Technical Bulletin

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Privilege and Access to Information

PRIVILEGE AND ACCESS TO INFORMATION

1. INTRODUCTION

1.1 Persons acting as insolvency office holders may sometimes find that information which they produce or which comes into their possession during the course of their work can be made available to third parties under the various legal rules relating to the disclosure and use of information. The purpose of this Technical Bulletin is to identify areas where information generated or held by office holders may be subject to disclosure to outside parties, and to summarise the relevant legal provisions.

1.2 The topics covered by this Bulletin are:

- Legal professional privilege
- The Civil Procedure Rules
- The Freedom of Information Act 2000
- The Data Protection Act 1998
- Information relating to the conduct of directors

1.3 The main points discussed are:

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- Nature and scope of privilege
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1.4 The information in the Bulletin is correct as at 1 February 2013. It applies to England and Wales only.

2. LEGAL PROFESSIONAL PRIVILEGE

2.1 Nature and scope of privilege

2.1.1 The case law on legal professional privilege has divided the privilege into two categories: legal advice privilege and litigation privilege. Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given. Legal advice privilege gives the person entitled to it the right to decline to disclose, or to allow to be disclosed, the confidential communication or document in question.

2.1.2 Litigation privilege applies in circumstances where litigation is in existence or is contemplated. For the privilege to apply the litigation must be adversarial, not investigative or inquisitorial. Litigation privilege covers not only communications between lawyer and client, but can extend to communications between the lawyer or client and a third party or to any document brought into existence for the dominant purpose of being used in litigation.

2.1.3 Legal advice privilege applies to communications between lawyer and client where advice is sought or given on any legal matter. It is not confined to advice given on the client's legal rights and obligations, or on matters which may be the subject of litigation. Moreover, for the purposes of privilege, legal advice is not confined to telling the client the law. It also includes advice on what would be a sensible course of action in a relevant legal context. Legal advice privilege applies <u>only</u> to communications between the client and their legal advisers. Documents created by third parties, and the client's own internal or preparatory documents will not be protected by privilege.

2.1.4 The nature and scope of legal advice privilege was examined in detail by the Court of Appeal and the House of Lords in *Three Rivers District Council v. Bank of England*. This case arose from the collapse of BCCI, and concerned the question of whether privilege attached to documents prepared by the Bank, and communications between the Bank and its solicitors, in connection with the Bank's evidence to the Bingham Inquiry. The purpose of the Bingham Inquiry was to enquire into the supervision of BCCI under the Banking Acts and the actions taken by the UK authorities, including the Bank of England. The liquidators of BCCI sought the disclosure of a number of documents by the Bank. Initially they sought only documents prepared by employees of the Bank for the purpose of being passed to the Bank's solicitors, but by a later application they also sought the production of documents passing between the Bank and its solicitors. These documents related to the nature, presentation and timing of the Bank's submissions to the Inquiry, on which the solicitors had been asked to advise.

2.1.5 On the first of these applications (*Three Rivers No. 5*[1]), the Court of Appeal held that the only documents for which privilege could be claimed were communications between the Bank and its solicitors seeking or giving legal advice. The documents prepared by the Bank's employees, even if prepared for the purpose of being shown to the solicitors, did

1 [2003] EWCA Civ 474; [2003] QB 1556; [2003] 3 WLR 667

not qualify for privilege because the dominant purpose of the material was to put relevant factual material before the Bingham Inquiry and not to obtain legal advice. (The Court also considered the question of the identity of the client, which is discussed further below.) On the later application (*Three Rivers No. 6*[2]), the Court had to consider what constituted 'legal advice' for the purposes of privilege, which had been left unclear in the previous decision. The Court held that legal advice meant advice on the client's legal rights and obligations. The advice on the presentation of the Bank's submissions to the Bingham Inquiry did not constitute advice on the Bank's legal rights and obligations and so did not qualify for privilege. Leave to appeal against the decision in *Three Rivers No. 5* was refused, but the Bank appealed to the House of Lords against the decision in *Three Rivers No. 6*.

2.1.6 Allowing the appeal, the House of Lords examined the history of legal privilege and the policy reasons for it[3]. The House of Lords held that legal advice privilege applies to communications between lawyer and client where advice on the law, or on possible courses of action, is sought in any legal context. It is not confined to advice on legal rights and obligations, or to circumstances involving litigation. Legal advice privilege is not an outgrowth of litigation privilege, but rather litigation privilege and legal advice privilege are both sub-categories of legal professional privilege. Legal advice privilege covers advice and assistance in relation to public law rights, liabilities and obligations as well as private law rights. The House of Lords endorsed the approach of the Court of Appeal in *Balabel v. Air India*[4], and in particular the observations of Taylor LJ, where he said: 'Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.'

2.1.7 The House of Lords noted some examples of circumstances in which privilege might attach to advice given in a non-litigious legal context. These included advice on making a will, and advice given to the promoters of private bills. In the present case, the advice given by the Bank's solicitors on the presentation of evidence to the Bingham Inquiry was clearly 'advice as to what should prudently and sensibly be done in the relevant legal context', the relevant legal context being the Bingham Inquiry. The communications between the Bank and its solicitors therefore qualified for legal advice privilege.

2.1.8 The position as regards documents created by third parties and the client's own internal documents remains as stated by the Court of Appeal in *Three Rivers No. 5.* Thus in *National Westminster Bank v. Rabobank*,[5] National Westminster Bank challenged Rabobank's claim to legal advice and litigation privilege over certain documents which had been created by Rabobank during its internal investigations into the transaction which had since become the subject of the proceedings. The High Court confirmed that privilege could only be claimed over documents passing between the client and its legal advisers, and did not attach to preparatory materials, even if they were created for the purposes of enabling lawyers to advise. Therefore legal advice privilege did not apply to these documents, because they represented preparatory work by Rabobank and did not constitute communications between lawyer and client.

2.2 Identifying the client

2.2.1 In *Three Rivers No. 5* the Court of Appeal had to consider the question of who constituted the 'client' for the purposes of determining whether legal advice privilege applied. The Court of Appeal's approach raised a number of questions regarding the criteria to be adopted to determine whether communications between lawyers and employees of the client can be treated for privilege purposes as communications between the lawyer and the client. The House of Lords was invited to give a view on this at the same time as the appeal against *Three Rivers No. 6*, but declined to do so as it was not the subject of the appeal. (It should be noted that the difficulties identified in the discussion which follows do not arise in the context of litigation privilege.)

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2 [2004] EWCA Civ 218; [2004] QB 916; [2004] 2 WLR 1065; [2004] 3 All ER 168

3 *Three Rivers District Council & Ors v. Governor and Company of the Bank of England*, [2004] UKHL 48; [2005] 1 AC 610; [2004] 3 WLR 1274; [2005] 4 All ER 948

4 [1988] Ch 317; [1988] 2 WLR 1036; [1988] 2 All ER 246

5 [2006] EWHC 2332

2.2.2 The Bank of England had set up an internal unit ('the Bingham Inquiry Unit') to deal with all communications between the Bank and the Inquiry. It was the Inquiry Unit's communications with the Inquiry that were the subject of the legal advice from the Bank's solicitors and counsel instructed by them, and it was the Inquiry Unit that communicated with the solicitors. The Court of Appeal took the view that it was the Inquiry Unit that was the client for the purposes of considering whether legal advice privilege applied, rather than any single officer of the Bank. The Court said that information provided to solicitors by an employee stood in the same position as information provided by an independent third party, and did not qualify for privilege. Uncertainty therefore remains as to whether companies can effectively rely upon legal advice privilege when they can only communicate with their lawyers through employees or officers.

