IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

BETWEEN:

GUARDIAN NEWSPAPERS LTD **Appellant**

and

THE INFORMATION COMMISSIONER **Respondent**

DECISION OF THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Paper Hearing by: **Alison McKenna, Tribunal Judge**
Gareth Jones, Tribunal Member
Alasdair Warwood, Tribunal Member

On: 5 October 2010

At: Field House, Breams Buildings, London

Date of Decision: 8 November 2010

Subject Matter:

Freedom of Information Act 2000
Absolute Exemption
Section 40 FOIA

Decision of the Tribunal

The Appeal is dismissed and the Information Commissioner's Decision Notice dated 10 November 2009 is upheld.

Reasons for Decision

Introduction

1. This is an appeal by Guardian Newspapers ("the Appellant") against decision notice FS50139983, issued by the Information Commissioner on 10 November 2009. The Decision Notice relates to a request for information made in 2006 to the Office for Standards in Education (Ofsted)[1] under the provisions of the Freedom of Information Act 2000 ("FOIA").

2. Ofsted is an independent, non-ministerial government department, which is responsible for the inspection of a range of education and children's services, and for the inspection and regulation of registered early years and childcare provision. In relation to childcare, Ofsted maintains two registers: The Early Years Register and The Childcare Register. Ofsted publishes a Framework for the regulation of those on the Early Years and Childcare Registers[2], which includes guidance on the exercise of its powers of waiver.

The Information Request

3. On 29 June 2006, the Appellant requested the following information from Ofsted[3]:

(a) the total number of nursery providers to have been de-registered in the last four years; and
(b) the names of the nursery providers that have been de-registered in the last four years.

4. On 17 July 2006, the Appellant requested the following information from Ofsted:

(c)how many times Ofsted has been asked [to waive a disqualification from working in childcare provision], the decision made and what the details or circumstances are in each case;
(d)how many times Ofsted decided to waive an individual's disqualification to work in early years childcare after such a request has been made;
(e) how many people with convictions have been registered by Ofsted to provide early years childcare and the details of those convictions;

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[1] Ofsted's original full title was the Office for Standards in Education; in April 2007 this changed to the Office for Standards in Education, Children's Services and Skills, but it continues to be known as Ofsted. For more information visit www.ofsted.gov.uk

[2] See http://www.ofsted.gov.uk/Ofsted-home/Forms-and-guidance/Browse-all-by/Other/General/Framework-for-the-regulation-of-those-on-the-Early-Years-and-Childcare-Registers

3 Throughout this decision, each separate information request is consistently identified by the letters (a) to (g), as set out in this paragraph.

(f) how many people who are or who have ever been on the sex offender register have been registered to provide early years childcare and the details or circumstances of these decisions;
(g) where Ofsted has been requested to waive disqualification, information concerning the circumstances of the decision made (without the names identified).

5. On 28 July 2006, Ofsted responded to each of the requests above as follows:

(a) it stated that between March 2003 and March 2006 it had cancelled registration for 518 day care providers;

(b) it refused the requested information relying on the absolute exemption provided by s.40(2) FOIA;

(c) it provided a figure of the total number of applications to waive disqualification (61 since October 2005);

(d) it confirmed that in that period 47 applications for waiver had been granted, 5 had been refused and that 9 were under consideration;

(e) and (f) it stated it did not hold the information in the format requested;

(g) On 22 August 2006, it refused the requested information relying on the absolute exemption provided by s.40(2) FOIA (but provided some anonymised statistical information regarding the broad categories of grounds for disqualification in respect of which waivers had been considered.)

6. On 2 August 2006, the Appellant asked Ofsted to conduct an internal review of its earlier decision in relation to the above requests. The Appellant also later that month clarified the scope of request (g) following receipt of the statistical information provided, as follows "*we would like further information about the cases in the following broad categories that you outlined: where the provider lives with a disqualified person, have been medically unsuitable, where they have failed to demonstrate they could meet the National Standards, have been convicted of an offence, where the children are subject to care orders and the miscellaneous category. I'd like to find out the outline of each case, the reasons for decisions made, any communication that relates to them and any further information pertaining to those cases.....*"

The Internal Review

7. On 13 September 2006, Ofsted informed the Appellant of the outcome of its internal review. Ofsted reiterated its view that s.40(2) FOIA was applicable to requests (b) (c) and (g) and that the information requested was exempt from disclosure because its disclosure would breach the first data protection principle. The responses to the other requests are not relevant to this appeal.

