



Department
for Education



The Insolvency
Service

Memorandum of understanding between the Department for Education and the Insolvency Service

May 2019

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Introduction

1. This Memorandum of Understanding (MoU) sets out at a high level the agreement between the Insolvency Service (IS) and the Department for Education (DFE) that governs the exchange of information to better deliver the objectives of both organisations. It should be noted that 'exchange' covers all transfers of information between both organisations.
2. Information will only be exchanged where it is lawful to do so. The main legal bases for exchanging information are detailed within this MoU.
3. The purpose of this MoU is to establish a framework for cooperation between the IS and the DFE. It sets out (i) the role of each organisation; and (ii) explains the intention to work together and cooperate proactively in matters of common interest. Its aim is to outline the ways in which the IS and the DFE will exchange information and intelligence to further the objectives of each organisation.
4. Although this MoU is not legally binding and does not in itself create a lawful means for the exchange of information, it has an essential role in documenting the high level principles agreed between both organisations.
5. This MoU should not be interpreted as removing or reducing existing legal obligations or responsibilities on each organisation, including as data controllers under the applicable data protection law.

The role of the Insolvency Service (IS)

6. The IS is an executive agency of the Department for Business, Energy and Industrial Strategy (BEIS). It fulfils a range of statutory functions and delivers a range of public services on behalf of the Secretary of State. It exercises powers and duties on behalf of the Secretary of State arising under the Insolvency Acts 1986 and 2000, the Company Directors Disqualification Act 1986, the Employment Rights Act 1996 and the Companies Acts 1985 and 2006, as well as under secondary legislation relating to these Acts.

7. The IS has numerous powers and responsibilities ranging from the statutory role of trustee and liquidator, to policy, redundancy payments and regulation of the insolvency profession, to investigation and enforcement work tackling corporate misconduct, financial wrongdoing and fair markets.

8. Of particular relevance to this MoU (in the context of academy trusts which are companies limited by guarantee) is that:

- i. the IS has the power to conduct confidential enquiries into a company's affairs under the provisions of the Companies Act 1985 in cases where there is reason to believe the company's activities are being conducted in a manner contrary to the public interest;
- ii. the IS also has the power to investigate the affairs of companies entering insolvency and of individuals entering bankruptcy or debt relief;
- iii. as a result of these investigations the IS has powers to seek the disqualification of directors or the bankruptcy or debt relief restriction of individuals whose conduct falls below the required standard as well as to petition for the winding up of companies where it is in the public interest to do so.

9. The IS is also responsible for both investigating and prosecuting breaches of company and insolvency legislation as well as fraudulent activity arising in the context of insolvency.

The role of the Department for Education (DFE)

10. The DFE's vision is to provide world-class education, training and care for everyone, whatever their background. Its current responsibilities are education and children's services (including early years), schools, higher and further education policy, apprenticeships and wider skills in England.

11. The DFE aims to develop world-class education through striving to recruit, develop and retain the best people, prioritising the most disadvantaged, protecting the autonomy of institutions by intervening only where clear boundaries are crossed, making every pound of our funding count, preventing and addressing risks to the sustainability and quality of education and skills provision, with a focus on effective financial management and governance.

12. The DFE is responsible for ensuring there is an adequate framework in place to meet these aims, and has a strong interest in securing good governance in schools generally. The vast majority of academies are well-run and do not have unsuitable people employed or engaged in management roles, but where DFE has concerns about governance or financial management the department will make full use of its intervention powers to address these. This includes the Secretary of State's power under section 128 of the Education and Skills Act 2008 to prohibit an individual from taking part in the management of an independent school, including an academy or free school school, as well powers to intervene at an institutional level. The grounds and procedure for giving a direction under section 128 are prescribed in the Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014.

General cooperation

13. To fulfil their duties and obligations the IS and the DFE need to be able to share information, in particular information relating to misconduct, investigations and enforcement within their respective remits, and need to be able to support each other in achieving their objectives for the benefit of the public and UK economy.
14. There is an inherent public interest in the IS and the DFE robustly using their powers to tackle corporate and financial misconduct and the commission of financial crime. Information sharing wherever possible and appropriate will assist both organisations to meet this objective.
15. The arrangements set out in this MoU are intended to ensure a better understanding of the roles and responsibilities of the respective organisations, and to provide an auditable structure and process to facilitate the regular exchange of information between the two. This enables both organisations to share information (including personal data) in a lawful and proportionate manner, and establishes the legitimate purpose for the sharing of material and the means by which it will be defined and managed.
16. This MoU supports the following objectives of the organisations:
 - i. **DFE:** The Education and Skills Funding Agency (ESFA), on behalf of the Secretary of State for Education: ensuring the financial health of academy trusts, ensuring lawful and efficient use of public funds, ensuring pupils are able to continue to access education and supporting academy trusts to make better use of their resources.
 - ii. **IS:** Delivering economic confidence by supporting those in financial distress, tackling financial wrongdoing, and maximising returns to creditors.

