

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 16 December 2010**

**Public Authority:** Department of Enterprise, Trade and Investment  
**Address:** Room 72c Netherleigh  
Massey Avenue  
Belfast  
BT4 2JP

### Summary

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The complainant requested the Administrators' reports into the Presbyterian Mutual Society, which was placed in administration in November 2008. DETI refused to disclose the information, relying upon the exemptions set out in sections 31(1)(g) and (h) and 40(2) of the Freedom of Information Act 2000 (the Act). The Commissioner finds that the exemption in section 31(1)(g) is engaged in relation to the entirety of the withheld information, and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner requires no steps to be taken. However, the public authority breached its procedural obligations under the Act by failing to issue its refusal notice within 20 working days.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

## The Request

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2. On 29 October 2009 the complainant submitted the following request to the Department of Enterprise, Trade and Investment (DETI):

*"We refer to the Presbyterian Mutual Society which has been placed in Administration by Order of the High Court of Northern Ireland of 17 November 2008. The court-appointed Administrator, Arthur Boyd & Co, has made a report to the DETI with respect to the conduct of the Directors of the Presbyterian Mutual Society. We require, pursuant to the Freedom of Information Act 2000, a copy of this report and other reports which the Administrator has furnished to you. Please provide a copy of this information within the statutory timescale and, if you consider that any fee is due, advise of that by return."*

3. On 30 November 2009 DETI advised the complainant that it was withholding all of the requested information. DETI cited the exemptions as set out in section 31(1)(g) and (h) by virtue of section 31(2)(d), and 40(2) by virtue of section 40(3)(a)(i) of the Act.
4. The complainant requested an internal review of DETI's decision on 15 December 2009.
5. On 22 December 2009 DETI advised the complainant that the result of the internal review was to uphold DETI's original decision.

## The Investigation

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### Scope of the case

6. On 22 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- DETI's application to the withheld information of the exemptions under sections 31(1)(g) and (h), 31(2), and 40(2) and (3) of the Act, and
  - the way in which DETI carried out the public interest test as set out in section 2(2) of the Act.

7. The Commissioner noted that some of the withheld information was already in the public domain. Following the Commissioner's intervention DETI agreed to release this information to the complainant. Therefore, the Commissioner's decision in this case relates solely to the remaining withheld information, all of which falls under the section 31(1)(g) exemption.

### **Chronology**

8. The Commissioner wrote to DETI on 10 March 2010 and 21 May 2010 to request further information from DETI as to its application of the specified exemptions and the way in which it carried out the public interest test.
9. DETI provided detailed submissions to the Commissioner on 7 April 2010 and 18 June 2010. DETI also provided the Commissioner with a full copy of the withheld information.

### **Findings of Fact**

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10. In Northern Ireland the Insolvency Service is part of DETI. Within that Service, the Directors Disqualification Unit (DDU) is responsible for investigating cases where there is alleged misconduct of company directors. When a company (in this case the Presbyterian Mutual Society, or the PMS) goes into administration, an Insolvency Practitioner is appointed as Administrator.
11. The Company Directors Disqualification (Northern Ireland) Order 2002 (the CDDO) provides that DETI may apply to have individuals disqualified from acting as company directors. Article 10(1) of the CDDO requires the Administrator to report to DETI anything that comes to his or her attention in the course of administration which might suggest possible unfit conduct of one or more of the company directors. Article 10(4) of the CDDO provides that DETI may require the Administrator to provide it with information with respect to any person's conduct as a director of the company.
12. The withheld information in this case is a report compiled by the Administrator of the PMS and provided to DETI on 9 July 2009.

## Analysis

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### Exemptions

#### Section 31 – Law enforcement

13. Section 31(1) of the Act states that:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)*
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."*

The purpose in subsection 31(2) cited by DETI is:

*"(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on".*

14. When considering the application of a prejudice-based exemption, the Commissioner adopts the three-step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (EA/2005/0026 and EA/2005/0030). In that case the Tribunal stated that:

*"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption..... Second, the nature of 'prejudice' being claimed must be considered..... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."*  
*(para 28 to 34).*

### ***Relevant applicable interest***

15. DETI advised the Commissioner that one of its specific functions is to take disqualification action against any company director whom it deems to be unfit. DETI has the power to take such action by virtue of Article 10(1) of the CDDO which states that:

*"If it appears to the Department that it is expedient in the public interest that a disqualification order under Article 9 should be made against any person, an application for the making of such an order against that person may be made*

*(a) by the Department....".*

16. The Commissioner accepts DETI's argument that taking action under the CDDO comprises a formal part of DETI's core business and therefore constitutes a function for the purposes of the Act. DETI further argued that in order to fulfil that function in the context of an insolvency it was necessary to have access to "frank and unfettered" advice from the Insolvency Practitioner appointed as Administrator in order to fully investigate the conduct of company directors.
17. The Commissioner accepts that investigations into the conduct of company directors may be necessary in order to fulfil the requirements of the specified remit. He also accepts that such investigations are part of one of DETI's core functions and that the purpose of them is to ascertain if a person is fit or competent to manage a corporate body.
18. The Commissioner is satisfied that in seeking to protect its ability to investigate the conduct of company directors, DETI has identified an applicable interest relevant to section 31(1)(g) and 31(2)(d). Therefore, the Commissioner has gone on to consider the nature of the prejudice identified and the likelihood of it occurring.