2.2.3 The courts are therefore still faced with difficulties in identifying the 'client' when a company seeks advice from external legal advisers or in-house lawyers. Under English domestic law, legal advice privilege applies to both in-house and external lawyers[6] (unlike the position under EU law in the context of EU Competition investigations[7]). Therefore, in order to seek to protect such communications, there should be clear documentation as to the identity of those employees or officers authorised to deal with lawyers on particular projects and only these nominated individuals should deal with the external lawyers in order to be regarded as the 'client'. Preparation of all sensitive internal documentation should be delegated to the 'client'. If it becomes necessary to disclose privileged material to an employee or officer other than the 'client', it should only be provided to them on confidential terms so as to avoid any waiver of privilege.

2.2.4 Where communications between legal adviser and client are made in a non-litigious context via an agent, whether agent of the legal adviser or of the client, legal advice privilege will arise provided that the agent's role is merely to communicate material between the two parties. Therefore if the role of an employee or company officer, who is in direct communication with the legal adviser, is merely to communicate information between the company and the legal adviser, that will not be fatal to the claim for legal advice privilege. If the role is broader and extends to the creation or collection of material, then legal advice privilege will not attach to the communication of such material by the employee (unless the employee amounts to the client). See *Natwest v. Rabobank* above.

2.2.5 In *Price Waterhouse v. BCCI Holdings*[8] Price Waterhouse had been part of a committee investigating problem loans within BCCI. It was held that the committee was more than a mere channel of communication to BCCI's legal advisers since it was involved in collecting evidence and information. It was therefore held that BCCI could not claim privilege in relation to the documents.

2.2.6 Internal client documents that reproduce or reveal communications from the client's legal advisers, which are privileged, are covered by the same privilege[9].

2.2.7 It is to be noted that in proceedings against a person for an offence under the Insolvency Act 1986, section 434C provides that nothing in this Act is to be taken to require any person to disclose any information that he is entitled to refuse to disclose on grounds of legal professional privilege. This was inserted subject to savings specified in SI 2008/948 arts 11 and 12 by Companies Act 2006 (Consequential Amendments etc) Order 2008/948 Sch 1(2) para 105 and has been in force since 6 April 2008.

2.2.8 An equivalent provision has been added to the Company Directors Disqualification Act 1986 by section 20A, subject to savings specified in SI 2008/948 arts 11 and 12, by Companies Act 2006 (Consequential Amendments etc) Order 2008/948 Sch 1(2) para 106(3) and has been in force since 6 April 2008.

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6 *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No.2)* [1972] 2 QB 102,129.

7 *Akzo Nobel Chemicals Ltd v European Commission* (C-550/07 P) [2011] 2 AC 338 (2010) 160 NLJ 1300 (ECJ).

8 [1992] BCLC 583

9 *The Good Luck* [1992] 2 LLR 540

2.3 Other professional advisers

2.3.1 Legal advice privilege only applies to communications between lawyer and client. It does not apply to advice on legal matters given by other professionals.

2.3.2 The case of R (*on the application of Prudential Plc) v. Special Commissioner of Income Tax* [2010] 3 WLR 1042 [2009] EWHC 2494 (Admin) concerned material relating to a commercially marketed tax avoidance scheme in connection with which Prudential had taken advice on tax law from a firm of accountants. The Inland Revenue served notice under the provisions of the Taxes Management Act 1970 for the delivery of documents relating to the scheme. Prudential argued that the documents were protected by legal professional privilege. This was on the grounds that, in the modern context where skilled professional advice on tax law is obtained from accountants, the long-established common law rules regarding legal professional privilege apply to the communications between client and accountant, as the professional adviser, for the purposes of obtaining such legal advice on tax and conducting litigation concerning tax liabilities.

2.3.3 The court rejected this argument. The authorities indicated that for legal professional privilege to apply to legal advice and assistance it had to be given by a member of the legal profession, with exceptions or extensions when the right or privilege arose in litigation, or when litigation was contemplated. It was not disputed that the client of an accountant who acted for him in connection with tax litigation could claim litigation privilege. But this did not mean that legal advice privilege also extended to advice given by accountants on tax law in circumstances where, if the accountant had been a solicitor, the claim to legal professional privilege would not be one based on litigation privilege.

2.3.4 This was applied by Burnett J in *R (on the application of Morville Trading Ltd) v. Manchester Crown Court* [2009] EWHC 3680 in the context of a judicial review application, considering the Revenue's approach towards the treatment and isolation of material potentially attracting legal professional privilege, as produced by taxpayers' accountants pursuant to a lawfully obtained production order for the purposes of an investigation into suspected VAT fraud.

2.3.5 The Court of Appeal affirmed the decision in *R (on the application of Prudential Plc) v. Special Commissioner of Income Tax* [2011] QB 669, dismissing Prudential's appeal. The Court of Appeal made it clear that subject to limited exceptions, legal professional privilege is an absolute rule, which has to be certain in its nature and content, entitling a client to refuse to disclose documents or answer questions, and to require the adviser and others to refuse to do so. The Court of Appeal relied on the fact that Parliament had not created any statutory extension of legal professional privilege to legal advice sought from and given by accountants on tax matters and held that it would be for Parliament and not the courts to formulate an appropriate extension of the scope of the privilege to accountants. The Court of Appeal held that it was bound to hold that legal professional privilege applied, at common law, only as regards advice given by members of the legal professions in their professional capacity and did not extend to non-lawyers, even if the advice they were giving was legal advice, which they were competent to give. Following this decision, legal professional privilege and legal advice privilege were held not to attach to correspondence to and from a company providing claims and project-handling advice in connection with a construction project in *Walter Lilly & Co Ltd v MacKay* [2012] EWHC 649 (TCC), [2012] BLR 249.

2.3.6 The Supreme Court also upheld (by a majority of 5 to 2) the decision of the Court of Appeal that legal advice privilege should cover legal advice provided by members of the legal professions only and accordingly did not cover legal advice provided by accountants in relation to a tax avoidance scheme – see *R. (on the application of Prudential Plc) v. Special Commissioner of Income Tax* [2013] 2 WLR 325 [2013] UKSC 1. Lord Neuberger, who gave the lead judgment, acknowledged the strength of the appellants' case 'in terms of logic'. Nevertheless he concluded that any extension of legal advice privilege would lead to uncertainty and raised questions of policy, which should be the decision of Parliament, which has legislated in the past to extend legal advice privilege to certain professions, such as patent attorneys and licensed conveyancers. The judgment notes that the Government expressly rejected an Office of Fair Trading proposal in 2003 that legal advice given by accountants should be subject to legal advice privilege. Therefore, as the law stands, no communication between a non-lawyer and his client can benefit from legal advice privilege, regardless of its subject matter.