Complaint to the Information Commissioner

8. On 30 October 2006, the Appellant made a complaint to the Information Commissioner in respect of requests (b) (c) and (g) only.

9. On 10 November 2009, the Information Commissioner issued Decision Notice FS50139983, which found that (save for two breaches relating to the timing of its responses and which are not relevant to this appeal) Ofsted had dealt with the requests in accordance with FOIA and that the information requested in (b) (c) and (g) was in each case exempt from disclosure by virtue of s. 40(2) FOIA.

The Appeal to the Tribunal

10. On 8 April 2010 the Appellant appealed to the Tribunal in respect of grounds (b) (c) and (g). Ofsted did not take any part in the Tribunal proceedings. The parties' submissions in relation to the appeal are described below. Although they are of necessity described here in summarised form, the full arguments were considered very carefully by the Tribunal.

The Parties' Submissions

(i) The Appellant

11. In its grounds of appeal, the Appellant argued that:

(I) The Information Commissioner's decision Notice was wrong in law in concluding that the disclosure of all the requested information would contravene any of the data protection principles, and/or in concluding that disclosure would represent an unwarranted intrusion into the lives of the data subjects, and/or in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information and/or in failing to consider whether any of the conditions in Schedule 2 to the Data Protection Act 1998 ("DPA") were met;

(II) Disclosure of some or all of the requested information would not contravene any of the data protection principles because disclosure was necessary for the purposes of legitimate interests pursued by the Appellant, and the disclosure was not unwarranted by reason of prejudice to the rights or freedoms of the data subjects;

In further submissions made prior to the hearing the Appellant additionally argued that:

(III) The Tribunal should rely on the witness statement of Jacqueline Timberlake in which she asserted that:

(i) disclosure of the requested information is important in the public interest;
(ii) the information relates to individuals in the performance of a public function, namely as providers of childcare;

(iii) Ofsted publishes reports into registered nurseries[4] from which the proprietor is identifiable;
(iv) parents are entitled to know how Ofsted approaches applications to waive de-registration and whom it allows to re-register following a waiver application;
(v) that there is nothing to prevent someone whose de-registration has been waived from working in another childcare setting falling outside Ofsted's remit.

(IV) Ms Timberlake exhibited to her witness statement a number of decisions of the Care Standards Tribunal where it had determined appeals against Ofsted's decisions to de-register certain individuals. She argued that the Tribunal should take into account the fact that these decisions are routinely put into the public domain;

(V) In relation to request (b) it was further argued that the Information Commissioner was wrong to conclude at paragraph 26 of the Decision Notice that the disclosure of the names without further details "*could result in negative assumptions about individuals being made"* and consequent damage to their reputations. It was argued that, given the range of innocuous reasons which could result in de-registration, it was wrong to conclude that the release of the names alone would cause people to assume the worst and alternatively that the Information Commissioner could have dealt with this point by releasing the names and the circumstances together;

(VI) In relation to requests (c) and (g) it was further argued that in deciding whether personal data is processed "fairly" for the purposes of the DPA, the Information Commissioner should have taken into account the following matters:

(i) that the names of registered nursery providers are publicly available in any event;
(ii) that many nursery providers put their names into the public domain;
(iii) that nursery providers perform a public function;
(iv) that nursery providers are in receipt of public funding;
(v) that the Care Commission in Scotland had, under the Scottish Freedom of Information Act, provided the Appellant with the names of de-registered nurseries and the circumstances of the decisions taken in each case;
(vi) that analogous regulatory bodies (e.g. General Medical Council; Law Society; Bar Standards Board) publish the names of individuals who have been "struck off";
(vii) transparent decision making by Ofsted would increase public confidence in its activities;
(viii) that appeals against de-registration are held in public and that waivers should therefore be subject to the same level of public scrutiny.

[4.] The Tribunal notes that the Appellant has used the terms "nursery providers" and "providers of early years childcare" interchangeably in these proceedings. This does not appear to be significant.

