On the edge – Lexis®PSL Restructuring & Insolvency

Data protection law for insolvency practitioners

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Welcome to your third edition of 'On the edge', a series of guides highlighting a selection of less familiar areas of legislation that may not fall within the everyday work of insolvency practitioners.

Being aware of these areas, and being able to spot potential problems before they arise can help avoid unexpected expenses or, at worst, personal liability attaching to the insolvency practitioner.

In this guide, Mark Gleeson, a partner, Rachel De Souza, an associate, and Helen Kavanagh, a professional support lawyer, of Squire Patton Boggs give guidance on key areas of data protection law that insolvency practitioners need to be aware of, the steps that can be taken to protect against liability and the main laws governing this area.

What are the main laws and regulations governing this area?

The Data Protection Act 1998 (DPA 1998) regulates the use of personal data.

Personal data is data that relates to a living individual who can be identified from that data, or from that data and other information, is in the possession of, or is likely to come into the possession of, a data controller. It includes, but is not limited to, any expression of opinion about the individual and any indication of the intentions of a data controller or any other person in respect of the individual.

Examples of personal data which an insolvency practitioner dealing with the assets of an insolvent company may come across include employee records held by the insolvent company, customer lists, supplier contact information and individual creditor details.

In relation to insolvency practitioners' own practice, personal data processed will include records relating to the directors of the companies in respect of which they are appointed, lists of debtors, list of creditors and the dividend distribution to the creditors.

DPA 1998 is based around the following eight principles of 'good information handling' which give individuals (known as data subjects) specific rights in relation to their personal information and place certain obligations on those organisations (known as data controllers) that are responsible for processing the personal information:

Data protection principles

1. Personal data shall be processed fairly and lawfully.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under DPA 1998 (this includes a data subject's right to access his or her personal data held by a data controller by way of a data subject access request (DSAR)).
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Unless one of the limited exceptions applies, data controllers must be registered with the Information Commissioner's Office (ICO) (http://ico.org.uk/). It is a criminal offence under DPA 1998 for a data controller to process personal data without being registered.

Why is it relevant to insolvency practitioners? In particular, in what circumstances may liquidators or trustees in bankruptcy become data controllers?

In the course of an insolvency appointment (for example, as administrator of a company or trustee in bankruptcy), the insolvency practitioner will encounter a large array of data, some of which will be personal which will be caught by the provisions of DPA 1998. It is important for the insolvency practitioner (and their staff) to understand what personal data they hold and accordingly how they must treat it.

Data relating to directors

Licensed insolvency practitioners are required to keep records of their appointments. This includes keeping records relating to the directors of the companies in respect of which they are appointed. The insolvency practitioner has a duty, under the Company Directors Disqualification Act 1986 (CDDA 1986), to report to the Secretary of State in respect of the directors. This information is likely to be personal data and so needs to be dealt with in accordance with the requirements of DPA 1998.

Data relating to the insolvent entity or individual

The insolvency practitioner may also personally hold other information they have a duty to deal with, for example, list of debtors, list of creditors and the dividend distribution to the creditors and which may contain personal data. These records are kept by the insolvency practitioner and are not the same as the records of the insolvent company or bankrupt (although these may also be physically held by the insolvency practitioner).

Data held by the insolvent company

Under guidance issued by the ICO, 'A Guide to Data Protection', where an insolvency practitioner is appointed, they will also become the data controller of the personal data held by the insolvent company. This is because the insolvency practitioner will control the purpose and manner in which the personal data is processed by the insolvent company. The insolvency practitioner must therefore comply with the relevant requirements of DPA 1998 when dealing with personal data held by the insolvent company.

However, in the case of Re Southern Pacific Personal Loans Ltd [2013] EWHC 2485 (Ch), [2014] 1 All ER 98, the High Court challenged the view that an appointed insolvency practitioner will always become a data controller of the personal data held by an insolvent company. Southern Pacific Personal Loans Limited (SPPL) collected and retained a large amount of personal data and was a data controller within the meaning of DPA 1998. In September 2012, SPPL entered into liquidation. As a result, management companies, on behalf of borrowers who had taken personal loans from SPPL, made a large number of DSARs (see meaning above in the sixth data protection principle) against SPPL to determine whether borrowers had a claim against SPPL for mis-sold personal protection insurance. The liquidators applied to the court for directions as to the nature of their obligations and liabilities in respect of the DSARs.

The court distinguished between the activities performed by the liquidators being:

- those activities undertaken by virtue of their office as liquidator i.e. not undertaken on behalf of the company in liquidation; and
- those performed as agents of the company in liquidation.