2.3.7 Burnett J in *R (on the application of Ford) v Financial Services Authority*, [2012] 1 All ER 1238, [2012] 1 BCLC 622, considered a claim to joint legal professional privilege made by former executives of a company in administration, where the administrators had provided the FSA with privileged emails and attachments emanating from solicitors retained by the company to advise in connection with the FSA's investigation. It was held that on the evidence it had been established that a former executive of the company had enjoyed joint legal advice privilege with the company and it was accepted that the administrators' waiver of privilege on behalf of the company did not affect his privilege. The need for insolvency practitioners to check the nature and scope of any retainer is therefore an issue to consider.

3. THE CIVIL PROCEDURE RULES

3.1 As a result of changes made to the Civil Procedure Rules with effect from 2 October 2006, a non-party can now obtain any statement of case (for example, particulars of claim, defence, reply or further information) or judgment or order given or made in public with or without permission under CPR5.4C-D depending upon the particular circumstances. Copies will be available without the need for the Court's permission if:

- all of the defendants have filed an acknowledgment of service or a defence or the claim has been listed for a hearing or judgment has been entered in the claim; and
- there is no order or undecided application on file to restrict the release of the documents.

Documents filed or attached to the statement of case (for example, a report or agreement) will only be available if the court gives permission.

3.2 The old rules continue to apply to all statements of case filed before 2 October 2006.

3.3 These changes do not apply to proceedings under the Insolvency Act 1986, as these are governed by the Insolvency Rules 1986 – see *Mansell v. Acton* [2006] BPIR 778.

3.4 They will, however, apply to other proceedings, such as proceedings for debt recovery, which are subject to the Civil Procedure Rules. When presenting their case in such proceedings, office holders will need to bear in mind that such documents may be accessed by outside parties. There are no provisions requiring the court to notify the parties that access has been requested or provided to any statements of case. In some cases it may be possible to make an application to the court to prevent or restrict access to statements of case.

3.5 The rules are supplemented by the Practice Direction (Court Documents) (Practice Direction Part 5A) which sets out how an application for an order preventing or restricting rights of access is to be made. The court is likely to approach any such application in line with the overriding objective enshrined in the Civil Procedure Rules. The Court of Appeal made an order restricting access in *McKennitt v. Ash* [2008] QB 73.

3.6 Careful consideration ought therefore to be given to the information to be included in any statement of case in light of the risk of possible disclosure to third parties under the Civil Procedure Rules. Provided the exclusion of any possible confidential or damaging information is not damaging to the merits of the claim, it could be excluded to minimise such risks.

3.7 For any other documents held on the court file such as witness statements, expert reports, or skeleton arguments, a non-party must make an application for disclosure. The Civil Procedure Rules are silent as to the basis on which access will be granted. Generally once a document is referred to in open court, it will be accessible unless there are compelling reasons for the court to refuse access. See *Dian AO v. Davis Frankel* [2005] 1 WLR 2951 and *Chan U Seek v. Alvis Vehicles Ltd* [2005] 1 WLR 2965. The latter case was considered in *R (on the application of Guardian News and Media Ltd) v. City of Westminster Magistrates Court* [2011] 1 WLR 1173, an appeal by way of case stated against the decision of the magistrates' court refusing the newspaper publisher's application for inspection or disclosure of certain documents in extradition proceedings, which had been held in open court. The Criminal Procedure Rules have no equivalent provision to CPR 5.4C. The Court held also that the publisher could not invoke the provisions of the Freedom of Information Act 2000 to obtain the documents since no good reason had been advanced as to why the checks and balances in that Act ought to be overridden in this case.

3.8 In *G v Wikimedia Foundation Inc* [2009] EWHC 3148 [2010] EMLR 14, Tugendhat J held that orders under CPR r.5.4C(4) prohibiting a non-party from obtaining a statement of case was a derogation from the principle of open justice and, as such, had to be granted only when it was necessary and proportionate to do so. On the facts of that case, the court ordered that a non-party might not obtain a copy of any statement of case other than one edited to remove any reference to the claimant's names or the user name shown in a confidential annex.

3.9 The *Dian AO* case was relied on by Lewison J in *ABC Ltd v. Y* [2012] 1 WLR 532. On the facts of that case, where a Master had already considered the question of access to the court file and had restricted access to it and where certain interlocutory hearings had been held in private, Lewison J held that the Court should not lean in favour of granting permission to a non-party to obtain copies of documents, but instead applied the test of 'whether there are strong grounds for thinking that it is necessary in the interests of justice that [X] should have access to the documents he seeks in so far as they were deployed at hearings held in private'.

3.10 In *Pfizer Health AB v. Schwarz Pharma AG* [2011] FSR 14; [2010] EWHC 3236, in considering an application under CPR 5.4C, Floyd J adopted the distinction drawn in the *Dian AO* case between (a) documents that have been read by the court as part of the decision-making process and (b) those that have been filed but not read. Floyd J held that the court should lean in favour of disclosing the former category to a non-party, who has shown a legitimate interest in obtaining them. It should be borne in mind that an application under this rule must adequately identify the document or class of documents sought and identify the grounds on which they are sought. See also *Re Mobile Phone Voicemail Interception Litigation*, [2012] EWHC 397, [2012] 1 WLR 2545, in which Vos J considered an application by a non-party, namely The Guardian, for disclosure of certain court documents referred to in open court at the pre-trial review, namely the notice to admit and response. The court considered why The Guardian had applied for the documents and the purpose for which it intended to use them and held that there was a real and vital public interest in the dissemination of accurate information about the course of the proceedings (even though The Guardian's motivation was to publish any material about the litigation, which it thought of public interest). The fact that the notice to admit and response had been referred to in open court made it even more important that they were made available to the public, applying the *Dian AO* case.

3.11 It should be borne in mind that arbitration is still confidential and therefore this rule may impact on the forum chosen by litigants.

3.12 This rule may also be a useful tool for finding out the details of pending litigation, and could be used by office holders to obtain the statements of case in litigation in which they may have an interest as to the outcome.

4. THE FREEDOM OF INFORMATION ACT 2000

4.1 Introduction

4.1.1 The Freedom of Information Act 2000 (FOIA), which came into force on 1 January 2005, grants all persons, whether based in the UK or not, a right to access any information held by public authorities. The Act, which aims to make public authorities more transparent and accountable, represents a fundamental change in the way that UK public authorities handle and disseminate information. The impact of this change is of significance well beyond the public sector. In particular, insolvency office holders, although not themselves 'public authorities' for the purposes of the Act, need to be aware that information which they provide to a public authority in the course of carrying out their functions may be subject to disclosure to outside parties.

