

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2022

Public Authority: The Insolvency Service
(Department for Business, Energy and Industrial Strategy)

Address: 3rd Floor
Cannon House
18 The Priory Queensway
Birmingham
B4 6FD

Decision (including any steps ordered)

1. The complainant requested information about specific costs charged by three third parties for legal advice and representation during proceedings against the charity Kids Company. The Insolvency Service withheld the information under section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the Insolvency Service has correctly relied on section 43(2) of FOIA and that the balance of the public interest favours maintaining this exemption.
3. The Commissioner does not require further steps.

Nomenclature

4. The Insolvency Service is not listed as a separate public authority in Schedule 1 of 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. On 12 February 2021 the High Court delivered its verdict on a case brought by the Official Receiver under the Company Directors Disqualification Act 1986 against the charity Keeping Kids Company, more commonly known as Kids Company.
6. The Official Receiver sought to disqualify all of the directors who had been in office at or shortly before the date of the charity's collapse, together with its Chief Executive Officer, Ms Batmanghelidjh, arguing that she should be classed as a "de facto" director, and also disqualified.
7. The case was thrown out. In her judgement Mrs Justice Falk found that a disqualification order was not warranted against any of the directors and that Ms Batmanghelidjh was not a de facto director. She added that had Ms Batmanghelidjh been a de facto director she would not have made a disqualification order against her. Mrs Justice Falk also criticised several aspects of the Official Receiver's approach to the its investigation and praised the directors and Ms Batmanghelidjh.
8. Lesley Anderson QC and Gareth Tilley (junior counsel), instructed by Womble Bond Dickinson (UK) LLP, represented the Official Receiver during the proceedings. These three parties are each referred to in the request for information considered in this decision notice.
9. The Insolvency Service has previously disclosed information about the overall legal costs of the proceedings under a previous request. Specifically, in response to a request dated 18 January 2021 the Insolvency Service disclosed on 12 February 2021 that the costs incurred by the Official Receiver from the use of external legal services during the proceedings, which ran between 19 October and 17 December 2020, was £738,909.11.

10. The Commissioner notes that Mr Tilley's fees, which make up part of this total, are already, separately, in the public domain. This is addressed as part of the Commissioner's considerations, further on in this notice.
11. The case was brought by the Official Receiver. The request for information considered in this decision notice was made to the Insolvency Service. The Technical guidance for Official Receivers¹ published by the Insolvency Service explains the status of the Official Receiver and the relationship between the Official Receiver and the Insolvency Service as follows:

"Official receivers are appointed, removed and act under the general direction of the Secretary of State for BEIS. On appointment the official receiver becomes a statutory office holder but is also a civil servant employed by The Service [sections 399 and 401(4)].

The official receiver's duties as a statutory office holder are largely set out in the Insolvency Act 1986. They may have additional functions conferred on them by the Secretary of State. On an operational level the official receiver complies with any directions, instructions and guidance issued by The Insolvency Service."

12. As wider context, the Commissioner is aware that there has been significant media coverage of the collapse of the charity, much of it focussed on Ms Batmanghelidjh, who was a high profile figurehead of the charity.

Request and response

13. On 9 March 2021 the complainant wrote to the Insolvency Service and requested information in the following terms:

"Can you provide the full costs charged by Womble Bond Dickinson, Gareth Tilley and Lesley Anderson for the whole proceedings in relation to the IR's recently concluded case against the charity Kids Company.

Can you break the proceeding costs down in an itemised list."

¹ [1. The Official Receiver - Technical guidance for Official Receivers - Guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/the-official-receiver-technical-guidance-for-official-receivers)

14. The Insolvency Service responded on 26 March 2021. It refused to provide the requested information citing the commercial interests exemption under section 43(2) of FOIA.
15. Following an internal review the Insolvency Service wrote to the complainant on 11 May 2021. It maintained its original position and provided additional explanation as to the basis for this position.

Scope of the case

16. The complainant contacted the Commissioner on 19 May 2021 to complain about the way their request for information had been handled.
17. The following analysis focuses on whether the exemption at section 43(2) of FOIA was cited correctly.

Reasons for decision

Section 43(2) – prejudice to commercial interests

18. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

19. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must

be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Does the information relate to a person's commercial interests?