### ***Nature of the prejudice***

19. When considering the nature of the prejudice, the Commissioner is again guided by the Tribunal's comments in *Hogan* (paragraph 30):

*"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be*

*rejected. There is therefore effectively a de minimis threshold which must be met."*

Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.

20. DETI has argued that disclosure of the withheld information in this case would prejudice its ability to effectively investigate the conduct of company directors in the following respects.
  - i. It would prejudice the relationship between DETI and those who are appointed as Administrators, which is by its nature confidential. If those Administrators thought that their views would be likely to be made public, they would be much more constrained in these views, particularly in reporting unsubstantiated suspicions and tentative conclusions reached.
  - ii. It would deter individuals from co-operating with investigations and from providing the Administrators with the evidence necessary for them to compile their reports to DETI regarding the conduct of company directors.
21. Having considered the arguments above, the content of the withheld information and the context in which the material was created, the Commissioner accepts that disclosure could prejudice the ability of DETI to carry out the investigations into company directors' conduct. Therefore, he is satisfied that a causal link has been established.
22. In reaching the conclusion above the Commissioner has noted that the withheld information does contain evidence provided by witnesses and the views and some tentative conclusions of the Administrator. The Commissioner further considers that any prejudice caused to DETI's ability to effectively carry out that function would not be trivial or insignificant. In view of this the Commissioner has gone on to consider the likelihood of such prejudice arising.

### ***Likelihood of prejudice***

23. In this case DETI considered that disclosure 'would prejudice', rather than 'would be likely to prejudice' its functions. The Commissioner takes the view that, whilst it might not be possible for a public authority to prove that prejudice would occur beyond any doubt

whatsoever, for the higher level of prejudice to apply the likelihood of prejudice occurring must be at least more probable than not.

24. The Commissioner has considered the withheld information, i.e. the Administrator's report to DETI regarding the PMS. DETI argued that the information gathered by the Administrator in order to form his initial judgement and compile his report, must necessarily be provided in circumstances of trust. Therefore, those providing the information must be able to do so in the knowledge that they can speak frankly and in an unrestrained manner and that the information they provide will not go any further than the Administrator and DETI. The Commissioner accepts that this is extremely important to the process of making and submitting a report to DETI.
25. DETI further pointed out that the information and views gathered by the Administrator were provided by fellow company directors or other employees of the PMS. DETI was of the view that these individuals would have been less likely to provide open and frank views regarding the conduct of their colleagues if they thought that those views may be made public. Equally, DETI argued that an Administrator would be reluctant to commit his or her views and judgements to paper if he or she thought that these may be made public. DETI argued that this would prejudice its ability to gather evidence and therefore to carry out its investigative function effectively.
26. The Commissioner believes that prejudice to DETI's ability to carry out the function specified above would be more probable than not. Therefore, the Commissioner accepts DETI's arguments that disclosure of the withheld information would prejudice its functions in relation to future investigations. The Commissioner is satisfied that the exemption under section 31(1)(g) by virtue of section 31(2)(d) is engaged and has gone on to consider the public interest test.

***Public interest arguments in favour of disclosing the withheld information***

27. DETI recognised that there is a strong public interest in ensuring transparency and openness on the part of government and public officials.
28. DETI also acknowledged that there is a considerable number of people such as shareholders, investors and employees who have an interest in the events at the PMS which led up to it being put into administration. There is already a significant amount of information in the public domain, particularly through the media, regarding this issue. However, disclosure of the withheld information would better inform public

debate and would improve the public's understanding of how the PMS ended up in administration.

29. DETI accepted the importance of public confidence in regulatory processes carried out by government. In this case, disclosure of the withheld information would go some way towards increasing public understanding of how these processes are carried out and improving public confidence in those processes as it would demonstrate how they were carried out effectively in this case.

