

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 April 2010

Public Authority: The Insolvency Service
Address: Floor 4, Zone B
21 Bloomsbury Street
London
WC1B 3QW

Summary

The complainant requested a copy of the administrator's report into Hemmingway's Worldwide Touring Holidays. The public authority refused his request relying on the exemption provided by section 40(2)(a) and (b) of the Act because the report contained third party personal data. The Commissioner has investigated and his decision is that the public authority was correct to withhold the information.

The Commissioner's Role

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

2. On 1 September 2009 the complainant wrote to the Insolvency Service ("the IS") and explained that he is the representative of fifty elderly members of the 'International Caravan Association' who are creditors of the liquidated company Hemmingway's Worldwide Touring Holidays. He went on to make the following request:

"The administrator reported his progress and findings to date in writing to the Liquidation Committee at the end of July 2009. In this, under investigations, he reported that 'as required by legislation, a full investigation into the company and the conduct of the directors has been carried out and the appropriate Report has been submitted to the department of Trade and Industry, and the investigation continues'.Could I please ask you for a copy of his report, so I may keep those people I represent fully informed of the administrator's findings to date."

3. The IS responded on 15 September 2009 refusing to disclose the report relying on section 40(2)(a) & (b). An explanation of the reasoning of this decision was provided.
4. On 25 September 2009 the complainant wrote to the IS and requested a review of its decision. He stressed the creditors needed to: ".know how and why they became victims of a failed company which they trusted with their savings". The complainant stressed his concern was for the report on the management of the company's affairs and not an individual's affairs.
5. On 5 October 2009 the IS responded confirming its initial response to withhold the information.

The Investigation

Scope of the case

6. On 12 October 2009 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:
 - "The elderly creditors who became victims of a failed company want to know how and why this happened. They believe the requested report would provide an explanation to which they have no access."

Chronology

7. The Commissioner began his investigation on 15 January 2010 by contacting the IS and asking further questions to establish the nature of the report and the status of the IS investigation into the company.
8. The IS provided a copy of the report concerned and a full explanation of its refusal to provide the requested information.

Analysis

Exemptions

Section 40(2)(a) and (b)

9. It is important to point out that the Act is applicant blind, except in very limited circumstances, none of which apply in this case. This means that a disclosure made under the Act is in effect a disclosure to the world at large, as any other applicant would be entitled to the same information on request.
10. The provisions of section 40(2) exempt personal data from disclosure where, in the case of third parties, that disclosure would breach one of the eight principles of the Data Protection Act 1998 ('the DPA'). The first question to consider is therefore whether the information is personal data.
11. Section 1 of the DPA defines personal data as data which relate to a living individual who can be identified:
 - from those data, or
 - from those data and other information which is in the possession of, or is likely to come into the possession of the data controller.
12. The information requested is a D Return which contains data relating to the Director of a liquidated company, including his conduct as a director. The Commissioner is satisfied that the information is the personal data of the Director. The next question to consider is whether disclosure of the information would breach any of the data protection principles.
13. The Commissioner considers that the data protection principle most likely to be breached by disclosure of the information in this case is the first data protection principle.
14. The first principle of the DPA requires that the processing of personal data is fair and lawful. In considering whether a disclosure is fair under the First Principle for the purposes of section 40 of the Act the Commissioner balances the consequences of any disclosure and the reasonable expectations of the data subject with the general principles of accountability and transparency.
15. In order to reach a view on whether disclosure would be fair in this case the Commissioner has firstly considered what would be the reasonable expectation of a director of a liquidated company, i.e. would

he have any expectation of his personal data being provided to a third party.