4.1.2 The Insolvency Service has issued guidance in the form of frequently asked questions on its approach to dealing with requests for information under the FOIA. It has also published details of its publication scheme, setting out details of the information which it will make routinely available and how and where it can be obtained. This information covers most of the areas of activity of the Service, but does not extend to information about specific cases. Both the guidance and the details of the publication scheme are available on the Insolvency Service website at:

http:/www.bis.gov.uk/assets/insolvency/docs/publication-pdfs/foi

4.2 What is a Public Authority?

4.2.1 Some of the public authorities to which the Act applies are specifically listed in Schedule 1 to the Act; others fall within its scope as a result of a general listing, for example 'any government department'. The Protection of Freedoms Act 2012 (which is soon due to come into force) will extend the definition of 'public authority' to include 'the wider public sector'.

4.2.2 Furthermore the Secretary of State may designate as a public authority any private body which appears to him to be performing a public function or which is contracted to perform the functions of a public authority.

4.2.3 The Insolvency Rules Committee is expressly listed in Schedule 1 to the FOIA as a public authority.

4.2.4 The Insolvency Service and therefore its Official Receivers, Disqualification Unit, Prosecutions Section, Insolvency Practitioner Unit, Finance, Banking and Resources Directorate and Redundancy Payment Directorate, Policy and Technical Directorate are also all public authorities for the purposes of the Act.

4.2.7 As yet the FOIA does not extend to information held by insolvency practitioners as they are not public authorities for the purposes of the Act. It remains open to the Secretary of State to make an order designating them a public authority, but he would be obliged to consult before doing so.

4.3 What is 'information'?

4.3.1 The concept of 'information' is defined as 'information recorded in any form'. This includes paper documents, electronic files, audio recordings, micro-fiches, video, photographs, and essentially extends to anything that has been transcribed in an enduring form. The

FOIA does not impose obligations to maintain records, nor does it impose penalties for destroying information but it is nonetheless plausible that over-zealous use of paper shredders might be taken by the Information Commissioner as a deliberate attempt to thwart the application of the Act. However, it should be noted that it is contrary to the Data Protection Act 1998 to keep 'personal data' for longer than is necessary. Good record management is needed in order to strike the correct balance.

4.3.2 The concept of 'held' is also very broad. It is not limited to information *created* by a public authority or *owned* by a public authority: what matters is physical possession of the information and whether the information is being held on behalf of the public authority or if it is being held on behalf of a third party. So for example, any information submitted by an insolvency practitioner to the Insolvency Service or the Inland Revenue or any other public authority will be susceptible of disclosure, unless one of the Act's 23 exemptions applies (see below). Subject only to exempted items, the FOIA covers *all* information held by a public authority - not just what it has received after 1 January 2005. This means that information submitted by insolvency practitioners to a relevant public authority years ago may become public knowledge long after the event. There is no legal obligation for public authorities to inform third parties that their information is going to be disclosed - although the government has recommended that there at least be consultation.

4.4 Exemptions

4.4.1 General

There are 23 exemptions from the general right of access, for example in relation to commercially sensitive information, confidential information, and personal data about third parties where the release of that data would breach the Data Protection Act 1998. However the exemptions under the Act fall into two categories:

- Absolute exemptions – these are cases where the right to know is wholly disapplied; and
- Qualified exemptions – these are cases where a public authority, having identified a possible exemption, must consider whether there is a greater public interest providing the information to the applicant or in maintaining the exemption.
- In some circumstances an exemption will require the public body to neither confirm nor deny the existence of the requested information.

Some exceptions are class-based and some are prejudice based. For a prejudice-based exemption to apply it is necessary to consider whether a particular exemption would be likely to cause prejudice – for example with commercially sensitive information[10] it is necessary to identify the interests, how disclosure might prejudice them and whose interests they are – and then consider the public interest test. Class-based exemptions (including legal professional privilege) potentially cover all information within a particular category (but still subject to the public interest test). It is not necessary to demonstrate any prejudice in event of disclosure.

In deciding whether particular circumstances fit within an exemption the public authority should consider relevant ICO guidance relating to the exemption.

4.4.2 Absolute exemptions

The absolute exemptions are:

- information accessible by other means;
- information supplied by or relating to bodies dealing with security matters;

[10] See, by way of analogy, the case of *Amaryllis Ltd v HM Treasury* (No.2) [2009] BLR 425 in which the court considered the competing aspects of public interest, commercial sensitivity and confidentiality in carrying out its assessment of a disclosure application in the context of litigation in which an alleged breach of the Public Contracts Regulations 2006 was alleged in relation to a tendering process.

- court records and information held in relation to court proceedings;
- information covered by Parliamentary privilege;
- personal information subject to the Data Protection Act 1998[11]
- information provided in confidence[12]
- information whose disclosure is prohibited by law.

4.4.3 **Qualified exemptions**

The qualified exemptions are:

- information intended for future publication;
- information which would prejudice or would be likely to prejudice:
    - the effectiveness of the armed forces;
    - national security and defence;
    - international relations;
    - government relations within the UK;
    - the economy;
    - investigations and proceedings of public authorities;
    - law enforcement;
    - audit functions; and
    - effective conduct of public affairs.
- Information which:
    - relates to formation of government policy;
    - contains trade secrets and other commercially sensitive information;
    - is a communication with Her Majesty;
    - would endanger health and safety; and
    - some personal information;
- Information protected by legal professional privilege; and
- Environmental information (which is covered by the separate Environmental Information Regulations 2004).

4.4.4 **Personal information**

Inter-relationship with the Data Protection Act

The Data Protection Act 1998 is the route for individuals to find out personal data held about themselves by private and public bodies via subject access requests. The FOIA is not relevant to such requests. However any such request is at law automatically treated as a subject access request under the DPA.

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[11] Note the IC points out that there must be a breach of the DPA Principles and this is not as straightforward as simply asking whether or not there is consent to processing as consent is not always required.

[12] But breach must be legally actionable and information must have been provided by a third party. Also how the document is marked is not conclusive.

If the personal data requested is about a third party, there is restriction on such disclosure, where disclosure would breach any of the eight Data Protection Act 1998 Principles. The first principle (that personal data is processed fairly and lawfully) is likely to be relevant in this context.

Relevant questions to ask could include:

- Would disclosure cause unnecessary or unjustifiable distress or damage to the person whom the information is about?
- Would the third party expect that his or her information might be disclosed to others?
- Had a person been led to believe that his or her information would be kept secret?
- Is it practical to contact the third party to request his or her consent to such disclosure?
- Had a third party expressly refused to consent to disclosure of the information?

The FOI Act Awareness Guidance No. 1 prepared by the ICO suggests that information which is about the home or family life of an individual, his or her personal finances or personal references is likely to deserve protection. However this will not be the case in relation to the information which is about someone acting in an official or work capacity which should normally be provided unless there is some risk to the individual concerned. The guidance also warns that issues like damage or distress should not be taken into account as a means of sparing officials embarrassment over poor administrative decisions.

An issue which will often arise is whether the DPA prevents the disclosure of information which can be used to identify members of staff. The guidance suggests that if some information requested consists of names of officials, grades, job functions or decisions made in an official capacity, then disclosure should normally be made. On the other hand information such as home addresses or internal disciplinary matters should not normally be disclosed.

The DPA does give people the right to object in writing to the processing or disclosure of their personal data ('section 10 notices'). Certain restrictions apply to the issuing of section 10 notices:

- the notice must be in writing to be valid;
- an individual can only object to their own data being processed;
- the processing must be causing unwarranted and substantial damage or distress; and
- the notice must specify why the processing had the alleged effect.

