

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2015

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

Decision (including any steps ordered)

1. The complainant has requested information about an investigation he believes is or was conducted by the Insolvency Service. It relied on sections 31(3) and/or 43(3) to neither confirm nor deny that the requested information was held.
2. The Commissioner's decision is that the Insolvency Service has not persuaded him that the aforesaid sections permit it to neither confirm nor deny it holds the information requested by the complainant.
3. The Commissioner requires the Insolvency Service to take the following steps to ensure compliance with the legislation.
 - Issue a reconsidered response to the request that is compliant with the requirements of section 1 and/or section 17 but does not seek to rely on sections 31(3) and/or 43(3).
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 24 November 2014, the complainant wrote to the Insolvency Service and requested information in the following terms:

- To supply an update on the progress of the investigation into the Board of [named company] prior to the takeover of that company by [named company] including ... *(a possible impropriety alleged by complainant)*.
 - If incomplete a timescale for completing and reporting that investigation.
 - If complete, to provide a report on the findings.
6. On 11 December 2014, the Insolvency Service informed the complainant that it was relying on sections 31 and/or 43 FOIA to neither confirm nor deny that it held the information he had requested.
7. An internal review of that decision was conducted and this outcome was conveyed to the complainant in correspondence dated 5 February 2015. The outcome of the review was to uphold the original decision to neither confirm nor deny that the requested information was held.

Scope of the case and chronology

8. The complainant contacted the Commissioner on 8 March 2015 to complain about the way his request for information had been handled by the Insolvency Service.
9. As part of his investigation of the complaint the Commissioner wrote to the Insolvency Service on 24 April 2015 to seek its submissions on its reliance on sections 31 and 43 FOIA to neither confirm nor deny that the requested information is or was held by it at the time of the request. The Commissioner also stressed how important it was for the Insolvency Service to provide him with its full submissions regarding the matter.
10. In particular the Insolvency Service was asked, amongst other things, to;

"In the first instance, please lay out fully your submissions as to why the Insolvency Service (if it maintains the same) neither confirms nor denies it holds the requested information.

...

Section 31 – law enforcement

Please confirm which sub-section(s) of 31(1) the Insolvency Service is relying on to withhold the information that has been requested.

Please clearly explain why disclosure of the information would prejudice, or be likely to prejudice the function which a particular sub-section is designed to protect.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

Section 43(2)

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur."

11. On 13 May 2015, the Insolvency Service replied to the Commissioner's letter. In particular it directed the Commissioner to its correspondence with the complainant, dated 5 February 2015, to stand as its reply to the Commissioner's queries. The salient parts of that letter are as follows:

"(It was) explained to you, the complaint you made concerning these companies led to the Insolvency Service considering an investigation using powers set out in section 447 Companies Act 1985. That Act provides for such investigations to be confidential, and this is irrespective of whether the company is public or private, and whether the person raising the complaint is an employee, shareholder, creditor or third party (such as another regulator like the FCA). Information about these investigations can only be disclosed using strict gateways set out in the law, and disclosure outside those gateways is a criminal offence.

In addition to this it was also explained that complying with your request would (under section 31(1) FOIA) require the disclosure of information which in turn would prejudice in particular the exercise by a public authority of its function, namely the conducting of confidential investigations under s447 Companies Act 1985 (which are carried out for purposes outlined in section 31(2) FOIA).

It was explained to you that this prejudice would arise because it would counter the clear need for such investigations to remain confidential,

both in order to comply with the law and for the other reasons of confidentiality which (was) set out for you. In particular that the investigation processes we use needs to remain confidential in order to effectively serve the purpose they were created for and to deliver justice....

I have reviewed this matter and consider that, for the reasons explained above, the public interest remains in not disclosing any information relevant to your request, and that the exemptions claimed have been properly applied.

A second issue arises concerning whether or not the Insolvency Service should confirm or deny that an investigation is taking place.

Again it was explained to you that such confirmation or denial could have exactly the same effect under section 31 FOIA as disclosing the material obtained in any investigation, and the reasons for this were outlined in our reply. Hence a further exemption under section 43(2) FOIA was claimed.

Having reviewed this decision as well I can confirm that again the public interest comes down clearly on the side of maintaining the exemption, and for the reasons that were given to you."

12. The Insolvency Service also provided the Commissioner with a bundle of copy correspondence that flowed between it and the complainant and between the complainant and a third party public authority. The Insolvency Service invited the Commissioner to read this correspondence in order to substantiate its position. and the Commissioner did as asked. However, whilst they provided background material they do not address the legal specifics of the Insolvency Service's reliance on sections 31(3) and 43(3).
13. Having considered all the aforementioned submissions, on 25 August 2015 the Commissioner wrote to the Insolvency Service saying, amongst other things;

"As it currently stands any Decision Notice issued will likely find that you have not persuaded the Commissioner that your reliance on sections 31 (3) and/or 43(3), to neither confirm or deny, was correct."
14. The Commissioner asked the Insolvency Service to provide a substantive response to this correspondence within 10 working days.
15. Having not received a response, the Commissioner wrote again on 15 September 2015 and, as a result of a further lack of response, also left a telephone message later in the same month. None of these

communications have to date resulted in a response received by the Commissioner.