Legal

17. The IS has statutory powers of investigation and enforcement under its legislation. The DfE has contractual relationships with academy trusts via funding agreements with the Secretary of State, and also statutory powers to investigate and disqualify a person from the management of an academy. DfE and IS also acquire intelligence to inform decisions about whether or not to exercise these powers.

18. The IS and the DFE aim to co-operate by sharing information where it is judged to be helpful to both organisations in fulfilling their respective functions, subject to any restrictions on disclosure of information and compliance with the law.

Data Protection Act 2018, General Data Protection Regulation (EU) 2016/679 ('GDPR') and Human Rights Act 1998

19. Nothing in this Memorandum of Understanding will limit the receiving department's legal obligations under applicable data protection law. All the information transferred by DFE or the Insolvency Service should be relevant, necessary and proportionate to enable the recipient to carry out their task or process.

20. DFE and the Insolvency Service will become the Data Controller of any personal data received from the other under the terms of this MoU.

Freedom of Information (FOI) Act 2000

21. DFE and the Insolvency Service are subject, where Sch1 para 1 applies, to the requirements of the Freedom of Information Act 2000 (FOI) and shall assist and co-operate with each other to enable each department to comply with their information disclosure obligations. In the event of one department receiving an FOI request that involves disclosing information that has been provided by the other department, the department in question will notify the other to allow it the opportunity to make representations on the potential impact of disclosure.

22. All DFE FOI requests must be notified to MPCD.MAILBOX@education.gov.uk. All Insolvency Service requests must be notified to the FOI team at foi@insolvency.gsi.gov.uk.

The IS

23. Information that has been obtained by the IS in connection with an inquiry into a company pursuant to s447 of the Companies Act 1985, or under s448A or s453A, is restricted under s449 of that Act, which creates a criminal offence in relation to disclosures of 's447 material', subject to certain exceptions.

24. Schedules 15C and 15D to the Companies Act 1985 set out respectively people to whom and purposes for which information may be disclosed. Information held by the Insolvency Service which is restricted under s449 can be disclosed to the Secretary of State 'at large' under Schedule 15C paragraph 1. S449(11) makes clear that nothing in the section authorises the making of a disclosure in contravention of data protection legislation (including 'GDPR').

25. There may be some occasions where information is subject to Legal Professional Privilege and as a result the IS will not share such information with the DFE.

26. Where information generated by the IS is subject to Legal Professional Privilege, the IS will consider whether such information can be shared with the DFE on the basis of a limited waiver of privilege. In considering whether such information can be shared, regard will be had to a range of factors including the potential for the sharing of such information to better deliver the objectives of the DFE. For the avoidance of doubt, that limited waiver will not, unless specifically agreed otherwise by the IS, allow the DFE to pass that information on or otherwise reveal it, in proceedings or otherwise.

27. Where the IS receives information from an external source which is subject to Legal Professional Privilege, the IS will not share that information with the DFE unless that privilege has been or is specifically waived, whether entirely or in favour of the DFE, by all those benefiting from it, or there are sufficient grounds to consider that the information was never truly privileged, whether having regard to the crime or fraud exception or otherwise.

The DFE

28. The DFE may only use non-public information supplied by the IS under this MoU for any relevant purposes as described below.

The DFE will treat all non-public information supplied under this MoU, as well as any requests, the contents of such requests and consultations between the IS and the DFE pursuant to this MoU as confidential and will not disclose this information to any third party without first obtaining the consent of the IS. Where disclosure is required by law, the DFE will notify the IS and provide it with an opportunity to be heard prior to making any disclosures.

29. Where information generated by the DFE is subject to Legal Professional Privilege, the DFE will consider whether such information can be shared with the IS on the basis of a limited waiver of privilege. In considering whether such information can be shared, regard will be had to a range of factors including the potential for the sharing of such information to better deliver the objectives of the IS. For the avoidance of doubt, that limited waiver will not, unless specifically agreed otherwise by the DFE, allow the IS to pass that information on or otherwise reveal it, in proceedings or otherwise.

30. Where the DFE receives information from an external source which is subject to Legal Professional Privilege, the DFE will not share that information with the IS unless that privilege has been or is specifically waived, whether entirely or in favour of the IS, by all those benefiting from it, or there are sufficient grounds to consider that the information was never truly privileged, whether having regard to the crime or fraud exception or otherwise.