An organisation receiving such a notice must comply unless there is some overriding justification for the processing.

Under the FOIA, if there is a request for information to which a third party has already objected, then the public authority must review its decision to accept the objection and must only comply with it if it is satisfied that the objection to further processing or disclosure is in fact valid.

4.4.5 Information provided in confidence

There are two components to the exemption:

- The information must have been obtained by the public authority from another person (an individual, company, local authority or other legal entity). The exemption does not cover information which the public authority has generated itself although other exemptions may be relevant (see further below).
- Disclosure of the information which gives rise to an actionable breach of confidence (i.e. the aggrieved party would be able to take the authority to court as a result of the disclosure).

Nature of the information

The information which is protected from disclosure by an obligation of confidence must have the necessary 'quality of confidences':

- information need not be highly sensitive but will not cover trivial matters; and
- information must not be readily available by other means.

When can confidential information be disclosed?

The common law has developed a concept of three circumstances in which confidential information may be disclosed:

- with consent of the person to whom the obligation of confidentiality is owed;
- as required by law (although note that if the information is obtainable by another source which will probably be the case where this principle applies the FOIA will not apply); or
- where there is an overriding public interest.

The courts require strong grounds to use the overriding public interest as a grounds for breaching confidentiality must be very strong. Confidentiality is recognised as an important principle in itself and in balancing confidentiality against public interest the task is not to weigh up the impact upon the individual against the good of society, but rather the good of society against the importance of preserving confidences. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.

4.4.6 **Legal professional privilege**

Legal professional privilege is a class based exemption. This means that for the exemption to apply, it is not necessary to demonstrate that any prejudice may occur to the professional legal advisers/client relationships if the information is disclosed, and it is assumed that the disclosure of even quite trivial information might undermine the relationship of lawyer and client. Nevertheless the exemption from the right to know is conditional and can only be relied upon where public interest in maintaining the exemption outweighs the public interests in disclosing the information.

In what circumstances should a public authority disclose legally privileged information?

The ICO's Guidance suggests that a key question for public authorities in determining whether to disclose legally privileged information is whether such privilege has been lost because previous disclosures to the 'world at large' mean that the information can no longer be considered to be confidential. In determining this, the public authority will need to consider whether the information has been disclosed in a restricted or unrestricted way. Where confidentiality has been lost (by a disclosure to the world at large) the public authority cannot claim that the exemption applies.

Historically legal privilege has been applied to information in perpetuity. However, under the FOIA this is no longer the case: an exemption cannot be applied to information which is deemed to be part of an historical record (that is a record which is 30 years old).

4.4.7 **Commercial interests**

The exemption from the right to know applies if:

- the information requested is a trade secret; or

- release of the information is likely to prejudice[13] the commercial interest of any person;

The exemption does not apply beyond 30 years, the point at which information becomes a 'historical record'.

If information constitutes a trade secret there is no need to consider the harm its release may cause. The very fact that the information is a trade secret is reason enough to withhold it, subject to the public interest test. However, if information does not constitute a trade secret it can only be withheld under the exemption if the public authority is satisfied that to release the information would damage someone else's commercial interests (the prejudice test).

A public body seeking to rely on the prejudice to the commercial interests of a third party exemption will need to be able to explain why this is the case. Where possible the third party must be asked for their opinions, it is not enough for the public authority to merely speculate that the third party may be affected.

Commercial interest is a qualified exemption and therefore subject to the public interest test set out in section 2 of the Act. This means that even where the public authority is satisfied that the information requested is a trade secret or that its release would prejudice someone's commercial interests, it can only refuse to provide the information if it believes the public interest in withholding the information outweighs the public interests in disclosing it.

While the weight of public interest is to be assessed on a case by case basis, the ICO suggests that the public interest is served where access to information would:

- further the understanding of and participation in the debate of issues of the day;
- facilitate the accountability and transparency of public authorities for decisions taken by them;
- facilitate accountability and transparency in the spending of public money;
- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist the individuals in challenging those decisions; or
- bring to light information affecting public safety.

Commercial interests and the prejudice test

When deciding whether the release of information would, or would be likely to, harm someone's commercial interest it is necessary to consider all the circumstances in question.[14] For example whether the price of goods is commercially sensitive will depend upon a number of factors: releasing information on the price of goods purchased from a catalogue that was freely available to all would not prejudice the supplier's commercial interest; the price submitted by a contractor is likely to be commercially sensitive during the tendering process but less likely to be so once the contract has been awarded. A suggested approach is to ask some or all of the questions below in order to determine the impact that releasing the information will have:

- Does the information relate to or could it impact on a commercial activity? One of the examples given by the ICO is that information relating to a company's proposed relocation may not have a direct link to a commercial transaction, but may have repercussions for labour relations which the company would wish to manage properly in order to minimise damage to production.

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13 The meaning of 'likely to prejudice' was considered by Munby J in the context of the Data Protection Act 1998 in *R. (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073, [2004] Prison LR 65 as 'a very significant and weighty chance' of prejudice occurring and this was considered by the Information Tribunal in considering the commercial interest exemption under the FOIA in *John Connor Press Associates Ltd v Information Commissioner* (EA/2005/0005). The Tribunal interpreted it as a 'real and significant risk' of prejudice.

14 Furthermore, there must be empirical evidence to support an authority's reliance on this exemption and to support the conclusion of a real and significant risk of prejudice – Information Commissioner and Camden Primary Care Trust (FS50214920), decision notice dated 07/01/10 – see transcript at http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50214920%20.pdf. For decision notices see http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx

- Is that commercial activity conducted in a competitive environment?
- Would there be damage to reputation or business confidence?
- Whose commercial interests are affected?
- Is the information commercially sensitive?
- What is the likelihood of the prejudice being caused?

The public interest in commercially sensitive information

Factors which need to be taken into account:

- accountability for the spending of public money;
- protection of the public;
- circumstances under which the public authority obtained the information;
- competition issues (there is public interest in ensuring that companies are able to compete fairly and in ensuring that there is competition for public sector contracts).

Timing

The timing of disclosure is of crucial importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made. Circumstances may change over time.

Ways of Protecting Confidentiality

The ICO Guidance recognises that during a procurement process public authorities may be asked by contractors to accept confidentiality clauses which attempt to prevent the disclosure of information. In many cases such clauses may be perfectly proper and serve to make clear that information which the supplier considers should not be made public and that which can be freely disclosed. Clauses may also be helpful in providing a framework or redress in the event of an unauthorised disclosure. The guidance also recognises, however, that there is a risk that blanket clauses are proposed which purport to restrict the disclosure of all information including that which could be disclosed without any prejudice to the commercial interest of the supplier.

4.5 Complying with a FOIA request

A public authority must comply with a request within 20 days of receiving it (or if the public interest test applies, within such time as is reasonable in the circumstances). When responding to an information request a public authority must tell the applicant (subject to the exemptions) whether they hold any information falling within the scope of the request and must also provide a copy of that information.

