

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2020

Public Authority: The Insolvency Service
(Department for Business, Energy and Industrial Strategy)

Address: Cannon House
18 Priory Queensway
Birmingham
B4 6FD

Decision (including any steps ordered)

1. The complainant has requested information regarding an alleged breach of the Insolvency Rules. The Insolvency Service relied on section 21 of the FOIA (reasonably accessible) and section 40(2) of the FOIA (third party personal data) to withhold information.
2. The Commissioner's decision is that any information the Insolvency Service held within the scope of the request, not already in the public domain, would be criminal offence personal data. Therefore not only was the Insolvency Service entitled to withhold any relevant information not already in the public domain, but should in fact have relied upon section 40(5B) of the FOIA and not confirmed (or denied) that it held any additional information in the first place.
3. The Commissioner does not require any further steps.

Nomenclature

4. The Insolvency Service is not listed as a separate public authority in Schedule 1 of the FOIA because it is an executive agency of the Department for Department for Business, Energy and Industrial Strategy (DBEIS). However, as it has its own FOI unit and as both the complainant and the Commissioner have corresponded with "the Insolvency Service" during the course of the request and complaint, the Commissioner will refer to "the Insolvency Service" for the purposes of this notice – although the public authority is, ultimately, DBEIS.

Request and response

5. On 23 September 2019, the complainant wrote to the Insolvency Service and requested information in the following terms:

"The request made is to receive all information your organisation holds on record or was made reference to, in any format, regarding the companies ["Company 1"] and ["Company 2"].

"To aid you complying with my request, I only require information held on record following the to the 1st of April 2019 but up until the 22nd of September 2019."

6. The Insolvency Service responded on 14 October 2019. It noted that some of the information it held was already in the public domain and was therefore exempt under section 21 of the FOIA. The remainder of the information the Insolvency Service held, it relied on section 40(2) of the FOIA to withhold. It stated that the information would be the personal data of an individual and that disclosure of this information would represent a breach of data protection legislation.
7. Following an internal review the Insolvency Service wrote to the complainant on 31 October 2019. It upheld its original position but provided some further information as to why the remaining information would be personal data.

Scope of the case

8. The complainant contacted the Commissioner on 15 December 2019 to complain about the way his request for information had been handled.
9. The complainant has not challenged the Insolvency Service's use of section 21 to withhold information. The Commissioner has therefore restricted her investigation to determining whether the Insolvency Service dealt appropriately with the request to the extent that it covered information not already in the public domain.
10. The Insolvency Service set out, in both its responses, why it considered information falling within the scope of the request to be personal data and why it considered that disclosure of that information would be unfair.
11. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case, based on the internal review arguments and her own

expertise, without seeking further arguments from the Insolvency Service.

12. Given that providing a confirmation or a denial that information is held can, in itself, involve the disclosure of personal data, the Commissioner has first given consideration to whether the Insolvency Service should have confirmed or denied holding further information within the scope of the request. The rationale for this approach is set out in more detail below.

Background

13. Section 216 of the Insolvency Act states that:

(3) Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating company went into liquidation—

(a) be a director of any other company that is known by a prohibited name, or

(b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or

(c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.

(4) If a person acts in contravention of this section, he is liable to imprisonment or a fine, or both.

14. The complainant informed the Commissioner that he had previously submitted a complaint to the Insolvency Service because he believed that a particular individual ("the Director"), who had been a director of Company 1, had set up a second company (Company 2) with a prohibited name. His FOIA request was, the complainant explained, aimed at establishing what action, if any, the Insolvency Service took to investigate his complaint and when any such action took place.

Reasons for decision

Section 40 - personal information

Would the information be personal data?

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. In its response to the complainant, the Insolvency Service noted that Section 216 did not restrict the name of an insolvent company from being reused. The legislation only prevented the *directors* of the insolvent company from being involved with another company using the same or similar name. As such, any investigation into the *use* of a prohibited name would be inseparable from the question of *who* was using it.
20. According to the records publicly available from Companies House, in the 12 months prior to liquidation, the Director was the *only* individual listed as a director of Company 1. The director was therefore the only individual who could be investigated for using a prohibited name in respect of Company 1.
21. The Commissioner is therefore of the view that, were the Insolvency Service to confirm that it held additional information within the scope of the request, it would mean that the Director had been investigated. If it denied holding information, it would mean that the director had not been investigated. Either way, providing a confirmation or a denial that information was held by the Insolvency Service would involve the disclosure of something about the Director – who is indirectly identifiable from the request.

22. In the circumstances of this case, having considered the facts, the Commissioner is satisfied that providing a confirmation or a denial that information was held in respect of this request, beyond that already in the public domain, would reveal information which both relates to and identifies the Director. This information would therefore fall within the definition of 'personal data' in section 3(2) of the DPA.
23. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if doing so would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.

Would providing a confirmation or a denial breach data protection principles?

24. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

25. In the case of a FOIA request, the personal data is "processed" when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful.
26. Therefore, for the Insolvency Service to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, not only must providing a confirmation or denial involve the disclosure of personal data, but providing this confirmation or denial must be either not be lawful, not be fair or not be transparent.

Criminal Offence data

27. The Commissioner also considers it appropriate to consider whether the Insolvency Service would be disclosing information relating to the criminal convictions and offences of a third party by confirming or denying that it holds further information within the scope of the request.
28. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to:-

- (a) The alleged commission of offences by the data subject; or

- (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
29. Section 216(4) of the Insolvency Act 1986 sets out a specific criminal offence for using a prohibited name. Schedule 7 of that Act sets out that the offence is punishable by a fine or up to two years' imprisonment.
 30. Confirming or denying that it had taken steps to establish whether a breach of Section 216 had occurred, would involve the Insolvency Service confirming or denying whether it had investigated the possibility that the Director had committed a criminal offence. Providing a confirmation or a denial would therefore involve the processing of criminal offence data.
 31. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed (which includes confirming or denying whether the information is held in response to a FOI request) if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
 32. When considering the disclosure to the world at large required by the FOIA, the Commissioner considers it likely that only two of the Schedule 1, Part 3, conditions might ever justify such processing of personal information of this type. These are:
 - a. that the data subject had given their explicit consent for the public authority to provide a confirmation (or a denial) that information is held; or (para 29)
 - b. that the data subject has manifestly made the information public themselves (para 32)
 33. There is no evidence to suggest that the Director has provided any consent for the Insolvency Service to provide a confirmation or a denial that it holds relevant criminal offence data. The Insolvency Service is not required to seek consent from the Director and it seems likely that consent would not be given in any case. Similarly, the Commissioner is unaware of any indication that the Director has made any such information public.
 34. The Commissioner therefore considers that providing a confirmation or a denial that further information within the scope of the request is held would involve the processing of criminal offence data about the Director. As none of the conditions required for processing criminal offence data are satisfied, there can be no legal basis for confirming whether or not further information is held. Providing such a confirmation or denial

would breach data principle (a) and therefore the second criterion of the test set out above is met.

35. It therefore follows that the Insolvency Service was entitled to refuse to confirm or deny whether it held further information, beyond that already in the public domain, on the basis of section 40(5)(B) of FOIA. In the Commissioner's view, it should have done so.

Right of appeal

36. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Phillip Angell
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Wycliffe House
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