

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 June 2014

**Public Authority:** Insolvency Service  
**Address:** 4 Abbey Orchard Street  
London  
SW1P 2HT

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information about two named companies. One company had gone into liquidation, the second is still live. The Insolvency Service (IS) acknowledged it held information about the company in liquidation but withheld that information under section 40(2). It refused to confirm or deny whether it held any information in respect of the live company under section 40(5).
2. The Commissioner's decision is that the IS was correct to withhold information about the company in liquidation under section 40(2). However the IS was not entitled to rely on section 40(5) to refuse to confirm or deny whether it holds information about the live company.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Confirm or deny whether it holds the information in relation to the live company ie the second company named in the request.
  - If it does hold the requested information the IS must either communicate that information to the complainant or issue a fresh refusal notice citing the grounds it is relying on to refuse the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

---

5. On 20 October 2013, the complainant wrote to the Insolvency Service and requested information in the following terms:

"Please supply me with information concerning the two companies below;

[Named company – which went into liquidation]

[Named company – which is still live]

I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents.

I am especially interested in any documentation of actions taken or considered as a result of non compliance with Companies law, including the processing and review of the Insolvency Practitioner report and the reasons for the decision not to pursue disqualification action of 31<sup>st</sup> July 2012 for [the first named company, which has gone into liquidation].

Can you please confirm for me the precise dated from which the 24 month time limit for disqualification proceedings for the Director [named director] would have been calculated?

I am also specifically interested in the processing of my complaint regarding the [the second named company, the live company] and reasons for a decision to investigate or not investigate.

Can you please provide me with information regarding the shortest timescales achievable for administering procedures for the disqualification of directors once the D report is available."

6. A D report is the report submitted by the Insolvency professional appointed when a company goes into liquidation. Its focus is on the conduct of the directors of the company and whether any of them were responsible for unfit conduct.
7. The IS responded on 18 November 2013. It stated that some of the requested information was the complainant's own personal data. It therefore treated his request for this information as a subject access request under section 7 of the Data Protection Act 1998 (DPA).

8. Under the FOIA a public authority is not obliged to provide the personal data of the applicant under section 40(1). Although the IS did not cite this section, the Commissioner is satisfied that the IS has in effect applied it in respect of the applicant's personal data.
9. It also referred to information about any live company as being treated as confidential and explained that there was a need to protect the commercial interests of such companies. It also mentioned that there were legal restrictions on the disclosing of the existence of an enquiry into any live company. It did not however make any attempt to apply the exemptions provided by the FOIA to protect these interests. In the absence of any further explanation of these reasons for wishing to withhold information, the Commissioner does not consider the IS has made any serious attempt to apply other relevant exemptions. The IS was advised it had the opportunity to apply fresh exemptions when it was initially contacted by the Commissioner and during the course of his investigation. The IS has not done so.
10. The IS explained that some of the remaining information that had been requested was being withheld under section 40(2). This exemption provides that a public authority can refuse to disclose the personal data of a third party if to do so would breach the data protection principles of the DPA. The IS also said that some of the information it held was available from other sources and was therefore exempt under section 21 of the FOIA. It gave Companies House as an example of where this information could be obtained.
11. In respect of the final part of the request the IS stated that there was no "shortest timescale achievable for administering procedures for disqualification of directors once the D report is available". Therefore, it explained, it did not hold the requested information.
12. The complainant asked the IS to carry out an IR on the same day. At this stage the complainant revised his request in respect of the shortest timescales for disqualifying directors. The Commissioner is satisfied that this revised request is in effect a new request. The complainant's right of access to this information is therefore the subject of a separate investigation by the Commissioner and is not dealt with any further in this notice.
13. Following the internal review the IS wrote to the complainant on 22 November 2013. In so far as is relevant to the matters addressed in this notice, the IS stated that it was satisfied that its original refusal of the request was correct.