In responding to an access request the FOIA imposes a duty on public authorities to follow its ‘access code’.

In addition to the exemptions, a public authority may refuse to comply with a request if the cost of doing so would exceed the ‘appropriate limit’ specified by regulations (which is currently set at £600 for central government, Parliament and the armed forces and £450 for all other public authorities). Public authorities are able to aggregate costs of all related requests received within a 60 day period from the same person or group of people working together.

Public authorities may also refuse a request if it is vexatious (i.e. if it intends to cause disruption or distress). Public authorities may also refuse repeat requests from an applicant. When refusing an information request public authorities should document their decision making process, in order to protect their position.

4.6 Further information

Detailed guidance notes have been produced by the ICO in relation to freedom of information and these are available from the website of the Information Commissioner's Office at :

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx#request

5. DATA PROTECTION ACT 1998

5.1 Introduction

5.1.1 Insolvency office holders are sometimes faced with requests by debtors or directors for information or documents from case files on the grounds, or alleged grounds, that the applicant is entitled to such material under the Data Protection Act 1998 ('DPA'). Conversely, they may face complaints that they have disclosed information in contravention of the Act. An understanding of the principles underlying the Act, and some of the available guidance, judicial and otherwise, may be of assistance to practitioners when considering how to deal with such requests and complaints.

5.1.2 The DPA governs the processing of personal information, and gives individuals rights of access to personal information held about them. The Act states that anyone who processes personal information must comply with eight principles. These state that information must be:

- Fairly and lawfully processed
- Processed for limited purposes
- Adequate, relevant and not excessive
- Accurate and up to date
- Not kept for longer than is necessary
- Processed in line with individuals' rights
- Secure
- Not transferred to other countries without adequate protection

Section 7 of the Act gives individuals the right of access to personal data held about them. An individual about whom data is held is called a 'data subject.' A request by a data subject for access to personal data held about him is a 'subject access request.'

The Act was enacted partly to give effect to Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

General guidance on the operation of the Act can be found on the Information Commissioner's website at:

http://www.ico.gov.uk/for_organisations/data_protection.aspx

The ICO issued a Guide to Data Protection in 2009, which refers to insolvency in para A3/36 and gives the following example:

> 'A high-street retailer (which operates as a limited company) goes into administration. Control of the company's assets – including an extensive customer database – passes from the board of directors to the administrators, who decide to sell some of the

assets. Because the administrators now control the purpose and manner in which the database is used, they become data controllers in respect of the personal data it contains. The administrators must comply with the Data Protection Act in connection with any possible sale of the customer database.'

This is not consistent with the detailed guidance issued to insolvency practitioners in 1996. Accordingly, the ICO Guide requires further clarification.

The shortcut to the ICO Guide can be found at:

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/the_guide_to_data_protection.pdf

5.2 DPA definitions

The DPA defines 'data' as information which:

- is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- is recorded with the intention that it should be processed by means of such equipment,
- is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- does not fall within the above definitions, but forms part of an accessible health, educational or public record, as further defined.

'Personal data' means data which relate to a living individual who can be identified –

- from those data, or
- 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. Anonymised data which would not lead to the identification of a living person is not 'personal' data – see *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550, followed in *Department of Health v Information Commissioner* [2011] EWHC 1430.

'Processing', in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including –

- organisation, adaptation or alteration of the information or data,
- retrieval, consultation or use of the information or data,
- disclosure of the information or data by transmission, dissemination or otherwise making available, or
- alignment, combination, blocking, erasure or destruction of the information or data.

A continuous and single operation of processing personal data does not amount to 'processing' within the meaning of the Act – *Johnson v Medical Defence Union* [2007] EWCA Civ 262; [2008] Bus LR 503.

'Relevant filing system' means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

'Data Controller' means the person (including a company) who determines the purposes for which, and the manner for which, any personal data are processed. Personal data may at any one time be processed by a wide number of different data controllers.

'Data Processor' means any person who processes personal data on behalf of the data controller. Employees of data controllers are excluded from this definition.

The DPA makes a distinction between Data Controllers and Data Processors. The Data Controller is obliged to ensure its compliance with the eight principles set out above. In addition, subject access requests can only be made to a Data Controller.

5.3 How to tell if a request falls within the Act?

5.3.1 There has been little judicial guidance on the criteria to be used in determining what constitutes 'data' and whether a subject access request comes within the purview of the Act. The key judgment is that of the Court of Appeal in *Durant v Financial Services Authority*[15] , which was followed by the High Court in the cases of *Smith v. Lloyds TSB Bank*[16] and *Ezsias v The Welsh Ministers*[17], and considered by the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 when considering the meaning of 'personal data'.

5.3.2 **The *Durant* case**

In the *Durant* case the Court of Appeal addressed two key points – what is data, and what is a 'relevant filing system'?

Mr Durant sought information from the FSA's files about a complaint which he had made against Barclays Bank, which he claimed was personal data, under section 7 of the Act. The Court of Appeal dismissed his claim and set out some guidelines on what constitutes 'personal data' and a 'relevant filing system' for the purposes of the Act.

Personal data

The Court held that the intention of the Act was to enable an individual to obtain from a data controller's filing system, whether computerised or manual, his personal data, that is, information about himself. It was not an entitlement to be provided with original or copy documents as such, although the data could be provided in documentary form. The purpose of section 7, in entitling an individual to have access to information in the form of his 'personal data', was to enable him to check whether the data controller's processing of it unlawfully infringed his privacy and, if so, to take such steps as the Act provides to protect it. It was not an automatic key to any information, readily accessible or not, of matters in which he may be named or involved. Nor was it to enable him, for example, to obtain discovery of documents that may assist him in litigation or complaints against third parties.

It followed that not all information retrieved from a computer against an individual's name or unique identifier was personal data within the Act. Mere mention of the data subject in a document did not necessarily amount to personal data; it depended on whether such mention was sufficiently relevant or proximate to the subject, as opposed to matters in which he was involved to a greater or lesser degree. Two measures of relevance or proximity were whether it was significantly biographical, and whether the data subject was the focus of attention. The information must have affected the subject's privacy in his personal, family, business or professional life.

Any court considering whether or not particular information constitutes 'data' within the meaning of the Act will require proper evidence to justify such a conclusion as to the status of the information as 'data' or otherwise. See also *Intercare Direct Ltd v. Pfizer*

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[15] (2004) FSR 28; The Times, 2 January 2004

[16] [2005] EWHC 246 (Ch)

[17] QBD (Cardiff) Claim No 6CF90111 (2007)

[2010] EWHC 600 in which the court made clear that more information was required so as to justify the argument that the information in issue constituted 'data' within the Act's meaning.

Relevant filing system

It was clear from the legislation that Parliament intended to apply the same standard of accessibility to personal data in manual records as to such data in computer records. That required a manual filing system to be so referenced or indexed that it enables the data controller's employee responsible to identify at the outset of his search with reasonable certainty and speed the file or files in which the specific data relating to the person requesting the information is located and to find the relevant information about him within the file or files, without having to make a manual search of them. For practical reasons, the data must be readily accessible. The protection given by the legislation was for the privacy of personal data, not documents, the latter being mostly retrievable by a far cruder searching mechanism than the former.

