

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 27 March 2012

Public Authority: The Insolvency Service
Address: 21 Bloomsbury Street
London
WC1B 3QW

Decision

1. The complainant has requested a copy of the Enforcement Investigation Guide (EIG) from the Insolvency Service. The Commissioner's decision is that the Insolvency Service has not successfully engaged section 22 of the Act in relation to the EIG. The Commissioner requires the Insolvency Service to disclose the EIG to ensure compliance with the legislation. The Insolvency Service 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.

Background

2. The Enforcement Investigation Guide (EIG) is a substantial document comprising of over 100 chapters providing guidance to the Insolvency Service's investigation teams and official receivers on all aspects of the statutory investigations that are undertaken.

Request and response

3. On 12 January 2012 the complainant wrote to the Insolvency Service and requested information in the following terms:

'Under the FOI Act, could you forward to me a copy (of) the following publications,

1. *Enforcement Investigation Guide*

2. *A copy of the sentencing guidelines for criminal allegations.'*

4. The Insolvency Service responded on 6 February 2012. It stated that it was applying section 22 of the Act to the Enforcement Investigation Guide (EIG) as it intended to publish it in the future once it had been reviewed to ascertain whether any parts should be redacted. With regard to the 'sentencing guidelines for criminal allegations' it stated that it did not hold any recorded information as it was not a prosecuting authority.
5. On 7 February 2012 the complainant requested an internal review. He explained why he required a copy of the EIG and in particular, chapter 14, part 11.
6. Following an internal review the Insolvency Service wrote to the complainant on 10 February 2012. It stated that it was upholding its original decision to apply section 22 of the Act to the EIG. With regard to chapter 14, part 11 of the guide, it disclosed this to the complainant on the basis that it was unlikely to change before publication and therefore did not require any redaction.

Scope of the case

7. The complainant contacted the Commissioner on 13 February 2012 to complain about the way his request for information had been handled. In particular, he complained about the Insolvency Service's application of section 22 of the Act to the EIG and its claim that it held no recorded information relating to the sentencing guidelines for criminal allegations.
8. During the course of the Commissioner's investigation the Insolvency Service reiterated that it did not hold any recorded information in relation to the sentencing guidelines for criminal allegations. In view of this the complainant agreed to restrict his complaint to the Insolvency Service's decision to withhold the EIG.

Chronology

9. On 2 March 2012 the Commissioner wrote to the Insolvency Service. He said he was not persuaded by its arguments that section 22 of the Act was engaged in respect of the EIG. He stated that to successfully engage section 22 a public authority would have to demonstrate that the information it intended to publish at some future date was exactly the same as that which existed at the date of the request. As the Insolvency Service stated it was in the process of reviewing the EIG to see which parts required redaction prior to publication in the future, the

Commissioner suggested that it was not in a position to confirm that the information to be published would be identical to that requested. He drew the Insolvency Service's attention to a previous decision of his in the case of the [Ministry of Justice FS50121803](#) where he decided that section 22 was not engaged as the public authority was unable to confirm that the information it intended to publish in the future would be exactly the same as the information requested. The Commissioner therefore invited the Insolvency Service to reconsider its decision to engage section 22 to the EIG.

10. The Insolvency Service responded on 8 March 2012 by stating that it *did* intend to publish the EIG in the future. However, it added that this would not be until the specialist solicitors it had employed to review the EIG had completed its task and made all the appropriate redactions. It added that some of these redactions were 'likely' to be made under section 31 of the Act. The Insolvency Service stated that the EIG consisted of over 100 chapters two of which has already been reviewed to date with the conclusion that some redaction would be necessary prior to publication.
11. In conclusion, the Insolvency Service reiterated its view that section 22 of the Act was engaged in respect of the entire EIG as it was its intention to publish it in the future albeit with some redactions which had yet to be decided. It also reiterated that it did not hold any recorded information in connection with sentencing guidelines for criminal allegations.
12. On 13 March 2012 the Commissioner wrote to the Insolvency Service again. He noted that it intended to maintain its reliance on section 22 and asked it when it anticipated the EIG would be published.
13. The Insolvency Service responded on 14 March 2012 and stated that it was unable to set a publication date for the EIG as this was dependant on the legal advice it would receive in respect of the 'considerable' redactions that were anticipated under section 31 of the Act (despite it was still relying on section 22). It did however add that it was not anticipated that publication would occur until at least 6 months after (its) lawyers had advised on the question of redaction.

