



Neutral Citation Number

**IN THE FIRST-TIER TRIBUNAL** **Case No. EA/2010/0092**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Notice No: **FS50274047**  
Dated: **19 April 2010**

**Appellant: David Cox**

**Respondent: Information Commissioner**

**Determined on the papers alone**

**Date of decision: 2 November 2010**

**Before**

**David Marks QC  
Judge**

**and**

**Michael Hake  
Narendra Makenji**

**Subject matter: Freedom of Information Act 2000, s.40(2); Data Protection Act 1998 s.1 and Schedules 1 & 2**

**Cases: *Butters v Information Commissioner* (EA/2008/0088); *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550; *Durrant v FSA* [2003] EWCA Civ 1746**

### **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the Decision of the Information Commissioner in his Decision Notice dated 19 April 2010 under Reference No. FS50274047

### **JUDGMENT**

#### **General**

1. This appeal concerns a request for information as to the reasons why a company formerly carrying on business as travel agents and travel organisers went into insolvent liquidation. More particularly, it concerns the form of what is commonly known as a D Return being an insolvent practitioner's written assessment of the conduct in relation to a director's actions within the company. D Returns are frequently employed as a basis for a subsequent investigation into whether a director should be considered fit to carry on as a director and, in particular, whether he should be subject to disqualification proceedings as a director at the instance of the Secretary of State.

2. In this case, the request was made to the Insolvency Service, the Government agency charged with the responsibility of conducting the relevant investigation. In terms of the subject matter of the appeal, the principal issue is whether the content of the D Return constitutes the personal data of the director concerned and thus is absolutely exempt from disclosure under the Freedom of Information Act (FOIA).

### The facts

3. In January 2009 the company concerned, Hemmingways Worldwide Touring Holidays Ltd, went into liquidation. A Mr Alan Bradshaw was subsequently appointed as liquidator. This followed a meeting of creditors which was held on 15 January 2009. The Appellant was, it seems, a member of the liquidation committee which was established for the purposes of the liquidation. In correspondence, he described himself as representing:

“... some fifty elderly members of the International Caravan Association, all creditors, each one loosing [sic] a considerable amount of money when the company failed. Most lost a holiday of a lifetime for which they had saved carefully over the years.”

In a subsequent exchange with the office of the Information Commissioner (the Commissioner), the Appellant explained that he and others had been on a caravan tour in Australia when they were presented with “a bill for £7K prior to returning”.

4. According to the Appellant, the Liquidator, whom he erroneously described in correspondence as an “administrator” stated that:

“... a full investigation into the company and the conduct of the directors had been carried out and the appropriate Report has been

submitted to the department [sic] of Trade and Industry, and the investigation continues.”

By letter dated 1 September 2009, the Appellant formally requested a copy of the report from the Insolvency Service. The Liquidator had previously formally refused to produce his report.

5. By letter dated 15 September 2009, the Insolvency Service replied to the Appellant refusing the request and relying upon the exemption set out in section 40(2) of FOIA. The Appellant then contacted the Commissioner and shortly afterwards the Insolvency Service conducted an internal review and confirmed its refusal.
6. In the agreed bundle, the Tribunal has seen a redacted note and record of a telephone conversation held between the Commissioner and the Insolvency Service which took place on 15 January 2010. The redacted portion is contained in the paragraph which reads:

“Ms Pigley was very helpful in describing the operation and explained that in his case [*here is the redacted portion of the note and record referred to above*]. Which means that the Director is able to start another business immediately.”

#### The Decision Notice

7. The Commissioner issued a Decision Notice in this matter dated 19 April 2010. It bears the reference number FS50274047. The Notice explains at paragraph 17 that the Insolvency Service had in turn explained to the Commissioner that it, the Service, considered that if an allegation was made by an insolvency practitioner, it was only the “starting point” of an investigation as this was the opinion of the insolvency practitioner. In paragraph 18 the Commissioner stated:

“The Commissioner considers that a director subject to such a procedure would not expect their personal data from the D Return to be provided for the world at large because the report is one document forming part of an investigation in which those details which may, or may not, be upheld in any further action.”

8. Paragraph 19 pointed out that in this case the director did not consent to disclosure as he had not been asked to do so. The Insolvency Service, it was pointed out, had had no contact with the director prior to the submission of the D Return. Paragraph 19 went on as follows:

“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 this personal data.”

9. At paragraph 22, it was further observed that given the chronology in the present case and the fact that the Appellant’s request had been sent on 1 September 2009, at which time the D Return had “very recently” been concluded, disclosure “could pose a threat to the data subject’s emotional wellbeing.” The paragraph added that disclosure:

“... may also affect the director’s attempts to gain employment or establish a new company.”

10. Paragraph 23 then considered whether there was “any compelling public interest in disclosure”. At paragraph 25, the Commissioner concluded that 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”.