(VII) The Appellant also argued that the Information Commissioner had erred in his interpretation of the inter-relationship between FOIA and the DPA in relation to requests (c) and (g), in the following ways:

(i) by attaching too much weight to the Fair Processing Statement included in the Declaration and Consent Form "DC2" (which had been signed by each data subject as part of the Ofsted registration application and which did not mention the possibility of disclosure under FOIA);
(ii) by giving insufficient weight to the presumption in favour of disclosure under FOIA;
(iii) by giving insufficient weight to paragraph 6 of Schedule 2 to the DPA and in particular in failing to conclude that disclosure was necessary for the exercise of functions of a public nature exercised in the public interest by the Appellant and that the disclosure was not unwarranted by reason of prejudice to the rights and freedoms of legitimate interests of the data subjects[5];

(VIII) The Appellant also argued that the Information Commissioner had misdirected himself in embarking on his own examination of the sample material supplied by Ofsted as an alternative to ordering disclosure in the public interest;

(IX) The Appellant also argued that the Information Commissioner had erred in concluding that at least some of the requested information could not be disclosed without identifying the data subjects and that the requested information could have been disclosed in a redacted format if full disclosure was not permitted.

(X) The Appellant asked the Tribunal to vary the Decision Notice so as to require disclosure of the information requested at (b) (c) and (g) above.

(ii) The Respondent

12. In his response to the Appeal, the Information Commissioner argued that:

(I)The Decision Notice was correct in law and that the requested information could not be disclosed because it is personal data which is exempt from disclosure under the absolute exemption in s.40(2) FOIA;

(II)The requested information at (b) (c) and (g) was exempt from disclosure because it constituted personal data and its processing (by disclosure) would not be fair or lawful;

(III)Ms Timberlake's witness statement should properly be regarded as an additional legal submission as it contains opinion and argument rather than statements of fact;

5 The Appellant cited legal authorities for the recognition of the "legitimate interests" of the media in acting on behalf of the general public. This relates to the test in paragraph 6 of Schedule 2 to the DPA, but the point is not in dispute for the purposes of this decision and the Tribunal has not therefore repeated these submissions.

(IV)The decisions of the Care Standards Tribunal constitute fair processing under the DPA because they are intended to be in public; they do not therefore have any bearing on these proceedings;

(V) Having concluded that disclosure of the requested information would be "unfair" it was not necessary for the Information Commissioner to go on to consider whether any of the conditions in Schedule 2 to the DPA were met;

(VI)The Information Commissioner's own examination of some of the disputed material had lead him to conclude that Ofsted is performing its regulatory function properly. His conclusion should be sufficient to maintain parents' confidence in it Ofsted's activities;

(VII)The Information Commissioner invited the Tribunal to dismiss the appeal.

The Powers of the Tribunal

13. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

> *(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 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 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.*

14. As noted above, this appeal concerns the issue of whether the requested information is exempt from disclosure under s.40 FOIA. The question of whether the exemption in section 40 FOIA is engaged is a question of law based upon an analysis of the facts and does not involve consideration of the exercise of discretion by the Commissioner.

The Law

(i) FOIA

15. Under s.1(1) of FOIA, a person making an information request of a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have that information communicated to him, unless the information is exempt from disclosure as a matter of law.

FOIA provides for a number of qualified and absolute exemptions to the duty of disclosure.

16. Qualified exemptions are subject to public interest considerations. This matter concerns section 40 of FOIA which, if engaged, provides an absolute exemption from the duty of disclosure so that public interest considerations do not apply. The issue for determination in this appeal is therefore whether s.40 of FOIA is engaged so that the requested information is exempted from the duty of disclosure.

17. Section 40 FOIA reads as follows:

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
(2)Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data [of which the data requester is not the data subject], 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…..

(ii) The Data Protection Act

18. Section 40 of FOIA cross-refers to the Data Protection Act 1998 ("DPA"). Section 1(1) of the DPA defines "*personal data*" as:

"…data which relates to a living individual who can be identified –

1. *from those data, or*
2. *from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".*

The Appellant did not argue that the requested information was not personal data for the purposes of the DPA and the Tribunal proceeded on the basis that it was personal data. The Tribunal needed therefore to consider whether the first condition in s. 40(3) FOIA was engaged, namely whether any of the data protection principles would be contravened by the disclosure of the personal data.