Reasons for decision

Section 22 of the Act – Information intended for future publication

14. Section 22 of the Act provides that information is exempt if, at the time the public authority receives the request for it:

- a. It holds it with a view to its publication
 - b. It or another person intends to publish it at some future date, whether determined or not;
 - c. In all the circumstances it is reasonable to withhold the information prior to its publication and
 - d. The public interest in applying the exemption is greater than that for disclosing the information
15. The Commissioner has considered each of the above requirements and reached the following conclusions.

Intention to publish at the time request received

16. Section 22 only applies when the information is held with a view to publication at the time the request for it is received. In this case, the Insolvency Service has stated that it intends to publish the EIG and the Commissioner finds that this was the situation when the request was received.

Information held at time of the request

17. The Commissioner finds that the EIG was held by the Insolvency Service at the time of the request.

With a view to publication

18. The Commissioner interprets the words in section 22 of 'with a view to' to indicate an intention has been made to publish or at the very least that the information is held in the settled expectation that it will be published.
19. Publication requires the information to be generally available to the public. It is not enough if the intention is to make it available to a restricted audience.
20. If during the course of the preparation of the information for publication some material will be redacted, section 22 will not apply to the redacted information. This is because the public authority will no longer hold the information with a view to publication in the future.
21. In this case the Insolvency Service has informed the Commissioner that it intends to publish the EIG by making it available to the public through its publication scheme. However, it has added that this will not occur until at least 6 months after its lawyers have completed their review of the EIG and advised on the considerable redactions that will be required in likelihood under section 31 of the Act.

22. The Commissioner is not persuaded by the Insolvency Service's arguments that publishing the EIG at some future date with redactions will engage section 22 of the Act. The reason for this is that although it intends to publish a version of the EIG at some future date, it cannot specify which parts of the published guide will be the same as those which existed at the date of the request. Furthermore, it has already admitted that 2 of the 100 EIG chapters reviewed to date by its solicitors will require some redaction prior to publication.
23. The Commissioner has considered his previous decision in the case of the [Ministry of Justice FS50121803](#) where he took the view that section 22 of the Act was not engaged. In this case it was clear that some of the requested information was destined for future publication. However, as the public authority could not specify which information that would be he concluded that section 22 could not apply. Accordingly, the Commissioner concludes that section 22 is not engaged in relation to the EIG.

At some future date (whether determined or not)

24. The publication date does not need to be definite for the exemption to apply. As long as a decision has been made that the information requested will be published at some time in the future or there is a settled expectation that this will happen, the exemption can be considered.
25. Although the Commissioner accepts that the a version of the EIG will be published at some future date which is yet to be determined, he does not accept that the version which existed at the time of the request will be the same as the one published for the reasons given above.

Reasonable in all the circumstances to withhold the information prior to publication

26. In order to engage section 22 of the Act a public authority must first determine whether or not it is reasonable in all the circumstances to withhold the requested information prior to publication before considering the public interest test.
27. In this case the Insolvency Service has not been specific as to why it believes it would be reasonable in all the circumstances to withhold the EIG prior to publication. However, it has suggested that other public authorities (such as HMRC) only publish their internal manuals online once some of the text has been withheld because of exemptions under the Act. Specifically, the Insolvency Service referred the Commissioner to HMRC's Special Civil Investigations Guidance Manual which is published online with some of the contents deleted with the words 'this

text has been withheld because of exemption of the Freedom of Information Act 2000'.

28. The Commissioner does not believe it is reasonable in all the circumstances to withhold the EIG for the reasons stated above.

The public interest test

29. Even if the requested information falls within the exemption in section 22 of the Act, it is still necessary for a public authority to consider the public interest in maintaining the exemption is greater than the public interest in disclosing it.
30. In this case the Commissioner has not considered the public interests arguments for and against disclosure as he has concluded that section 22 is not engaged for the reasons give above.

Right of appeal

31. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Rachael Cragg
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