Notice of Appeal

11. The Appellant's Notice of Appeal is dated 5 May 2010. The grounds are set out in a written Appendix to the Notice. The first ground which will be addressed by the Tribunal appears to be that it is for the "*creditors of company alone*, not for the world at large" (italics in original) to be acquainted with the information requested. Second, it is asserted that the creditors in this case wish to know why they became victims of a failed company. Third, the grounds purport to constitute an assurance that no further use of the D Return will be made since, as is clear from the terms of the redacted extract set out above, no further steps appear to have been taken in the wake of the relevant investigation. Fourth, it is contended that the Commissioner was wrong to rely on the absence of the director's consent to disclosure of the D Return without at least a further consideration of whether the director had in any way indicated his opposition to disclosure. Failure to verify as much was, it was asserted, failure of "a fundamental data protection requirement". Fifth, it was contended (on the ground that this constituted a separate contention at all) that the Insolvency Service should not "be permitted to apply an existing practice of non-disclosure as far as D Returns were concerned" and that in consequence, disclosure would not contravene data protection principles. Sixth, the Appellant revisited the balancing test conducted by the Commissioner in his Decision Notice and referred to above. By way of revisiting the second argument referred to above in relation to paragraph 23 of the Decision Notice, the Appellant contended that the interests of creditors outweighed those of the directors or those pertaining to the directors' wellbeing. Seventh, the Appellant took issue with the Commissioner's finding that the director's employment prospects had to be considered, given that as it seemed in February 2009, the director in question was in fact involved in establishing a new company. In this connection, the

Appellant added that since it appeared that the D Return in this case did not indicate responsibility or provide any transparency as to what insight into the company's demise, little if any, harm would result. In the Tribunal's view and from its earlier exchanges with the Commission, the Appellant appears to have suggested, and therefore may have believed, that the Report related to the company as distinct from the individual director. Eighth and finally, the Appellant repeated his contention that the creditors here had little, if any, other information or means of being acquainted with an understanding as to how the company's insolvency occurred.

### The law

12. Section 40 of FOIA provides in relevant part as follows, namely:

“(2) 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.”

13. 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 and under this Act will 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 and under this Act will 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) was disregarded.”

14. The relevant description of “personal data” is to be found at section 1(1) of the 1998 Act (DPA) which provides as follows, namely:

“... “personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

15. The relevant data protection principles are set out in Part 1 of Schedule 1 to the DPA. The first data protection principle is that:

“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 ...”

16. The Tribunal agrees with the Commissioner, and in particular with the content of the Commissioner’s written Response, that the only relevant condition from Schedule 2 in this case is condition 6(1) which provides as follows, namely:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

#### The Tribunal’s findings

17. The main consideration of this Appeal is whether personal data is involved and, in particular, whether the D Return constitutes a director’s personal data. The Tribunal has no hesitation in so finding. In this case, the information is clearly about an identifiable individual whom the Tribunal assumes is still living and the information therefore comprises information which is biographical in the sense that it is personal data arising from both a professional, as well as a private context. See e.g. *Butters v Information Commissioner* (EA/2008/0088), especially at para 23. See also and generally *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550, especially at para 7, which refers to the equivalent exemption in the Scottish FOIA as well as *Durant v FSA* [2003] EWCA Civ 1746.
18. The Tribunal also accepts the related proposition advanced by the Commissioner that the identify of the individual director is critical in this case in the sense that the D Return in the present case, and indeed in any case, could not be redacted so as to remove the director’s personal information. If this were to be done, the resultant information

would be valueless since it would consist of a pro-forma D Return void of any substantial content. For the avoidance of doubt as to the correctness of this proposition, the Tribunal has itself considered the D Report in this case in relation as to whether it could be redacted in the way just indicated and has come to the same conclusion as the Commissioner.

19. It necessarily follows that section 40(2) is engaged. Section 40(2) constitutes an absolute exemption and therefore the public interest balancing test reflected in section 2(2) of FOIA does not arise. From what has been set out above, the next issue is whether disclosure of the D Return would be fair and lawful and therefore in accordance with the relevant condition under Schedule 2 of the DPA.
20. The Tribunal therefore needs to consider the issue of unfairness arising under condition 6(1). The Tribunal pauses here to note that it is also entirely satisfied that in considering the issue of fairness, the relevant time at which to address this issue relates to the time of the response to the request. In addition, and this is self-evident, disclosure under FOIA is to be treated as disclosure to the world at large. This last matter touches upon one of the principal issues raised by the Appellant, namely that disclosure is only if not principally sought on behalf of the creditors and no larger constituency.
21. The Tribunal is also entirely satisfied in this case on the basis of the material surveyed above that the freedoms and legitimate interests of the data subject in this case include the following, namely:
  - (i) there will generally be no disclosure of a D Return if only given the fact that of itself it is not, necessarily and finally, indicative of any ultimate finding of unfitness;