19. The first data protection principle[6] provides inter alia that:

[6] See section 4 and part 1 of schedule 1 to the DPA1998.

"1. 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, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

20. The first data protection principle is to be interpreted in accordance with part II of schedule 1 to the DPA 1998 (see paragraph 28 below).

21. For the purposes of this appeal, the relevant conditions in Schedule 2 are:

1.*The data subject has given his consent to the processing.*

And also

6.(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or a 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 expectations of the data subject.

"*At least one*" of these conditions would have to be met in order to comply with the first data protection principle and so the Tribunal has considered both condition 1 and condition 6(1) in addition to the question of whether the requested processing by disclosure would be fair and lawful.

22. The Tribunal has seen the sample data provided by Ofsted to the Respondent and which has not been seen by the Appellant. Although not relevant to this appeal, the Tribunal comments that the information it has seen would seem to constitute "sensitive personal data" in many cases and that its processing would therefore fall to be considered under schedule 3 to DPA. The Tribunal has concluded that it is not necessary for it to provide any more detailed analysis of the "closed" information and has therefore not prepared a confidential annexe to this decision.

23. A number of differently constituted panels of this Tribunal have referred to the complex inter-relationship between FOIA and the DPA. The Tribunal has proceeded on the basis that the objective of section 40(2) FOIA is that the presumption of disclosure is of necessity tempered by the right to privacy of the data subject. The Data Protection Act framework, as interpreted in accordance with the Human Rights Act 1998 so as to give effect to the subject's rights under Article 8 ECHR, is the relevant touchstone for the Tribunal in determining whether the data subject's right to privacy should prevail. To the extent that the Appellant's submissions are to be understood as arguing that FOIA should take precedence over the DPA in considering this matter, the Tribunal rejects these arguments.

The Tribunal's Conclusions

24. The Tribunal has considered the evidence and arguments most carefully in this matter. The Tribunal's conclusions are set out below.

25. The requested information (in its original form) constitutes personal data. As stated above, this was apparently not in dispute in this case. The Tribunal was satisfied that the requested information falls within the definition of personal data in s.1(1) DPA and set out at paragraph 18 above.

26. The Tribunal considered carefully whether it might be possible to redact the requested information so that it fell outside of the definition of "*personal data*" and could be disclosed to the Appellant. It is clearly not possible to redact a person's name where this is the only information sought, so this was not a relevant consideration to information request (b). In relation to requests (c) and (g), the Tribunal concluded that any such redaction would have to be so extensive as to render the disclosed information useless to the reader. This is because the nature of the de-regulation waiver process involves consideration of a highly individual (probably unique) set of biographical information by Ofsted. The Tribunal considered that it would not be possible to disclose such information in any form that would (a) not render the data subject identifiable within the meaning of s.1(1) DPA (referred to at paragraph 18 above) and which would also allow the reader to follow the reasons for the waiver application or decision. In the circumstances the Tribunal agreed with the Respondent's decision not to order disclosure of any redacted documents.

27. The Tribunal was satisfied that the first data protection principle was engaged in relation to all three requests and therefore that the data must be processed fairly and lawfully and in particular must not be processed unless one of the conditions in schedule 2 (set out at paragraph 21 above) is met.

28. The Tribunal considered the meaning of the word "*fairly*" in this context. As noted at paragraph 20 above, the first data protection principle is to be interpreted in accordance with part II of schedule 1 to the DPA 1998. This provides at paragraph 1 that when considering the question of fairness, *"regard is to be had to the method by which [data is] obtained including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed."* The schedule also provides at paragraphs 2 and 3 a requirement for the data controller to provide the data subject with certain information, including the purposes for which the data is intended to be processed. This is the information which was given to persons completing the "DC2" document referred to at paragraph 11 (VII) (i) above. The DC2 statement was annexed to the Information Commissioner's Decision Notice. It states: "*We will not give information about you to anyone unless the law permits us to do so. The law states that we can give information to the following people or organisations*…" and goes on to describe the information that can lawfully be given to parents, childcare organisations, child protection agencies, local authorities and other government departments. This statement would be

rendered misleading if the data supplied in reliance upon it were disclosed for other purposes.

