

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2021

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 submitted a request to the Insolvency Service seeking information about its process for considering applications for Debt Relief Orders (DRO). The complainant also sought information about a specific DRO awarded to a named third party. The Insolvency Service provided the complainant with some information about the process of DROs. It sought to withhold the information specific to the named third party's application on the basis of section 40(2) (personal data) of FOIA.
2. During the course of the Commissioner's investigation the Insolvency Service provided the complainant with additional information about its process for considering DROs. However, the Commissioner is satisfied that on the balance of probabilities, the Insolvency Service does not hold any further information falling within the scope of the complainant's request about the process of DROs beyond that information which has now been provided to him. The Commissioner has also concluded that the Insolvency Service is entitled to rely on section 40(2) to withhold information specific to the named third party's application.
3. No steps are required.

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 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.

Background

5. This decision notice concerns the issue of Debt Relief Orders (DRO). A DRO is a way by which an individual can deal with their debts if they cannot afford to pay them. The DRO means that the individual does not need to pay certain kinds of debt for a specified period. An individual can only apply for a DRO through an 'approved intermediary'. This is an authorised debt adviser who will make the application on an individual's behalf.
6. More specifically, the requests which are focus of this decision notice relate to the complainant's concerns about a particular DRO that was granted to a specific third party ('the named third party'). The complainant challenged the decision to award the named third party with a DRO. The Insolvency Service revoked the DRO on the basis of the information provided to it by the complainant.

Request and response

7. The complainant submitted the following request to the Insolvency Service on 27 December 2019:

'Please inform me, under the Freedom of Information Act, the steps your service took to verify the information proved by [name of third party] prior to your initially granting him a DRO [on] 19 November 2019. You do not give the date he applied. You rejected, very promptly (22 November 2019) and in a very patronising manner saying I must be 'disappointed', the evidence I gave re his assets etc, in particular the guitar returned to him, the subject of his debt to me, which suggests you made no further enquiries. Enquiries of this nature are far easier for a Government organisation than for a private citizen, but

I was able to provide further evidence of his purchases etc subsequently (I all ready [sic] had this information but you did not refer back to me before very rapidly issuing the DRO). It concerns me that others in my position may have lost because of your promptness in issuing DROs without your having made essential checks.

2 Please also inform me, under the Freedom of Information Act, of what further investigations you performed after my objection and complaint. Another person in my situation may not have had the amount of evidence I provided and may have had to accept your initial ruling, an injustice.'

8. The Insolvency Service responded on 27 January 2020, under reference number FOI2019-140, and explained that it held information falling within the scope of this request but it considered this to be exempt from disclosure on the basis of section 40(2) (personal data) of (FOIA).

9. The complainant contacted the Insolvency Service on the same day and submitted a further request in the following terms:

'I presume I have to accept that you cannot legally inform me of the details regarding the person to whom the DRO was initially allowed. I therefore rephrase the request to ask what steps your team takes, in general, to ensure that claims have merit.'

10. The Insolvency Service responded on 12 February 2020, under reference number FOI2019-151, and confirmed that it held the requested information. It provided the complainant with a description of the process followed and a link to the DRO process.¹

11. The complainant contacted the Insolvency Service on 13 February 2020 and asked it to conduct an internal review of this response. In his email he also included the following two additional requests:

1. *'Please inform me of the debt adviser involved in this case', and*
2. *'What checks are performed in these circumstances (before granting a DRO or if your circumstances change during your DRO)...and, if the info is allowable, were performed in this case, particularly after my objection where [name of Insolvency Service employee] in her letter dated 22 November 2019 states 'extensive investigations' were performed.'*

<https://www.gov.uk/government/publications/getting-a-debt-relief-order/getting-a-debt-relief-order>

12. The Insolvency Service responded on 23 March 2020. With regard to the internal review on request FOI2019-151 it explained that it did not hold any further information about the general steps that are taken to ensure a DRO application claim has merit. With regard to the additional requests, in relation to the first request the Insolvency Service confirmed that it held information but it considered this to be exempt from disclosure on the basis of section 40(2) of FOIA. In relation to the second request, the Insolvency Service explained that the checks that are performed in the circumstances outlined have already been provided in response to request FOI2019-151. Therefore, the Insolvency Service considered this to be a repeated request and refused it under section 14(2) of FOIA. In relation to the information falling within the scope of the second request specific to named third party's case, the Insolvency Service explained that such information was held but it considered this to be exempt from disclosure on the basis of section 40(2) of FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 24 March 2020 in order to complain about the way his request for information had been handled. The complainant initially agreed with the Commissioner that the scope of his complaint was limited to the following points:
- a) He argued that the Insolvency Service had failed to provide him with sufficient information to fulfil his request of 27 January 2020 which sought details of the general steps the Insolvency Service takes to assess the merit of DRO claims. More specifically, he noted that the information provided to him by the Insolvency Service did not include any details about how an individual's credit cards and Paypal accounts are investigated nor any details about how an individual's assets are investigated.
 - b) He disputed the Insolvency Service's reliance on section 40(2) of FOIA to withhold the name of the debt adviser involved in this case (ie the information sought by the first of his additional requests submitted on 13 February 2020).
14. During the course of the Commissioner's investigation the complainant explained that he also wished to dispute the Insolvency Service's decision to rely on section 40(2) of FOIA to withhold information falling within the scope of his additional request of 13 February 2020 which sought details of the specific steps taken in relation to the DRO applied for by the named third party.