Reasons for decision

16. Section 1(1)(a) of the FOIA requires a public authority to inform the requester, in writing, whether or not recorded information is held that is relevant to the request.
17. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the requester unless a valid refusal notice has been issued.

Section 31(3)

18. Section 31(3) provides that a public authority is not obliged to confirm or deny whether it holds information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1).
19. The Commissioner notes that the Insolvency Service did not expressly state to the complainant it was relying on section 31(3). However it did expressly state that it would (in the context of section 31) neither confirm nor deny whether the requested information, which would show whether the company was being investigated, was held.
20. The Insolvency Service states that compliance with the "request would (under s31(1) FOIA) require the disclosure of information which in turn would prejudice in particular the exercise by a public authority of its function, namely the conducting of confidential investigations under s447 Companies Act 1985¹ (which are carried out for purposes outlined in s31(2) FOIA)".
21. Section 447 provides powers to a Secretary of State to require documents and information from persons in specified circumstances. It does not alone give a function to the Insolvency Service to carry out conducting of confidential investigations. The Insolvency Service has not laid out to the Commissioner how it has, as one of its functions in the context of this matter, the conducting of confidential proceedings.

¹ <http://www.legislation.gov.uk/ukpga/1985/6/section/447>

22. As the Commissioner stated to the Insolvency Service it is incumbent on it to persuade the Commissioner that it has acted in accordance with FOIA. On the arguments and documents provided by it to the Commissioner it has simply not made its case out that section 31(3) is engaged and the Commissioner is not able to "back-fill" for the Insolvency Service.
23. Accordingly on the submissions and evidence provided by the Insolvency Service to the Commissioner he cannot find that it was entitled to rely on section 31(3) to neither confirm nor deny the information requested by the complainant was held.

Section 43(3)

24. The Insolvency Service also averred that section 43(2) FOIA permitted it to neither confirm nor deny that the requested information was held.
25. Section 43(2) FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person.
26. Section 43(3) FOIA states that the duty to confirm or deny does not arise if, or to the extent that, to do so would, or would be likely to, prejudice the interests mentioned in section 43(2).
27. Similar to paragraph 19 above the Commissioner notes that the Insolvency Service did not expressly state to the complainant it was relying on section 43(3). However it did expressly state that it would (in the context of section 43) neither confirm nor deny whether the requested information, which would show whether the company was being investigated, was held.
28. As stated above, the Insolvency Service referred the Commissioner to its previous explanations to the complainant for its submissions as to why it considers section 43(2) is applicable. Notwithstanding it is actually relying on section 43(3), read together with section 43(2), to neither confirm nor deny that it holds the requested information.
29. In its letter to the complaint dated 5 February 2015 the Insolvency Service said (regarding section 43(2)) as follows,
 - *The Service considers that knowledge of the existence of an investigation might be prejudicial to the commercial interest of those investigated, whether this is the company itself or the individuals associated with it. The mere fact of confirming that an investigation has occurred rightly or wrongly creates a stigma surrounding those investigated and is not something that should be made public. Conversely, denying that an investigation has*

been conducted leads to the assumption that in other cases where the Service has refused to confirm or deny that an investigation has taken place.

30. The Commissioner's view is that the above submission is insufficient to persuade him, on the balance of probabilities that section 43(3) is engaged. Its assertions lack substance and evidence. It does not explain in any meaningful detail how (and just as importantly) to what extent "an investigation might be prejudicial to the commercial interest(s)" of relevant party.
31. Primarily, the Insolvency Service has failed to adequately explain and show how the said "stigma", would, or would be likely to prejudice the commercial interests of any person and the Commissioner is unable to make the necessary explorations to do so. The reason for this failure to extrapolate is that it would involve the Commissioner making too many assumptions on matters of which he is unaware. In any event (and rightly or wrongly) people and companies could be said to be stymied when it is publically known that they are being investigated by the police or some other law enforcement agency. Section 43 is concerning with the prejudicing of commercial interests not stand alone stigmatization. It is therefore incumbent on the Insolvency Service to show how this stigmatizing will (and to what extent) harm those commercial interests
32. Accordingly on the submissions and evidence provided by the Insolvency Service to the Commissioner he cannot find that it was entitled to rely on section 43 to neither confirm nor deny the information requested by the complainant was held. Additionally, the Commissioner is not aware of any particular or pressing reason why the Insolvency Service should not be required to confirm or deny if it holds the requested information.

Right of appeal

33. 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

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

34. 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.
35. 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
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