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

30. As indicated above, the withheld information includes the Administrator's comments and conclusions, and DETI advised the complainant that disclosure could allow *"defensive steps to be taken in either covering up or destroying evidence"*. DETI was of the view that the harm this would cause the investigation weighed heavily in favour of maintaining the exemption.
31. The complainant rejects this argument, maintaining that the former directors of the PMS would not have any access to evidential material, which would in any case have already been used during the compilation of the report. However, the Commissioner is of the opinion that DETI was right to identify this as a factor in favour of maintaining the exemption as it would not be in the public interest for a significant investigation such as this to be impeded or otherwise affected by premature disclosure of the withheld information.
32. DETI advised the Commissioner that, in conducting investigations into companies and the conduct of their directors, it relies heavily on information supplied by third parties. The Commissioner has accepted that disclosure of the withheld information would prejudice DETI's investigative function in that these parties would be less likely to express their views. DETI argued that the public interest lay in protecting its ability to receive information in confidence.
33. The Commissioner is also mindful of the status of the Administrator's report within the context of DETI's investigation of the PMS. Any issues raised in the report would be used as a basis for determining whether further investigation is needed. Therefore, the report contains as yet unsubstantiated views regarding the company and its directors. The Commissioner is of the view that disclosure would be unfair to those mentioned in the report, against whom nothing had been proved at the time of the request. The Commissioner accepts that there is a legitimate public interest in not disclosing tentative or unsubstantiated views into the public domain when an investigation is ongoing.



34. DETI also argued that disclosure of the withheld information would prejudice DETI's functions in that it would hinder DETI in the performance of its responsibilities and would prevent the investigation from being concluded quickly, therefore costing more money from the public purse, which would not be in the public interest.

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

35. The Commissioner has considered carefully that arguments put forward both in favour of disclosing the withheld information, and in favour of maintaining the exemption. The Commissioner has also considered in detail the withheld information itself, and all the circumstances of this case.
36. The Commissioner is mindful that the issue of the PMS is both sensitive and high profile in that it affected a large number of individuals in Northern Ireland. The Commissioner appreciates that this has resulted in significant media comment and general interest. However, the Commissioner must bear in mind that what is in the public interest is not always that which interests the public.
37. The Commissioner also considers that significant weight must be given to the public interest inherent in ensuring that government departments such as DETI are able to carry out thorough and complete investigations without fear of premature disclosure of evidence. There is a strong public interest in DETI being able to obtain sufficient information to ensure that the investigation is thorough. This is particularly important in this case as the issues surrounding the PMS being put into administration are extremely high profile and, at the time of the request, the Administrator was assisting DETI with its enquiries, which are still ongoing.
38. In light of the above the Commissioner has concluded that in this case the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the withheld information. Therefore, the Commissioner is satisfied that the withheld information should not be disclosed.
39. As the Commissioner is satisfied that all of the withheld information was properly withheld under section 31(1)(g), he is not required to consider the other exemptions claimed.

## **The Decision**

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40. The Commissioner's decision is that the public authority correctly withheld the information by reference to section 3(1)(g). However, it breached the following procedural obligations:
- in failing to issue a refusal notice within 20 working days it breached section 17(1);
  - in failing to confirm within 20 working days that it held information falling within the request it breached section 10(1).

## **Steps Required**

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41. The Commissioner requires no steps to be taken.

## Right of Appeal

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42. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 16<sup>th</sup> day of December 2010**

**Signed .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Freedom of Information Act 2000

#### Public interest test

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### Law enforcement

31 (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.."

(2) The purposes referred to in subsection (1)(g) to (i) are—

- (d) "the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on".

#### Personal information

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

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

## **Company Directors Disqualification (Northern Ireland) Order 2002**

### **Article 10 -Disqualification order or undertaking; and reporting provisions**

(1) If it appears to the Department that it is expedient in the public interest that a disqualification order under Article 9 should be made against any person, an application for the making of such an order against that person may be made—

(a) by the Department, or

(b) if the Department so directs in the case of a person who is or has been a director of a company which is being, or has been, wound up by the High Court, by the official receiver.

(2) Except with the leave of the High Court, an application for the making under Article 9 of a disqualification order against any person shall not be made after the expiration of 2 years from the day on which the company of which that person is or has been a director became insolvent.

(3) If it appears to the Department that the conditions mentioned in Article 9(1) are satisfied as respects any person who has offered to give the Department a disqualification undertaking, the Department may accept the undertaking if it appears to the Department that it is expedient in the public interest that the Department should do so (instead of applying, or proceeding with an application, for a disqualification order).

(4) If it appears to the office-holder responsible under this Article, that is to say—

(a) in the case of a company which is being wound up by the High Court, the official receiver,

(b) in the case of a company which is being wound up otherwise, the liquidator,

(c) in the case of a company of which there is an administrative receiver, that receiver,

(d) that the conditions mentioned in Article 9(1) are satisfied as respects a person who is or has been a director of that company, the office-holder shall forthwith report the matter to the Department.

(5) The Department or the official receiver may require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company—

(a) to furnish the Department or, as the case may be, the official receiver with such information with respect to any person's conduct as a director of the company, and

(b) to produce and permit inspection of such books, papers and other records relevant to that person's conduct as such a director,

as the Department or the official receiver may reasonably require for the purpose of determining whether to exercise, or of exercising, any function under this Article.