Principles for exchanging information

31. The DFE and the IS will ensure timely and focussed exchange of relevant information that enables effective co-ordination and co-operation in the areas outlined in this MoU. Information available to one organisation that is relevant to the responsibilities of the other organisation will be shared when requested. Additionally, if one organisation considers that information it has gathered will be materially relevant to the other, it will proactively disclose such information to the other.
32. Subject to any restrictions on disclosure of information (confidential or otherwise) at law, the DFE and the IS will seek to apply the following principles when sharing information between the two organisations:

Intelligence

33. Both organisations need to be able to share information acquired as intelligence so that they can effectively decide whether to use their statutory powers of investigation and enforcement, and contractual enforcement powers, and be better informed about how and when to do so. This intelligence will cover a range of information from complaints or other information about individuals or firms, areas of shared interests consistent with both organisations' statutory powers and functions including, for example, information relating to patterns and trends, or developing legal issues and financial information.
34. The IS will use information provided for intelligence purposes to:
- i. Inform its decisions about whether or not to investigate a live company under powers contained in the Companies Act 1985;
 - ii. Inform its decisions about appropriate targeting of directors of companies subject to insolvency procedures for disqualification;
 - iii. Help identify trends and patterns of behaviour;
 - iv. Further the exchange of information on legal developments and case law; and
 - v. Assist an Official Receiver to carry out his/her statutory duties of investigation.
35. The DFE will use information provided for intelligence purposes to:
- i. Inform its decisions about taking regulatory or other action against an individual or other legal entity;
 - ii. Inform its decisions about engaging its statutory powers of investigation.

36. It is envisaged that information provided as intelligence will be used by each organisation to help identify individuals or firms for targeted action; assist in targeting specified individuals or firms; or as part of an overall strategy to combat corporate or financial impropriety in relation to matters of specific concern or more generally. Information provided as intelligence cannot be relied on evidentially.

37. Each organisation will ensure appropriate measures are in place to safeguard the security of the information and its sources.

Investigation

38. The IS has powers to require information from any person under the following provisions:

- i. Part XIV of the Companies Act 1985.
- ii. Section 7 of the Company Directors Disqualification Act 1986.
- iii. Sections 132, 235 & 236 of the Insolvency Act 1986.

39. The DFE has contractual powers to obtain information under an Academy's Funding Agreement.

Enforcement or other action

40. Information may be passed between the IS and the DFE to enable them to directly exercise their powers of enforcement, for example:

- i. the results of a DFE investigation may be passed (where and to the extent that the DFE is legally able) to the IS to enable a decision to be taken whether or not to seek the disqualification of directors, to commence a criminal investigation or to petition to wind-up a company in the public interest.
- ii. the results of an IS investigation (e.g. director disqualification obtained) may be passed (where and to the extent that the IS is legally able) to the DFE to enable a decision to be taken whether or not to take regulatory or other action against an individual or other legal entity.

41. The IS has powers under section 8 of the Company Directors Disqualification Act 1986 to seek the disqualification of a director or a person acting as or instructing an unfit director where it appears expedient in the public interest to do so on the basis of information provided to it.

42. Where, from information obtained following the exercise of its statutory powers of investigation, the DFE considers that the conduct of a person acting as a director (or a shadow director, or someone instructing an unfit director) of a limited company falls

below the standard required, or it appears to the DFE that the management, operation or business of a limited company is such that it should be wound up in the public interest, it may refer information to the IS to consider whether to seek the disqualification of that person as a director or the winding-up of that company in the public interest.

43. The types of information to be shared, the format and transmission of that information and subsequent support may be varied by written agreement between the organisations from time to time.

44. Information obtained under statutory powers of investigation can be used as evidence in enforcement proceedings commenced by the IS or DFE. Where appropriate each organisation will take all reasonable steps, as necessary, to enable the information to be adduced in evidence.

Security and Compliance

45. Each organisation will be responsible for ensuring that appropriate data security controls are in place appropriate to the nature and sensitivity of the material and its source, and their respective protective markings. These will include:

- i. restricting access to the data to staff members on a 'need to know' only basis;
- ii. carrying out duties in accordance with statutory powers and responsibilities;
- iii. keeping information securely when not being accessed by these members of staff; and
- iv. storing data on a system with security controls that ensure only access is by necessary and relevant people.

Handling breaches of security

46. All breaches of data security by one organisation must be reported to the other through the single point of contact referred to below immediately upon discovery by telephone and in writing within 24 hours of discovery.

47. Each party shall deal with any breach by it or its employees through its own internal procedures.

Miscellaneous

Review of this MoU

48. The IS and the DFE will continue to monitor the functioning and effectiveness of this MoU and review it from time to time, as necessary.

Date of coming into force

49. This MoU will come into effect when signed by both organisations.

Publication

50. The IS and the DFE agree to publish this MoU on their respective websites.

Contacts

Contact at the IS: Keith Owen, Insolvency Service, Apex Court, City Link, Nottingham NG2 4LA. Tel: 0115 872 4710

Contact at the DFE: Lesley Jones, Deputy Director, School Infrastructure and Access Division, Department for Education, Sanctuary Buildings, Great Smith Street, London SW1P 3BT email lesley.jones@education.gov.uk

Dated: 14 May 2019



Sharon Lewis (Deputy Chief Operating Officer)

On behalf of:

Alec Pybus

Chief Operating Officer, IS

Signed on behalf of the IS



Jonathan Slater

Permanent Secretary, DFE

Signed on behalf of the DFE



Department
for Education

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