20. The Insolvency Service argues that disclosure of the requested information would be likely to prejudice the commercial interests of Womble Bond Dickinson (WBD), Lesley Anderson QC and Mr Gareth Tilley as well as those of the Official Receiver and its own commercial interest.
21. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43², which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
22. The Insolvency Service argues that although details of its overall spend (including monies spent with external lawyers) and the names of its panel solicitors and some hourly rates are publicly available, specific spends with individual lawyers or external firms or businesses are by their very nature commercially sensitive.
23. It argues that if WBD's charging rates were to be disclosed it would be likely to prejudice WBD's ability to participate in future procurement exercises because knowledge of the exact fees charged could enable other providers to undercut that fee and that buyers procuring WBD's services could use the figures to argue for lower payment.
24. Similarly, it argues that Lesley Anderson QC and Mr Gareth Tilley both operate as businesses in their own right and that should their individual fees be disclosed this would compromise their ability to negotiate and charge commercial rates.
25. With regards to its own commercial interests and those of the Official Receiver, the Insolvency Service argues that disclosure of specific fees paid would be likely to affect its ability to obtain best value for public funds in future tendering exercises because it would be likely to lead to

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

negotiations with suppliers and potential suppliers being distorted by reference to existing or other arrangements with suppliers.

26. The Commissioner accepts that the interests in question are the commercial interests of WBD, Lesley Anderson QC, Gareth Tilley, the Official Receiver and the Insolvency Service.

The causal relationship

27. Regarding the commercial interests of WBD, the Insolvency Service argues that if WBD's charging rates were to be disclosed it would be likely to prejudice WBD's ability to participate in future procurement exercises because knowledge of the exact fees charged could enable other providers to undercut that fee and that buyers procuring their services could use the figures to argue for lower payment. It has consulted with WBD which has confirmed its strong objection to the release of any information about its specific costs to a third party (save for inclusion within a global figure for the Insolvency Service's spend across all of its suppliers and external advisers in this case, which has already been disclosed). The Insolvency Service argues that WBD work in the private and public sector and there is a concern that publication of detailed information about its charging rates might have an adverse effect on its ability to charge and negotiate fees in other matters in both of these fields of operation.
28. Regarding the commercial interests of Lesley Anderson QC and Gareth Tilley, the Insolvency Service makes a similar argument to that regarding those of WBD. It states that both parties take instructions in the private and public sector, are in business on their own account and wish to ensure they maintain control over their ability to negotiate and charge commercial rates. It argues that this ability might be harmed or compromised if details of their respective charges were to be published. It states that both parties confirmed that their individual charging rates were regarded as highly commercially sensitive and they expressly confirmed that they did not agree to their charging rates being disclosed to a third party (again, save for inclusion within a global figure for the Insolvency Service's spend across all of its suppliers and external advisers in this case, which has already been disclosed).
29. Regarding its own commercial interests and those of the Official Receiver, the Insolvency Service states that they are obliged to ensure all procurement is conducted fairly and in the public interest with the express aim of obtaining best value for public funds. It argues that negotiations with suppliers and potential suppliers are by their very nature commercially sensitive and if information about existing or other arrangements with suppliers were disclosed negotiations with suppliers

and potential suppliers would be likely to be distorted by reference to information about those arrangements.

30. The Commissioner is satisfied that a causal relationship exists between the disclosure of the information and the anticipated prejudice to the relevant commercial interests.

The likelihood of the prejudice occurring

31. The Insolvency Service argued that a disclosure of the information 'would be likely' to cause the prejudice it had foreseen. The Commissioner therefore considers that the chance of prejudice occurring must meet the requirement of being a real and significant risk in order for him to find the exemption engaged.
32. The Commissioner has considered the commercial interests of each relevant party and notes that the fees charged by Mr Tilley in this matter are already in the public domain as his rates as junior counsel are published on the Attorney General's Civil Panel Counsel's website. He is therefore not persuaded that prejudice would be likely to occur to the commercial interests of Mr Tilley.
33. However, with regard to the commercial interests of the Insolvency Service itself and the Official Receiver and of WBD and Lesley Anderson QC, the Commissioner considers that the Insolvency Service's arguments are persuasive. He accepts that the prejudice foreseen by it would be likely to occur at points in the future if this information were to be disclosed.
34. The Commissioner notes that the overall costs incurred by the Official Receiver from the use of external legal services during the proceedings have already been disclosed. However, he accepts the Insolvency Service's arguments that to disclose a breakdown of these costs would be likely to prejudice the commercial interests of the Insolvency Service and the Official Receiver as publication of these costs would be likely to affect the price quoted to the Insolvency Service for similar work in the future; companies may seek to closely match the disclosed figures, and therefore wouldn't offer best value for money. Currently, although the figure for the total costs has been disclosed this is not broken down into the fees paid for different services, it is the disclosure of this detail that would be likely to have an effect on the prices quoted for future legal work.