## Scope of the case

---

14. The complainant contacted the Commissioner on 29 November 2013 to complain about the way his request for information had been handled. In particular he was concerned that the IS had failed to provide any information on its administration of the D report in respect of the company in liquidation. He was also concerned about the IS failure to confirm whether it had taken any action in respect of a complaint that he had made in respect of the live company. Finally he was concerned that the IS did not provide information on its best performance in processing the disqualification of a director following the receipt of a D report. As discussed above, this final point is the subject of a separate investigation.
15. The Commissioner telephoned the complainant on 20 January 2014 to discuss the scope of his complaint. The complainant advised the Commissioner that he was not interested in the IS's application of section 40(1) to the extent that it had been applied to correspondence that he himself had submitted to the public authority. He also explained that he obtained some information from Companies House. This was the factual information about the live company which would have been contained in the D report into the directors of the company that had gone into liquidation. Therefore he did not wish to contest the IS's reliance on section 21.
16. The IS has also applied section 40(2) – third party personal data to refuse to comply with the remaining information captured by the request. Section 40(2) provides an exemption from the duty to communicate information which a public authority has acknowledged it holds. However during the course of the Commissioner's investigation it became apparent that the IS's position was that although it was prepared to acknowledge it held information about the company that had gone into liquidation, it was not prepared to confirm or deny whether it held any information in respect of the live company. The IS explained that to do so could breach a statutory prohibition on disclosing information in respect of its functions. The Commissioner advised the complainant of this development during a second telephone conversation on the 12 May 2014.
17. The Commissioner pointed out to the IS that it had not applied an exemption from the duty to confirm or deny whether it was holding information. However in light of the IS's refusal to confirm whether it holds information about the live company, the Commissioner has carefully considered what approach to take as a responsible regulator. He has decided that the only way to make sense of the IS's position is to interpret its response in respect of this information as a refusal to

confirm or deny whether the information is held under section 40(5) of the FOIA. Section 40(5) provides that a public authority can refuse to confirm or deny it holds information if to do so would breach the data protection principles of the DPA.

18. It should be noted that the Commissioner did bring the exemption provided by section 44(2) to the attention of the IS. This provides an exemption from the duty to confirm or deny whether it holds information if to do so is prohibited under an enactment. However the IS has not attempted to apply the exemption.
19. The Commissioner will first look at the IS's refusal to disclose the information relating to the company that went into liquidation. The IS has acknowledged it holds this information but has refused to disclose it under section 40(2). He will then go onto to consider whether the IS has any grounds to refuse to confirm or deny whether it holds any information on the live company under section 40(5).

## **Reasons for decision**

---

### **Section 40(2) - third party personal data**

20. In so far as is relevant to this complaint, section 40(2) of the FOIA provides that a public authority is not obliged to communicate information which constitutes the personal data of a third party if to do so would breach any of the data protection principles set out in the DPA. In particular the IS has argued that disclosing the information would breach the first data protection principle.
21. The Commissioner has viewed the IS's file relating to the company that went into liquidation. This consists of the D report prepared by the insolvency practitioner which was then submitted to the IS and the IS's response to that report. The complainant has advised the Commissioner that he was particularly interested in any information which would throw light on when the D report was received and how the IS dealt with the report once it was received. In light of this the Commissioner specifically asked the IS during a telephone conversation whether the information he had been provided with constituted all the information held by the IS on the company in liquidation. The IS confirmed that it did.
22. Having examined the information the Commissioner is satisfied that it does constitute the personal data of the director of the liquidated company. As with all D reports it clearly names the director and its focus on his conduct as a director. It therefore both identifies the director and relates to him in a biographically significant way.