29. The Appellant argued that the Respondent had given too much weight to the DC2 statement. The Respondent acknowledges that the statement should not be viewed as exhaustive and should take into account the reasonable expectations of data subjects in addition to the strict letter of the statement. The Tribunal notes that the statutory guidance as to the meaning of "fair" in this context is largely concerned with procedural fairness and the information given by the data controller to the data subject. The Tribunal notes that it would be open to Ofsted to amend the DC2 so as to inform registrants that one of the intended uses of their personal data might be disclosure under FOIA, or to provide a separate statement in connection with the information provided when seeking a waiver from de-registration. In the absence of such a statement the Tribunal agrees with the Respondent that the contents of the DC2 should be given appropriate weight so that the disclosure of the data under FOIA would not constitute "fair" processing for the purposes of the DPA.

30. The Tribunal has also considered, in the context of fairness, the question of whether the data subjects in this matter should be treated as public officials and so subject to a "sliding scale of protection" so that they might reasonably expect that, notwithstanding the contents of the DC2, certain personal information might be disclosable under FOIA[7]. The Tribunal has concluded that the data subjects in this matter are not public officials for these purposes. In so doing the Tribunal agrees with the analysis of the Respondent that a privately-run nursery which is in receipt of some publicly funded places for children does not thereby become a public body or its workers public officials. The Tribunal also agreed with the Respondent that a requirement to register with a public authority does not render a private individual or business a public body. The Tribunal had regard to the House of Lords' decision in YL v Birmingham City Council.[8]

31. Even if the Tribunal were to take the view that the data subjects in this matter should be regarded as public officials, the Tribunal notes that previous first-instance decisions of this Tribunal have been to the effect that whereas public officials might expect information such as their salaries to be made public, there is a greater expectation of privacy in the context of a disciplinary investigation.[9] The Tribunal takes the view that the process of seeking a waiver from de-regulation is more closely analogous to the situation of an internal investigation into conduct than to the question of salary and that this analogy support the Tribunal's view that the disclosure would not be fair.

32. The DPA does not provide guidance as to the meaning of "lawful." For the reasons set out at paragraph 23 above, the Tribunal does not accept that disclosure under FOIA would render lawful a disclosure that would not be lawful under DPA. The Tribunal considers that "lawful" must be interpreted

[7] See for example House of Commons v IC and Norman Baker 16 January 2007.
[8] [2007] UKHL 27.
[9] See for example Magherafelt District Council v IC 3 February 2010.

as including the requirement to give effect to the data subject's right to privacy under article 8 ECHR and gives further consideration to this point at paragraph 39 below.

33. The Respondent considered that the processing would not be fair and lawful in this matter and so did not go on to consider the conditions in schedule 2. The Tribunal notes that in a number of first-instance decisions, differently constituted panels of this Tribunal have taken the view that the use of the phrase "*in particular*" in the first data protection principle requires consideration of the conditions in addition to the general question of whether the processing would be fair and lawful[10]. The Information Commissioner's guidance also recommends this approach[11]. The Tribunal is not aware of any binding authority on the matter but for the sake of completeness has taken the approach of going on to consider the conditions, notwithstanding its conclusion that the processing would not be fair and lawful.

34. The Tribunal considered condition 1[12] and was satisfied that the data subjects have not consented to disclosure of their names or the circumstances surrounding consideration of their application for a waiver from de-regulation. There is no evidence of consent in this context. The only evidence of consent is in relation to the DC2 document, which provides evidence of what processing the data subjects have consented to in connection with the registration (rather than the de-registration and waiver process), and which clearly does not include the Appellant's FOIA request. The Tribunal found this situation to be in clear contrast to the instances referred to by the Appellant of hearings by the Care Standards Tribunal and various regulatory bodies, where those appealing against findings of regulatory bodies make a positive choice to put their names and circumstances into the public domain or to the situation where Ofsted agencies puts other information into the public domain as a matter of routine. The Tribunal cannot of course rely on the decisions of the Care Commission in Scotland, being unaware of the different law applied and the considerations taken into account.

35. The Tribunal considered condition 6(1)[13] of schedule 2 to the DPA, which forms the basis for the majority of the Appellant's arguments referred to at paragraph 11 above. Condition 6(1) provides an exemption from the general requirements of the first data protection principle where the processing is "*necessary*" for the purposes of legitimate interests pursued by a third party to whom the data is disclosed, except where the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate expectations of the data subject.