15. The scope of the Commissioner's investigation has therefore been to investigate the grounds of complaint as identified at points a) and b), and the additional ground of complaint set out in the preceding paragraph, ('ie ground of complaint c').

Reasons for decision

Complaint a)

16. In scenarios such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
17. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request.
18. In the context of this request, it is important to note that the right of access under FOIA is simply to recorded information.
19. As part of its response to the complainant the Insolvency Service has provided the complainant with a description of the process of how a DRO was awarded and a link to guidance about this process.
20. As part of her investigation of this particular complaint the Commissioner focused on establishing with the Insolvency Service whether it held any recorded information which detailed the process of how a DRO was awarded. The Commissioner initially asked the Insolvency Service whether it had any internal guidance documents which staff use when assessing the merits of DRO claims. She specifically asked the Insolvency Service whether it had any specific information detailing whether staff should assess an individual's credit cards, Paypal accounts or assets when assessing whether DRO claims have merit. Finally, the Commissioner asked the Insolvency Service that if it does not hold any guidance documents advising staff how to check the merits of DRO claims, how does it ensure that such claims are being considered in a uniform and consistent way?
21. In response the Insolvency Service explained that the process for granting a DRO involves a number of automated checks being undertaken. It noted that these checks do not involve individuals from the DRO team within the Insolvency Service. Rather, if these checks are 'passed' then an application for the DRO is made without any intervention by the DRO team. The Insolvency Service noted that in this

case the named third party's application 'passed' these checks and the DRO was made. In terms of recorded information held about this process, the Insolvency Service explained to the Commissioner it held a flow chart detailing these automated checks. At the Commissioner's request the Insolvency Service provided the complainant with a copy of this flowchart during the course of her investigation.

22. The Insolvency Service explained to the Commissioner that this checking process may not identify all information concerning an individual's eligibility for a DRO (which was the complainant's concern in relation to the third party individual). However, it explained that if the check is made, and no adverse information is identified, then the official receiver must make a DRO. The Insolvency Service explained that this 'presumption' that an applicant qualifies for a DRO is built in to the legislation and provides a requirement on the official receiver to accept the information in the application unless the prescribed checks indicate otherwise. The Insolvency Service explained that the failsafe for creditors is that if they consider an application has been wrongly made they can object (which is what the complainant did in this case). The Insolvency Service explained that were an objection made the case is reviewed, further information is requested if required, and a decision made whether or not to revoke the DRO (in this case the DRO was revoked on the basis of information provided by complainant).
23. In response to the Commissioner's specific questions about whether guidance is provided to staff on assessing the merits of DRO applications, the Insolvency Service emphasised that as explained above the initial assessment to make the DRO is an automated process which does not require individual staff to make a decision unless the application 'fails' the automated checks.
24. With regard to the Commissioner's question about how the Insolvency Service ensures that the applications for DROs are considered in a uniform and consistent way, the Insolvency Service explained that as the checks are automated they are by their very nature are uniform and consistent. The Insolvency Service explained that it is worth noting that the automated process has been in operation for more than 10 years and used to process in excess of 250,000 DRO applications with only a small number of complaints or objections every year (each of which is considered on its merits as in this case).
25. Having considered the Insolvency Service's response to her initial enquiries the Commissioner sought further clarification as to whether it held any written guidance for staff in the small number of cases where objections or complaints are received against DROs. In response the Insolvency Service confirmed that it held such guidance, and provided the Commissioner with a copy of it, but explained that it was not

prepared to disclose this under FOIA as it was not used in the case of the third party's DRO and therefore was not relevant.