23. The IS has withheld this information because it believes that it would breach the first data protection principle to disclose it. The first principle states the processing of personal data (which includes its disclosure) shall be fair and lawful and shall comply with at least one of the conditions set out in Schedule 2 of the DPA. In its submissions to the Commissioner the IS has also referred to a previous decision by the Information Tribunal (David Cox v Information Commissioner 2 November 2010 EA/2010/0092) in which the Tribunal found that the disclosure of a different D report would breach the first principle.
24. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. The consideration of fairness takes account of the consequences that disclosing the information would have on the director, the director's expectations of how that information will be used and this is then balanced against any legitimate interests the public may have in accessing this information. It should be noted here that a disclosure under the FOIA is a disclosure to the world at large and the Commissioner is concerned with the legitimate interests of the public rather than simply the private interests of the complainant.
25. It is understood that D reports are produced whenever a company goes into liquidation. The existence of one does not necessarily mean that the directors of the company have been responsible for unfit conduct. In some respects the disclosure of personal data about someone's working life is less intrusive than releasing information about their private life. Nevertheless it is conceivable that disclosing a D report could prejudice the future professional career of a director. Therefore its disclosure could, potentially, be sensitive.
26. The potential for the disclosure of a D report to harm the career prospect of a director would help shape their expectations of how the D report would be handled by the IS. The IS has explained that the director would have understood that the D report would remain confidential. It is understood that this is a long established practice. It would only be if the report lead to a further investigation establishing that a director was responsible for misconduct that any issues raised by the report would become more widely known through the legal proceedings to disqualify him as a director. This has not happened in this case.
27. In terms of the legitimate interests of the public the IS has dismissed the issues raised by the complainant as being purely private interests. The Commissioner accepts that the complainant has an outstanding dispute with the director and believes that accessing this information would assist him in that dispute. However his request is also prompted by his concerns over how the IS handled the D report. It is understood

that by law action to disqualify someone as a director has to be taken within a tight time frame. The complainant is particularly interested in when the IS received the report and how this influenced its consideration of that report, given the time constraints. Clearly there is a wider public interest in disclosing information on the performance of a public authority such as the IS. The IS performs the very important function of determining whether a director of an insolvent company is responsible for misconduct. This can lead to that person being disqualified from acting as a director in the future. This protects both potential customers and the UK economy. Therefore there is a public interest in disclosing information which would provide greater transparency on how the IS is fulfilling that role.

28. However having examined the file the Commissioner is satisfied that its contents do not provide an explanation of the issues of concern to the complainant, ie whether there were any delays in responding to the D report and if so why. Furthermore the Commissioner recognises that disclosing just one D report, from the thousands produced each year, would not provide a meaningful picture of the IS's performance. Finally, in this case, it is difficult to see how the legitimate interest in better understanding the IS's performance could override the interests of a data subject, the director, who is not responsible for that performance. This is notwithstanding the fact the Commissioner accepts that with the advent of the FOIA the interests of the data subject are not always paramount.
29. In light of the above the Commissioner is satisfied that disclosing the information on the liquidated company would be unfair to the data subject ie the director. This is primarily based on the expectations of the director.

**Section 40(5) - refusal to confirm or deny that the requested information is held.**

30. The IS has refused to confirm or deny whether it holds any information relating to the live company. The Commissioner has interpreted this as being a refusal under section 40(5). The Commissioner understands that this company has ceased trading however it has not gone into liquidation.
31. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the DPA. The Commissioner understands that the IS



is arguing that to either confirm or deny that the information is held would contravene the first data protection principle.

32. As with the analysis under section 40(2), the first issue is whether the information in question constitutes personal data. That information is the "Yes, the IS holds information on the named company" or the "No, the IS does not hold information on the named company" that the public authority would normally be required to provide in response to a request.
33. The live company is a limited company. As such it has its own legal identity, separate from that of its directors. Even though the name of the directors could easily be obtained from publicly accessible records, for example those held by Companies House, the Commissioner finds that the required response would only involve the disclosure of information about the company. The Commissioner is satisfied that confirmation or denial of whether the requested information is held would not, in itself, involve the disclosure of personal data. It follows that section 40(5) cannot apply.
34. The IS is not entitled to rely on section 40(5) to refuse to confirm or deny whether it holds the information. It must therefore confirm whether it holds any information about the live company. If it does it must either communicate that information to the complainant or withhold it under a relevant exemption.



## Right of appeal

---

35. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

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