

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 August 2015

**Public Authority:** Department for Business Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Decision (including any steps ordered)

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1. The complainant submitted a request to the public authority for reports produced by administrators in relation to the conduct of the directors, and, the financial affairs, of a company which had been declared insolvent.
2. The Commissioner's decision is that the public authority was entitled to withhold the reports in reliance on the exemption at section 30(1)(a)(i) FOIA.
3. No steps required.

### Request and response

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4. On 18 August 2014, the complainant wrote to the public authority and requested information in the following terms<sup>1</sup>:

*'I would like to make a formal request under the Freedom of Information Act for the following documents and details:*

1. *The report from the administrators of Albany Holdings (Carter Backer Winter) relating to the affairs of the company and conduct of the directors in accordance with the Company Directors Disqualification Act 1986.*
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<sup>1</sup> The requests are in italics. The information held is described below parts 1 and 2.

This refers to a report dated 4<sup>th</sup> August 2010, prepared under section 7(3) Company Directors Disqualification Act (CDDA) 1986 by the administrators of Albany Holdings Ltd (Carter Backer Winter) relating to the affairs of the company and conduct of the directors (the D report).

2. *The report from the administrators of Albany Holdings (Carter Backer Winter) of the forensic investigation conducted into the financial affairs of the company.*

This refers to as extracts comprising pages 1-9 and 25-28 of a final draft of a report by Carter Backer Winter dated 11 June 2012 into the use of company funds (the Financial report).<sup>2</sup>

3. *The details of misconduct for which [named person] was disqualified as a director in 2008 for a term of 5 years.'*
5. The public authority provided its response to the request on 10 September 2014. It disclosed the information held within the scope of part 3 of the request. The D report and the Financial report were however withheld in reliance on the exemptions at sections 21 (the D report only), 30(1), 40(2) and 42(1) FOIA.
6. It is not clear when the complainant submitted a request for an internal review of the public authority's decision above. The Commissioner however understands that the authority wrote to the complainant on 5 January 2015 with details of the outcome of the internal review. The review upheld the public authority's reliance on the exemptions cited in the letter of 10 September 2014.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 2 February 2015 to complain about the way his request for information had been handled.
8. For a variety of reasons he disagreed with the public authority's decision to withhold the D report and the Financial report in reliance on sections 30(1), 40(2) and 42(1). He however did not express any dissatisfaction

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<sup>2</sup> According to the public authority, these are the only parts of the report in its possession. The Commissioner understood this to mean that the administrators had provided the authority with only those extracts, not the full report.

with the authority's reliance on the exemption at section 21<sup>3</sup> to withhold information from the D report.

9. The public authority explained that the information withheld in reliance on section 21 is contained in documents which had been filed at Companies House at the time of the request and therefore available on request to Companies House. The relevant documents are; the Company's Statement of Affairs, Copies of Accounts and Reports to Creditors. Other information about the Company such as, the date of incorporation, the date of insolvency, names and addresses of directors could also be obtained from Companies House and were withheld on the basis of section 21.
10. The Commissioner's investigation therefore focussed on whether the public authority was entitled to withhold the D report (other than the information exempt on the basis of section 21) and the Financial report (ie pages 1-9 and 25-28) in reliance on the exemptions at sections 30(1), 40(2) and 42(1).

## **Reasons for decision**

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### **Sections 30(1) (a)(i) and (b)**

11. Section 30(1) states:

*'(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—*

*(i) whether a person should be charged with an offence, or*

*(ii) whether a person charged with an offence is guilty of it,*

*(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or*

*(c) any criminal proceedings which the authority has power to conduct.'*

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<sup>3</sup> Information accessible to an applicant by other means.

12. Both the D report and the Financial report were withheld by the public authority specifically in reliance on sections 30(1)(a)(i) and (b).
13. It is pertinent to mention from the outset that section 30 is a class based exemption. This means that information simply has to fit the description in section 30 in order for the exemption to be engaged. There is no need to initially establish the likelihood of harm should the information be disclosed.
14. Nonetheless, a public authority must be able to show that it has a duty to investigate offences and institute criminal proceedings in order to engage section 30(1)(a)(i). In relation to section 30(1)(b), the public authority must show that it has the power to investigate offences and institute criminal proceedings. Whilst a duty is something that the public authority is obliged to do, a power simply allows the public authority to do something, giving it discretion over whether it exercises its powers.
15. The Commissioner first considered whether the reports were correctly withheld in reliance on section 30(1)(a)(i).
16. The public authority explained that its Criminal Enforcement teams act on behalf of the Secretary of State, to conduct criminal investigations and, where appropriate in accordance with the Code for Crown Prosecutors, to institute criminal proceedings. The Secretary of State, as Minister of the Crown, has an inherent responsibility for the enforcement of the law, particularly in relation to company and insolvency law for which he is responsible. Investigators working for the Criminal Enforcement teams can approach witnesses to provide statements, have limited powers under the Police and Criminal Evidence Act 1984 (PACE) to obtain evidence via court order and invite suspects for interview. The results of their investigations are provided to in house lawyers who assess the evidence in accordance with the Code for Crown Prosecutors, and where appropriate, institute and conduct criminal proceedings.
17. According to the public authority, the reports relate to an investigation it had conducted following a complaint to the Insolvency Service that a [named person] was acting in contravention of a director disqualification order, an offence under the Company Directors' Disqualification Act 1986 (CDDA 1986). The authority explained that its investigation was limited to considering the complaint in relation to a number of companies linked to [named person] which conducted their business in England and Wales. The reports had been provided to the public authority in confidence by the liquidators for the sole purpose of the authority's investigation and any subsequent prosecution.
18. The Commissioner is satisfied that the reports were held by the public authority for the purpose of investigating the allegation that [named

person] was acting in contravention of a director disqualification order under the CDDA 1986.