- (ii) even in the light of the matters set out above in (i), it can properly be inferred that a director as a data subject would normally not consent to disclosure of a D Return regarding his activities as director;
  - (iii) the expectation described in (ii) above was and is reflected in the Insolvency Service's position in not disclosing such Returns, coupled with the fact that officeholders such as liquidators would formally acquaint directors of such effect; and
  - (iv) the evidence confirmed that directors would not as a matter of practice provided with copies of any D Return relating to them."
22. The Tribunal is next bound to ask itself whether the Commissioner properly took into account the possible and potential detriment which might arise should a D Return be disclosed. Quite apart from what can in general terms be regarded as a matter of natural justice (in the sense that a director will normally never see a D Report), the Tribunal has little doubt that disclosure could adversely affect employment prospects. In particular, if disclosure were to occur in a case where no further formal action were taken against a director, the same would also have a possible potential detrimental effect if only in terms of an emotional adverse reaction on the director himself.
23. A specimen D Return has been shown to the Tribunal and to the Appellant. The Tribunal finds it difficult to see how even, on its face, quite apart from the actual D Return employed in the present appeal, it is at all possible to discover or infer with any degree of certainty how a company such as the company in the present case arrived at a state in which it was put into insolvent liquidation. This conclusion is reinforced by the view that the Tribunal has taken in this case with regard to the individual information in this case which the Tribunal has been shown.

24. As referred to above at paragraph 11, the information has been sought with a view to educating the creditors of the company as to how the company came to be put into liquidation as distinct from the need to inform the public at large. The Tribunal accepts the Commissioner's submission in this regard that FOIA is concerned principally, if not exclusively, with the public's right to be informed and not in any way with private rights such as those arising in a case of this sort.

25. The test as to fairness embodied in condition 6(1) differs somewhat from the overall test embodied in the principal provisions of FOIA, namely section 2(2)(b). In *Corporate Officer of the House of Commons v Information Commissioner and Norman Baker* (EA/2006/0015 AND 0016), the Tribunal in that case made the following statement, namely:

"However, because the processing must be "necessary" for the legitimate interests of members of the public to apply, we find that only where (i) [the public interest] outweighs or is greater than (ii) [prejudice to the data subject's rights] should the personal data be disclosed."

26. It is well established that "necessary" in this context means "reasonably necessary". The Tribunal has been invited to consider a passage in the *Butters* decision referred to above at paragraph 29 which reads as follows:

"The Tribunal considered that whilst there was a legitimate interest in the public being confident of the fitness to practice of nurses, the IC had been correct in concluding that this did not require disclosure of complaints. In terms of paragraph 6, the legitimate interest did not make disclosure to the world "necessary". There were other means by which this confidence could be maintained, most notably through a regulatory system which publicised its determinations where the particular professional had been found not to be fit and proper. The

public confidence would not be increased by a knowledge of any or all complaints, whether or not well founded.”

27. The Tribunal finds the analogy with the facts in that case compelling. In that case, the appellant had requested a copy of a statement submitted to a Nursing Council by a nurse on duty at the time and place of the appellant’s mother’s death.

### Conclusions

28. The Tribunal turns again to a consideration of the various grounds set out in the Appellant’s Notice of Appeal enumerated above.
29. As to the first ground, it follows from the passages set out above that reliance on the creditors’ need to know totally misapprehends the function and purpose of FOIA. It is apparent the disclosure in all cases must be considered in terms of a disclosure to the public at large.
30. The second ground addresses the reason as to why the creditors needed to be acquainted for the reasons for the company’s failure. This point overlaps with that of the former point. It is also been indicated above that in any event, a D Return will provide little, if any, assistance as to a proper understanding of how a company had come to be placed into liquidation or otherwise failed.
31. The third ground presupposes an assumption by the Appellant that no further use will be made of the D Return if disclosed. If, as here, a director is not thereafter subject to any formal allegation of unfitness or misconduct, it is impossible to see how disclosure will assist either the Appellant’s or the public’s understanding as to the reason for the company’s failure.

32. Fourth, the Appellant addresses the issue of consent, or more accurately, the absence thereof. There is no obligation on the data controller or the Commissioner in this case to seek consent in the way alleged. It may be desirable, but the same is certainly not mandatory.
33. Fifth, it is suggested that the Insolvency Service should not be allowed to abide by its existing practice of non-disclosure. The Tribunal views this as a misapprehension of the balance which needs to be struck. This particular consideration merely goes towards justifying the director's reasonable expectation that a D Return would normally not be disclosed.
34. Sixth, with regard to the alleged breach of any relevant data protection principle, the Tribunal merely refers back to paragraph 26 above.
35. Seventh, the Tribunal needs to stress the fact that the overall test is one of fairness, not the balancing of public interest against private interest. In any event, the Tribunal fully accepts that the revelation of the D Return would contribute nothing to a public interest in the sense that that expression refers to interests which members of the public might hold or even, given the factual background, the interests of the creditors. The Appellant took issue with the Commissioner's finding that the director's employment prospects had to be taken into account. The answer to this is that the relevant date is that of the response. At that time, it was not, and would not have been, clear how the employment prospects of the director might have been affected.
36. Finally, the fact that the D Return might have failed to shed any light on the reasons for liquidation is ultimately not for consideration. The issue is whether it would be fair to the director to disclose it. The Appellant claims that no other source of information regarding the corporate failure exists. However, the Tribunal is not satisfied that the D Return is itself in any event any form of guide in that regard.

37. For all the above reasons, the Tribunal dismisses the Appellant's appeal.

Signed

David Marks QC  
Tribunal Judge

Dated: 2<sup>nd</sup> November 2010