The Commissioner's conclusions

35. The Commissioner has decided that the Insolvency Service is correct in that section 43(2) is engaged by the withheld information. He must

therefore go on to consider the public interest test required by section 2 of the Act.

The public interest

36. The test, as set out in section 2(2)(b), is whether “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

The public interest in the disclosure of the information

37. The Insolvency Service recognised that there is a public interest in effective use of public money, whereby disclosure would allow the public to know that the public purse is being used effectively and therefore in promoting accountability and transparency about decisions relating to the use of public money within the Insolvency Service, particularly in the context of unsuccessful proceedings.
38. The central public interest in the disclosure of the information rests around creating greater transparency over the Insolvency Service’s use of a significant amount of tax payers’ money to pursue legal proceedings which were unsuccessful and in which the Judge criticised the Official Receiver’s approach to its investigation which led to the action being brought. A disclosure of the withheld information would provide further details relating to the costs versus the benefits of the action. Although the Commissioner notes that the overall costs incurred by the Official Receiver from the use of external legal services during the proceedings have already been disclosed.
39. There is a public interest in the public being able to access relevant information where spending such as this is approved, and to understand the Insolvency Service’s reasoning and methodology for the decisions it has taken, particularly in cases where its reasoning may not be immediately understandable. In this way the public would be better able to hold the Insolvency Service to account for the decisions it has taken, and can form their own opinions on the Insolvency Service’s spending decisions from an informed basis.

The public interest in the exemption being maintained

40. The Insolvency Service argues that, if the information was made available to competitors in the legal services marketplace, it would undermine its own commercial interests and those of the Official Receiver in similar transactions in the future, thereby affecting its competitive edge and its ability to obtain legal services at best value to the public purse. Specifically it argues that publication of these costs would be likely to affect the price quoted to the Insolvency Service for

similar work in the future; companies may seek to closely match the disclosed figures, and therefore wouldn't offer best value for money.

41. The Insolvency Service also argues that it has already gone some way to meeting the public interests in knowing the costs of the disqualification proceedings by disclosing the overall costs of the action and that the public interest in knowing specifically how this cost is broken down is lower than the interest in knowing the overall cost.
42. It therefore argues that the public interest in achieving best value for public money was better met by withholding the information.
43. It also argues that there is a general public interest in maintaining a competitive market for providers of legal services.

The Commissioner's analysis

44. The Commissioner recognises that there is a strong public interest in the disclosure of information regarding the Insolvency Service's decision to bring these proceedings and the cost to the public.
45. The Commissioner accepts that there is a significant public interest in the transparency of decisions requiring the investment of large sums of public money.
46. That said, the Insolvency Service's arguments are also very strong in identifying likely issues which would arise from a disclosure of the withheld information. These issues would be likely to affect its commercial negotiations in some instances in the future, and as a result, would be likely to be detrimental to its ability to achieve best value for money in future negotiations in similar circumstances. There is a strong public interest in protecting the best use of public funds.
47. In addition the Commissioner considers that the public interest in the transparency of decisions requiring the investment of large sums of public money has already been largely met by the previous disclosure of the costs incurred by the Official Receiver from the use of external legal services during the proceedings. Although the information requested under the request considered in this decision notice would provide more detail about this spending the Commissioner considers that disclosure of this additional information would be of limited additional benefit to the public interest.
48. For this reason, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The Insolvency Service was not, therefore, obliged to disclose the requested information.

Right of appeal

49. 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

50. 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.
51. 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

Ben Tomes
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