26. The Commissioner has carefully considered the scope of the complainant's requests about the Insolvency Service's processes in relation to DROs and the recorded information it actually holds about how it assesses DRO applications. The Commissioner notes that the request of 27 January 2020 sought details of the steps the Insolvency Service takes 'in general' to assess DRO applications. In the Commissioner's view the recorded information which the Insolvency Service holds which falls within the scope of this request consists of the flowchart setting out the automated process. This has now of course been provided to the complainant. As this flowchart was not provided to the complainant by the Insolvency Service when it responded to the request, the Commissioner has therefore upheld complaint a).
27. The complainant's follow up request of 13 February 2020 also sought details of the checks the Insolvency Service performs in assessing DROs. In the Commissioner's view this request focuses on establishing what steps were taken (or what checks were followed) in the relation to the named third party's DRO which the complainant contested. Although the Insolvency Service does hold guidance for its staff on how to deal with contested DROs, as this guidance was not used in the particular circumstances of this case, the Commissioner accepts that it falls outside the scope of this request.
28. In light of the above the Commissioner is satisfied, on the balance of probabilities, that the Insolvency Service does not hold any further recorded information falling within the scope of these parts of the complainant's requests beyond that which has now been provided to him.

Complaint b)

29. The Insolvency Service withheld the name of the Authorised Intermediary, through whom the third party in question applied for the DRO, on the basis of section 40(2) of FOIA.
30. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

31. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. 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.
37. 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.
38. In the circumstances of this case, the Commissioner is satisfied that the name of the Authorised Intermediary clearly constitutes personal data as the individual in question is identifiable from their name. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

² As amended by Schedule 19 Paragraph 58(3) DPA.

the FOIA. As noted above, the second element of the test is to determine whether disclosure would contravene any of the DP principles.

40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. Article 5(1)(a) of the GDPR states that:

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

42. In the case of an 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 if to do so would be lawful, fair and transparent.

43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

44. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *'processing shall be lawful only if and to the extent that at least one of the'* lawful bases for processing listed in the Article applies.

45. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph

46. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
47. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
49. The Commissioner understands that the complainant wishes to be provided with the name of the authorised intermediary as he disagrees with the initial decision to allow the named third party to apply for a DRO. The Commissioner considers this to be a purely private concern, albeit that she accepts that the complainant has genuine concerns about how the individual in question was initially allowed a DRO. As a result she is persuaded that this is a legitimate interest.

Is disclosure necessary?

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

50. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
51. The Insolvency Service explained that it had not provided the complainant with the name of the Authorised Intermediary, but it had provided him with the name of the organisation they work for, National Debtline, to facilitate the complainant making a complaint to them about the actions of the authorised intermediary.
52. In light of this the Commissioner is of the view that the disclosing the name of the authorised intermediary under FOIA is not necessary. As the Insolvency Service suggests, if the complainant wishes to complain about actions of the authorised intermediary he can already do so to the organisation that the authorised intermediary works for.
53. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
54. The Commissioner has therefore decided that the Insolvency Service was entitled to withhold the named of the authorised intermediary information under section 40(2), by way of section 40(3A)(a).

Complaint c)

55. The Insolvency Service also sought to withhold the information relating to the specific actions it took in relation to the DRO applied for by the named third party on the basis of section 40(2) of FOIA.
56. The Commissioner has considered whether this information is exempt from disclosure using the same framework set out above in relation to complaint (b).
57. Having considered the withheld information the Commissioner is satisfied that it constitutes the personal data of the named third party as the information clearly relates to him and he is identifiable from it.
58. In terms of whether there is a legitimate interest in the disclosure of this information the Commissioner accepts that the complainant wishes to access this information in order to better understand the Insolvency Service's decision making in relation to this DRO. As above, the Commissioner considers this to be a purely private concern albeit that

she accepts that the complainant has genuine concerns about the Insolvency Service's handling of this DRO. As a result she is persuaded that this is a legitimate interest.

59. In contrast to complaint b), the Commissioner accepts that disclosure of this information is necessary in order to meet this legitimate interest. Disclosure of other information, for example details of the Insolvency Service's general processes, is not sufficient to fulfil the legitimate interest in fully understanding its actions in relation this specific case.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

60. Therefore it is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
61. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern about the disclosure; and
 - the reasonable expectations of the individual.
62. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
63. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
64. In the Commissioner's view the named third party would have no expectation that the Insolvency Service would disclose, under FOIA, details of his DRO application to the general public. Having considered the nature of the withheld information, in the Commissioner's view its disclosure would clearly invade the privacy of the named third party and be likely to cause him harm and/or distress. Therefore, whilst the

Commissioner accepts that the complainant has a legitimate interest in accessing this information, she considers that this is clearly insufficient to outweigh the named third party's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

65. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
66. The Commissioner has therefore decided that the Insolvency Service was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

67. 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

68. 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.
69. 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

Jonathan Slee
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