disclosure would be fair in data protection terms.

56. The Information Commissioner argued that the prejudice would be minimal. It did not outweigh the public interest in parents being informed about grades awarded for lesson observations, thereby gaining a better understanding about the performance of the school.

57. Ofsted relied on the factors it had put forward in support of its argument that the exemption was engaged and argued that the public interest in disclosure was met by the availability of the original report and the other material disclosed in response to the information request. It was the inspectors' expert conclusions that were of value to the public, not the raw information gathered during the inspection.

58. Having carefully weighed the various arguments put to us we conclude that the likelihood of prejudice, although sufficiently real to engage the exemption, is not so serious that it would outweigh the public interest in knowing what scores were recorded in respect of the various lessons observed by the inspectors. Accordingly, applying FOIA section 2(2)(b), we conclude that the public interest in maintaining the section 33 exemption did not outweigh the public interest in disclosing the Chronological Lesson Scores.

Conclusion and consequential issues to be considered.

59. The overall effect of our decision is that, on the basis of the format of information presented to us, it would have been appropriate for Ofsted to have refused disclosure under FOIA section 40, but not under the slightly different tests applicable under section 33. That may be said to reflect a greater degree of protection for an individual's personal data, as compared to the protection properly applied to a public authority's audit function.

60. Our decision is based on the case presented to us, that is to say, the Information Commissioner's decision to order disclosure of the Chronological Lesson Scores. We have decided that he was wrong in concluding that he should make such an order. In those circumstances FOIA section 58(1) requires us to consider whether we should *"substitute [for the successfully appealed Decision Notice] such other notice as could have been served by the Commissioner…"*

61. Although the Compromise Grading Format was only put forward a considerable time after the information request had been refused (and therefore could not be taken into account in deciding whether the refusal had been justified) it is open to us to consider it when deciding whether to issue a substituted Decision Notice. We think that the disclosure of information in that form would not constitute an

unwarranted interference into the privacy of the teachers whose lessons had been observed.

62. We should make clear, if it needs saying, that we have reached our conclusions in this Appeal on the basis of the case presented to us. Although there were one or two suggestions in the papers that broad guidance would be welcomed on the whole issue of anonymisation, we have resisted the temptation to go beyond a consideration of the lesson grading information assembled during the course of the inspection in question, taking account of such evidence as was adduced about the size and nature of the school and the pattern of lesson observations. It is in that specific context that we have decided that the particular information in question had not been sufficiently anonymised, as formatted in the Chronological Lesson Scores, but that it would be sufficiently anonymised if disclosed in the Compromise Grading Format.

63. Our decision is unanimous.

Chris Ryan
Tribunal Judge

20 February 2012

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9 March 2012: Decision amended to correct accidental and typographical errors, in accordance with Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.