16. When a company goes into voluntary liquidation the responsible insolvency practitioner has a duty under the Company Directors Disqualification Act 1986 to report to the Secretary of State via the IS on the conduct of the directors. This is a statutory obligation in every company. The D Return completed by insolvency practitioners for the IS includes personal data of the directors of a company and details of the conduct of such directors. The report is submitted to the IS for its assessment. The IS submits a return to the Secretary of State concluding whether the conduct of directors was fit or unfit. The Secretary of State then has discretionary power to seek the director(s)'s disqualification where he believes it to be in the public interest. Not all allegations of misconduct by an insolvency practitioner lead to an investigation under the Company Directors Disqualification Act 1986.
17. The IS informed the Commissioner that it considers, if an allegation is made by an insolvency practitioner, it is only the "starting point" of an investigation as this is the opinion of the insolvency practitioner. It can be the case that after investigation the initial allegations made in the D Return are not substantiated and accordingly do not feature in any allegations put forward in the Secretary of State's case for disqualification.
18. The Commissioner considers that a director subject to such a procedure would not expect their personal data from the D Return to be provided to the world at large because the report is one document forming part of an investigation which notes details which may, or may not, be upheld in any further action.
19. The director, as the data subject, did not consent to the disclosure of his personal data because he was not asked to do so. The IS has no contact with directors prior to the submission of the D Return by the insolvency practitioner. It is usually the case that insolvency practitioners will advise directors that the D Return is confidential. It is fair to say that the existing practice within the IS is not to disclose D Returns. This information would shape the director's expectations of what would be done with his personal data.
20. The Commissioner also noted that a director who is the subject of a D Return does not routinely receive a copy of the D Return. A request may be made and the IS will consider whether release would prejudice the Service's enquiries at the time and subject access may or may not be granted.

21. In this case the IS return to the Secretary of State has not resulted in any further action which adds further weight to the unfairness of disclosure since the IS has not pursued its investigation.
22. The D Return was produced by the Insolvency Practitioner on 13 July 2009 and the Insolvency Service concluded its investigation at the end of July 2009. The complainant's request was sent on 1 September 2009 at which time the D Return was very recently concluded and therefore disclosure could pose a threat to the data subject's emotional wellbeing. Disclosure may also affect the director's attempts to gain employment or establish a new company.
23. Notwithstanding the director's reasonable expectations or any damage or distress that might be caused to him by disclosure, it may still be fair to disclose if there is a more compelling public interest in disclosure. The Commissioner considered the legitimate interests of the public in disclosure of personal data balanced against the interests of the individual whose data it is. It is the Commissioner's opinion that even where the disclosure is necessary for a legitimate interest of the public, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.
24. The complainant argued that there is a legitimate public interest in the disclosure of the D Return because he believed that: "Freedom of Information... is enshrined in law and is a basic right for victims in our situation.... The elderly creditors I represent want to know how and why they became victims of a failed company which they trusted with their savings.... This report on the company's affairs would explain that to us."
25. The Commissioner understands the complainant's reasons for requesting the D Return. However, although there is always some public interest in the broad general principles of accountability and transparency, disclosure in this case would provide very limited information on an individual company and its director to the world at large including those individuals suffering adversely as a result of the liquidation. The D Return does not indicate responsibility for the liquidation of a company nor does it provide transparency in understanding its demise. The format of the D Return can be accessed via: <http://www.opsi.gov.uk/si/si2001/20010764.htm>
26. Although the Act is 'applicant and motive blind' the Commissioner notes that disclosure of the D Return is unlikely to assist the complainant in his stated objective of understanding how and why he and others had become "victims of a failed company". The information in the report does not explain why the company went into liquidation.

There is limited information in the form of bullet points regarding the conduct of the director which does not include any explanatory detail. The D Return in this case is not a narrative or descriptive report and would not enlighten the world at large on the reasons for the failure of the company concerned. The Commissioner is therefore satisfied that the interests served by disclosure of the D Return hold insufficient weight when balancing the legitimate public interests in disclosure against the consequences of disclosure for the data subject.

27. The Commissioner concludes that in the circumstances of this case it would not be fair to disclose the requested information.
28. The Commissioner considers that the requested information was properly withheld under section 40(2).
29. Section 40 of the Act is an absolute exemption. Therefore the Commissioner has not undertaken an additional assessment of the public interest in this case.

The Decision

30. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

31. The Commissioner requires no steps to be taken

Right of Appeal

32. 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.
Website: 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 served.

Dated the 19th day of April 2010

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Personal information.

Section 40(1) provides that –

“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.”

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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, 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

SCHEDULE 1 provides that –

‘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*

Reference: FS50274047

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