A 'relevant filing system' for the purpose of the Act, was limited to a system:

- in which the files forming part of it are structured or referenced in such a way as clearly to indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under section 7 is held within the system and, if so, in which file or files it is held; and
- which has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific criteria or information about the applicant can be readily located.

The Court added, obiter, that in future those contemplating or advising on such applications under the Act should carefully scrutinise the guidance given in the judgment to prevent a wholly unjustifiable burden and expense being imposed on data controllers.

5.3.3 *Smith v Lloyds TSB Bank*

In *Smith v Lloyds TSB Bank*, Mr Smith sought disclosure under section 7 of various items of information held by Lloyds TSB. Smith had been a controlling shareholder of a company involved in a development project funded by the bank. The company was unable to repay the loan and consequently went into liquidation. Smith asserted that the bank had entered into an oral agreement to the effect that it would make available to the company substantial long-term finance and that certain documentation held by the bank would prove this. It was not disputed that the bank had no computerised records relating to Smith at the time of the data request, but Smith argued that:

- the Act had to be construed consistently with Article 3 of Council Directive 95/46 so that the definition of data in section 1 of the Act meant information 'wholly or partly' processed or recorded on automatic equipment so that information relating to Smith that was once held on a computer disc had been partly processed;
- any pile of documents was capable of being turned rapidly into the digital equivalent and they should therefore be treated as being just as accessible as if they were in a computer database.

The bank argued that even if the material sought by Smith was 'data' within the meaning of the Act, it was not 'personal data'.

Laddie J rejected Smith's arguments. He held that:

- Even if section 1 of the Act was treated as including the words of Article 3 of the Directive, the question of whether information was data had to be answered at the time of the data request.[18]
- At the time of Smith's data request the bank did not hold information relating to Smith, either wholly or partly held by means of automatic equipment, so rewriting section 1 did not assist him.
- The reference to and definition of 'relevant filing system' in the definition of data in section 1 would be rendered meaningless and inconsistent with Recital 27 of the Directive if any pile of documents capable of being turned into digital equivalent were treated as being just as accessible as if they were in a computer database. It would destroy the distinction between information processed by automatic equipment and information kept in relevant filing systems. In the circumstances material sought by Smith was not data within the meaning of the Act.
- In any event, the documents held by the bank and the information contained within them were not personal to Smith in the relevant sense, as the files all related to loans to the company (following *Durant* above).

5.3.4 *Ezsias v The Welsh Ministers*

Andrew Ezsias v The Welsh Ministers concerned an application to the Welsh Assembly Government for disclosure of documents relating to a claim for unfair dismissal against an NHS trust.

Mr Ezsias was employed as a surgeon by the North Glamorgan NHS Trust. He was dismissed from his position, and brought a claim against the trust for unfair dismissal. In the course of the proceedings Mr Ezsias entered into a voluminous correspondence with the National Assembly Government in connection with the way the trust was dealing with his case. He made a number of requests to the National Assembly under section 7 of the Act for the disclosure of documents to advance his unfair dismissal claim. He was dissatisfied with the Assembly's response, and applied for an order that they comply with their obligations under the Act.

The judge commented that Mr Ezsias had exhibited fundamental misunderstandings of his rights under section 7. He had brought the claim with the express purpose of obtaining documentary evidence to further his claim against his former employers. He had correctly emphasised that the right of access to information under the 1998 Act is a free-standing right. There is no exemption from the requirements under the Act where proceedings are pending. Indeed, the Information Commissioner has indicated:

> 'If a data controller were able to avoid complying with a subject access request in circumstances where data subject was contemplating or had begun legal proceedings it would seriously undermine this fundamental right [of access]' (Information Commissioner Guidance quoted in The Encyclopaedia of Data Protection, Paragraph 1-421/1).

However, although it might be that information to which a data subject has the right of access may assist him in prosecuting or defending discrete litigation, that was not the purpose of the legislation. The judge quoted the comments of the Court of Appeal in *Durant* regarding the purpose and limits on the rights of access under section 7 referred to above. He went on to comment that there is a fundamental distinction between the right of access to data in the hands of another person for the purposes of protecting privacy, and the right to disclosure of documents under CPR Part 31. Mr Ezsias had laboured under the misunderstanding that the right to access to data is necessarily coterminous with a right to disclosure of documents. But it is not. Under the 1998 Act there is no right to have access to or copies of documents at all.

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[18] *Johnson v. Medical Defence Union* (2004) EWHC 347.

The second premise upon which the claim was based, namely that all information retrieved from a search against an individual's name is 'personal data' within the 1998 Act, was also false (again following *Durant* above). Accordingly, his entire approach to the application was misconceived. See also *Elliott v Lloyds TSB Bank plc*, 24 April 2012, an unreported decision of HHJ Behrens QC, in which it was held that if the real purpose of Mr Elliott's application for disclosure was to obtain documents or information, which might assist him in a claim against a third party, that would be an improper purpose, but it was unnecessary for him to establish that a dominant purpose in bringing the application was lawful. As far as the level of search required, it was held that the bank was only obliged to supply such personal data as was found after a reasonable and proportionate search.

5.4 The Information Commissioner's Guidance

The Information Commissioner's Office ('ICO') has issued guidance intended to illustrate the Commissioner's view of what is personal data for the purposes of the Act.[19]

The guidance is in the form of a flowchart of numbered questions which, when taken in order, aim to assist in identifying 'personal data'. The flowchart questions are supplemented by guidance and illustrative examples aimed at developing a practical understanding of the concept of personal data.

The ICO's guidance states that the mere mention of an individual (say, in minutes of a meeting) does not of itself make the information personal, but argues that information may be personal data even if it is not obviously about the individual. The ICO suggests, for example, that the scope of personal data could include any data used (or to be used) to inform or influence actions or decisions affecting the individual or any data impacting on the individual, whether in a personal, family, business or professional capacity

Although this approach is intended to help data controllers identify whether data is 'personal data' in particular cases, it is not easy to discern the underlying principles on which the guidance is based.

Moreover, it is not clear how this fits with the principles set out in the cases referred to above as this appears to be a wider definition of personal data. However, as the ICO will be the first arbitrator in a dispute over a subject access request, it is advisable to err on the side of caution if a subject access request is received.

5.5 Responding to subject access requests

A subject access request must be responded to within 40 days. However, no response has to be provided unless a written request is received (an email request will count as a written request). A data controller is also entitled to request a £10 fee before they deal with the request.

The Information Commissioner has issued detailed guidance on dealing with subject access requests, which can be found at:

http://www.ico.gov.uk/for_organisations/data_protection/subject_access_requests.aspx

and has also issued a checklist on handling subject access requests, which is available on its web site:

http://www.ico.gov.uk/~/media/documents/library/Data_Protection/Practical_application/checklist_for_handling_requests_for_personal_information.ashx

In *Elliott v Lloyds TSB Bank Plc (t/a Lloyds TSB Corporate Markets)* (unreported), 24 April 2012, HHJ Behrens QC indicated that where a person made a subject access request for personal data under the Data Protection Act, a data controller was only required to carry out a reasonable and proportionate search for that data.