19. In view of the above, he finds that the exemption at section 30(1)(a) was correctly engaged by the public authority to withhold the D report (save the information exempt by virtue of section 21) and the Financial report (ie pages 1-9 and 25-28).

#### Public interest test

20. The exemptions at section 30 are qualified by a public interest test. Therefore, the Commissioner must determine whether the public interest in maintaining the exemption at section 30(1)(a)(i) outweighs the public interest in disclosing the D report and the Financial report.

#### *Complainant's submissions*

21. The complainant explained that Albany Holdings Limited went into administration due to *'theft and fraud' 'taking with it £5m in contractors' funds'* and contends that neither the Police nor the public authority have taken any action as a result. He consequently submitted that *'such a lack of transparency and action can be very damaging for the reputation of London as a centre of contracting services.'*
22. Additionally, in his own words, *'it is important for the administration process itself that the administrators are not seen to be favouring the company and directors of the administrated company, especially when appointed by them (as in this case). The contractors who lost a combined total of more than £5m were not recognised by the administrators as creditors until a year after the forensic investigation was completed. As a result the claims and concerns of the contractors were largely dismissed at the time as being beyond the remit of the investigation as they were not creditors.'*

#### *Public authority's submissions*

23. The public authority's submissions on the balance of the public interest are summarised below.
24. The public authority noted that at the heart of the exemption at section 30(1) is the importance of public confidence in the conduct of criminal investigations and related litigation. It acknowledged that public confidence could be served by increasing the transparency of the investigation process.
25. However, although the public authority had completed its own investigation in May 2013, it stressed that investigations by the administrators were still ongoing and litigation was also ongoing on

behalf of creditors. The administrators had made it clear at the time of the request that they could not consent to the sharing of case-related sensitive information with external parties for that reason. The public authority therefore argued that disclosure of the reports is likely to severely inhibit witnesses from providing similar information to the authority in future. This, it argued, would significantly hamper the authority in determining whether an offence might have been committed under any legislation it is required to enforce.

26. It acknowledged that administrators are statutorily obliged, pursuant to section 7(4) of the CDDA 1986 to assist the Secretary of State in his/her investigations under that Act and the reports were provided pursuant to that obligation. The public authority however argued that administrators are less likely to be willing to freely discuss any concerns that they have in similar reports in future if they felt that the reports might be published. That would impede the Secretary of State's ability to effectively regulate the conduct of company directors. It also noted that administrators' findings on the conduct of individuals primarily responsible for running the company are not seen or agreed by those reported on. Therefore, to publish them without providing those reported on an opportunity to comment would not be in the public interest.
27. In terms of holding company directors to account, the public authority noted that creditors who have concerns about a company and its directors are able to report them to their supervising professional body and/or ask the court to examine their conduct. The FOIA is not the proper forum to conduct such investigations.

*Balance of the public interest – Commissioner's findings*

28. Each of the arguments submitted by both parties, including those of the public authority's not reproduced here, have been considered by the Commissioner when reaching his decision, even where he has not felt it necessary to address a particular argument further in the body of this notice.
29. There is no question whatsoever that there is a strong public interest in fully investigating claims by creditors against Albany Holdings Limited and that those with substantiated claims are compensated accordingly. However, the Commissioner shares the view that the FOIA is not an appropriate forum under the circumstances to ensure that the investigation process is open and transparent. Disclosure under the FOIA is effectively disclosure to the world at large. In the Commissioner's view, that could actually be counter-productive as it is likely to undermine any ongoing investigation and the prospect of litigation to recover monies due to creditors.

30. Of particular relevance to the exemption at section 30(1)(a)(i) is the strong public interest in the Secretary of State's ability to be able to effectively conduct investigations pursuant to his/her obligations under the CDDA 1986. It is clear that disclosure of the reports would be likely to undermine the ability to do so. It is pertinent to mention also that the public authority's own investigation was restricted to whether an individual was acting in contravention of a director disqualification order. It did not extend to determining culpability in respect of any alleged fraudulent practices.
31. With the introduction of the FOIA, the Commissioner has been reluctant to accept the general view that those providing information to public authorities still do so in the expectation that it will never be published. Nevertheless, in the circumstances of this case, the Commissioner has no hesitation in finding that the administrators would not have expected that their full and frank findings provided to the public authority to assist the authority with its own investigation would be published while their own investigations are ongoing and the likelihood of litigation to recover monies owed to creditors is certainly not a remote possibility. On that basis, he has attached significant weight to the argument that disclosure would be likely to result in administrators and others in a similar position being less willing to freely and frankly discuss any concerns they may have in similar reports in future.
32. The Commissioner is therefore satisfied that, on balance, the public interest in maintaining the exemption at section 30(1)(a)(i) outweighs the public interest in disclosing the information in the D report (save the information exempt by virtue of section 21) and the Financial report (ie pages 1-9 and 25-28).
33. In view of his decision that the public authority was entitled to rely on section 30(1)(a)(i), he has not considered the applicability of the remaining exemptions.

## **Right of appeal**

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34. 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 123 4504

Fax: 0870 739 5836

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)

35. 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.
36. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
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