36. The Appellant did not provide the Tribunal with specific argument on the question of "*necessity*" for this purpose. Ms Timberlake's statement referred to an "*overriding public interest*" in the disclosure, which the Tribunal did not consider to address the appropriate test. If the Appellant's submissions are to

[10] Blake v IC and Wiltshire CC 2 November 2009;
[11] See ICO Update Note January 2009: "Applying the Exemption for Third Party Data".
[12] Set out at paragraph 21.
[13] See paragraph 21.

be taken as suggesting this, the Tribunal does not accept that the presumption of disclosure under FOIA alone will satisfy the requirement of "*necessity*" in condition 6(1). The Tribunal accepts that there is a public interest in the question of Ofsted's decisions as to the waiver of de-regulation, however that is not the same as saying that disclosure is "*necessary*" under condition 6(1). The Tribunal notes that the courts have interpreted "*necessary*" as involving a pressing social need[14]. No such need has been identified in the Appellant's submissions and the Tribunal is unable to find that the disclosure is "*necessary*" so as to satisfy the relevant condition. The Tribunal nevertheless went on to consider the remaining elements of condition 6(1).

37. Many of the Appellant's arguments at paragraph 11 above involved argument as to its legitimate interest in the subject-matter. It was not argued by the Respondent in this appeal that the interests or aims of the Appellant in seeking the requested information were not legitimate and the Tribunal has accepted that they are.

38. The remaining issue for the Tribunal is whether the disclosure would represent an unwarranted interference with the rights and freedoms or legitimate expectations of the data subjects. This inevitably involves the Tribunal in a process of weighing up questions of the public interest in disclosure against the right to privacy of the data subject. The Tribunal regarded the public interest considerations identified by the Appellant as being of considerable weight. These included the legitimate concerns of parents about Ofsted's use of its power of waiver, the perceived inconsistencies of treatment as between those who appeal against de-registration (so that the process is public) compared with the privacy granted to those whose de-registration is waived and the public interest in being assured of proper practice by Ofsted in the sensitive field of child protection. The Tribunal concluded that it was because of the weight of these issues that the Respondent had gone as far as he did in considering sample information and trying to satisfy himself that the processes operated as Ofsted had told him they did. Whilst the Tribunal agrees with the Appellant that the Respondent's own investigation could never be a substitute for disclosure in an appropriate case, it seems to the Tribunal that the Respondent's exercise was designed to ascertain whether there were any additional factors that ought to be weighed in the balance and which might tip the scales in favour of disclosure. In those circumstances the Tribunal does not regard the exercise as inappropriate, albeit that it has had no impact on the legal tests applied by the Tribunal in considering this appeal.

39. In all the circumstances, the Tribunal has concluded that the disclosure of the requested information would constitute an unwarranted interference with the rights and freedoms or legitimate expectations of the data subjects. This is because the information requested involves disclosure of information which is highly biographical in nature, may well constitute sensitive personal data in many cases, and includes information about third parties living with or associating with the data subject. The Tribunal has taken into account the fact that the data subjects in this appeal have provided information to Ofsted in

[14] House of Commons v IC and Brooke, Leapman, Ungoed-Thomas [2008] EWHC 1084 (Admin).

support of an application for waiver from de-registration (which is different from providing information in support of the registration process) and that they may well have decided not to provide such information if they thought it may find its way into the public domain. The Tribunal notes that Ofsted has provided anonymised statistical information about the number of waivers and the general categories of de-registration that they fell under and the Tribunal considers that the balance of public interest against private rights has successfully been struck by the provision of this information.

40. In conclusion, the Tribunal has found that in relation to all three remaining information requests, s.40 FOIA provides an absolute exemption from the duty of disclosure. This is because disclosure of the requested information would contravene the first data protection principle as its disclosure would not in the opinion of the Tribunal be fair or lawful and, in particular, because none of the conditions in schedule 2 to the DPA are satisfied.

41. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the First-tier Tribunal for permission to appeal to the Upper Tribunal, within 28 days of the receipt of the decision against which they wish to appeal. Such an application must identify the alleged error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making such an application can be found of the Tribunal's website at www.informationtribunal.gov.uk.

Alison McKenna **Dated: 8 November 2010**
Tribunal Judge