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[19] Link to guidance and flowchart – http://www.ico.gov.uk/~/media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

5.6 Exemptions relating to a Subject Access Request.

There are a number of exemption and restrictions on a data subject right of access. These cover situations where;

- The request would require disclosing information referring to other individuals;
- The information is covered by legal professional privilege;
- The information covers the data controller's intentions in relation to negotiations with the data subject;
- The personal data is being processed for the purposes of management forecasting or planning in the conduct of the data controller's business.

There are other exceptions relating to, for example, health, crime, regulatory activities, publicly available information and confidential employment references. When considering whether an exemption should apply consideration should be given to the relevant ICO Guidance.

5.7 Keep Data Safe

The seventh data principle requires a data controller to keep information secure. This should be adhered to so as to ensure that no unauthorised disclosures are committed.

It is necessary that reasonable steps are taken;

- so that harm that might result from unauthorised or unlawful processing or accidental loss, destruction or damage is prevented;
- to ensure the reliability of any employees who have access to the personal data; and
- to ensure any data processors who have access to the personal data adhere to the seventh data principle as well.

5.8 Non-disclosure of personal data

5.8.1 Non-disclosurenerally generally

The DPA uses the term 'non-disclosure provisions' to refer to –

- the first five of the eight Data Protection Principles listed in paragraph 5.1.2 above;
- section 10 of the Act, which gives data subjects the right to prevent processing likely to cause substantial damage or distress;
- section 14(1) to (3) of the Act, which gives data subjects the right to have inaccurate data rectified, blocked, erased or destroyed.[20]

The non-disclosure provisions are subject to certain exemptions, which are set out in sections 28-36 and Schedule 7 (including by way of example legal professional privilege in paragraph 10), and various statutory instruments.

5.8.2 Disclosure required by law

Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.[21] *See R. (Davies) v. Child Support Agency* [2008] Fam Law 621, QBD (Admin) in which the Secretary of State's refusal to comply with disclosure orders made by the Child Support Appeal Tribunal was held to be irrational.

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[20] *Section 27(3) Data Protection Act 1998*

[21] Section 35 Data Protection Act 1998

Disclosure required under an enactment would include information required to be disclosed under the Insolvency Act 1986 and associated legislation, such as, for example, the inclusion of creditors' details in a statement of affairs in insolvency proceedings.

In the case of *Re Bernard L Madoff Investment Securities LLC Sub Nom In The Matter Of Madoff Securities International Ltd* [2009] EWHC 442 [2009] 2 BCLC 78, Ch, Lewison J ordered that information in the possession of joint provisional liquidators of a UK-based subsidiary of a US company be transferred to the trustee in the liquidation of the parent company on the basis that it was necessary for reasons of substantial public interest, pursuant to the DPA Sch.4 para.4(1), for the purpose of properly investigating allegations of large and complex fraud claims against the parent.

6. DIRECTORS' CONDUCT REPORTS

6.1 Under the Company Directors Disqualification Act 1986, insolvency office holders are required to submit reports or returns on the conduct of directors to the Secretary of State for Business Innovations & Skills in order to assist the Secretary of State in deciding whether to bring disqualification proceedings against the director concerned (the so-called 'D reports'). Office holders may be presented with requests by the subject director for copies of D reports, or for details of information contained in such reports. Practitioners who are faced with such a request should follow the guidance issued by the Insolvency Service following the decision of the High Court in the case of *Secretary of State for Trade and Industry v Baker and Others, re Barings plc and Others*.[22]

6.2 In *Barings* it was held that there were no grounds for refusing disclosure to a respondent director of a report made by the administrators of Barings plc and various of its subsidiaries under the Directors Disqualification legislation. The Vice-Chancellor held that the report was not protected by legal professional privilege as it did not in any sense represent legal advice given to the Secretary of State, and its immunity from disclosure was not necessary in order to protect the inviolability of communication between the Secretary of State and her lawyers. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery. The Vice-Chancellor noted that a claim to public interest immunity had rightly not been made.

6.3 In the light of this decision the Insolvency Service issued guidance on how to deal with requests for disclosure, which is now set out in Chapter 10 of *Dear IP*. The Insolvency Service advises that all enquiries made direct to insolvency practitioners about decisions made in connection with D reports and requests for copy returns or reports should be referred, in the first instance, to the Intelligence Hub, Investigations and Enforcement Services in Birmingham. Depending on the request, this unit will either deal with the request or forward it to the appropriate business unit. This includes all requests made under the DPA or FOIA for D reports. This also includes all requests from creditors, licensing bodies, regulators and investigating authorities such as the Police and HM Revenue & Customs.

6.4 The Secretary of State's current policy on disclosure of D reports to directors or defendants in Director Disqualification proceedings, both in England and Wales and Scotland following the decision in *Barings* is that –

- The Secretary of State does not seek to withhold disclosure on grounds of legal professional privilege or public interest immunity (other than in very exceptional circumstances.
- If a director asks for a copy of a D report, the request will be treated as a subject access request under the DPA.

[22] [1998] 1 All ER 673; [1998] BCC 888; [1998] 1 BCLC 16. See website addresses for:
guidance notes for completion of statutory notes and returns:
https://www.insolvencydirect.bis.gov.uk/guidanceleaflets/dus_guide/contents.htm
and information on disqualification procedures:
http://www.bis.gov.uk/insolvency/Publications/publications-by-theme/disqualification-publications

- Unless there are grounds for withholding disclosure under section 31 FOIA (that the release would prejudice various law enforcement purposes) a copy of the report will be made to the director, suitably redacted to remove personal information relating to any other person.

6.5 If a D report is requested by a third party such as a creditor, the opinion of the insolvency practitioner will constitute personal data of the director, to which the absolute exemption under section 40(2) of the FOIA applies. In *David Cox v Information Commissioner* (Case number EA/2010/0092) the First Tier Tribunal (Information Rights) upheld the Information Commissioner's decision that the contents of a D report were exempt from disclosure under the FOIA by virtue of section 40(2).

6.6 The Insolvency Service often receives requests for disqualification data, such as D reports, from regulatory authorities such as the Financial Conduct Authority, the Charity Commission etc. On receipt of these requests The Insolvency Service has to make a public interest decision about the release of the data. Generally, the Insolvency Service will be satisfied that the provision of information to the regulatory authority is in the public interest. Requests will be scrutinised to ensure that the requested material is relevant to the regulatory authority concerned. Permission will not normally be given for the D report to be further processed by the regulatory authority.

6.7 Practitioners should therefore bear in mind that, in cases where proceedings are contemplated, disclosure of D reports is more likely than not and therefore a report should contain only facts, not speculation, and only contain relevant and pertinent information and should not be a means for passing secret or dubious information. The Insolvency Service is not responsible for checking whether the report may contain defamatory material.

6.8 Queries about disclosure of D reports should be referred to the Intelligence Hub, Investigations and Enforcement Services , 3rd Floor Cannon House, 18 Priory Queensway, Birmingham B4 6FD, or e-mail Intelligence.insolvent@insolvency.gsi.gov.uk.