The court held that the insolvency practitioners are data controllers in relation to their activities in the first category. For example, where an insolvency practitioner receives and adjudicates upon proofs of debts submitted by those claiming to be creditors of the company, the insolvency practitioner does so as the liquidator and not as an agent of the company. Personal data will be processed and retained by the insolvency practitioner in the course of performing those duties. The court held that it therefore follows that the insolvency practitioner is required to register as a data controller in relation to these activities. However, insolvency practitioners were not data controllers in relation to activities performed as agents of the company in liquidation, which included responding to the DSARs. The liquidators' function, as agents for the company, replaced that of the directors of the company and directors were not considered to be data controllers.

The High Court ultimately decided that the liquidators were not data controllers within the meaning of DPA 1998, s1(1) in respect of personal data processed by the company *prior to its liquidation*.

The court did not give guidance in this case as to the position of a bankruptcy trustee. In bankruptcy, the bankruptcy trustee is likely to handle personal data, such as bank account information, relating to the bankrupt individual. This data will have vested in the trustee by virtue of the trustee's appointment and so, following the SPPL case, it is likely that the trustee will be a data controller of this data. Bankruptcy trustees will therefore need to ensure compliance with the DPA 1998 when handling the personal data in their possession.

Registration with the ICO

The insolvency practitioner should be registered as a data controller with the ICO in relation to personal data they hold in their capacity as data controller. Registration will include notifying the ICO what data processing the insolvency practitioner is carrying out and the type of personal data they store. The registration tends to be of a general nature (rather than specific to each appointment) and must be renewed annually. This must be distinguished clearly from the insolvency practitioner's firm's registration and is a personal registration in the name of the insolvency practitioner.

Failure to comply with DPA 1998

Failure to register with the ICO is an offence and may result in a fine. The ICO has enforcement powers under DPA 1998 which include:

- requiring the data holder to modify or delete personal data it holds
- compelling the data holder to take various steps in relation to data processing
- imposing a fine of up to £500,000

In addition, an individual can claim compensation for:

- damage caused by the breach
- distress if damage has occurred or the breach relates to processing for special purposes

Please give some examples of the type of insolvency situations where data protection issues arise?

Sale of the business or assets

Following appointment, an insolvency practitioner will likely look to dispose of the insolvent company's assets – this could include selling customer databases or transferring other assets which include personal data. Insolvency practitioners will need to be careful not to disclose personal information relating to the business or assets of an insolvent entity or individual in breach of DPA 1998 – for example, when undertaking any marketing activities as part of any sale.

Where a buyer of an insolvent company wishes to conduct due diligence and requires the disclosure of information relating to the insolvent company, steps should be taken to ensure that any disclosure of information complies with the DPA 1998. The insolvency practitioner should identify the personal data that may be impacted by the transaction and determine whether the personal data needs to be disclosed. Where personal data will be disclosed, insolvency practitioners should ensure that the data will be kept secure by the buyer and seek to minimise disclosure as far as possible by redacting personal data and limiting the purposes for which any disclosed data can be used for.

Request for DSARs

DPA 1998 gives individuals rights of access to personal information held about them. An insolvency practitioner may receive DSARs in respect of either

- information held by an insolvent individual or company prior to insolvency or
- information held by the insolvency practitioner themselves arising from the insolvency.

The first data protection principle requires fair processing of personal data. This includes providing adequate and transparent information to data subjects about how their data is processed. Insolvency practitioners will need to ensure that fair processing notices, explaining the purpose or purposes for which the personal will be processed and information on who the personal data may be shared with, are provided to data subjects who request these. These will be particularly important where the insolvency practitioner sells personal data to a new data controller, for example, where personal data is included in the sale of an insolvent business to a third party.

Employees of the insolvency practitioner

Where an insolvency practitioner engages staff who, as part of their role, handle personal data, of which the insolvency practitioner is the data controller, the insolvency practitioner, rather than the staff member, will remain the data controller of that personal data. Even if an individual is given specific responsibility in relation to that personal data, they will be acting on behalf of the insolvency practitioner, who will remain the data controller. As part of their responsibility as a data controller, insolvency practitioners must ensure that staff understand the importance of protecting personal data, the insolvency practitioner's obligations under the DPA 1998 and restrictions on the use of personal data. The DPA 1998 also requires data controllers to take reasonable steps to ensure the reliability of any staff who have access to personal data.

How should selling data as an asset in the estate be treated differently from the sale of other types of assets?

Normally personal information should not be sold as an asset if the individuals have not been told originally that their information could be passed on to other organisations.

However, where a business is insolvent, the DPA 1998 will not prevent the sale of data containing the details of individual customers, providing certain requirements are met. For example, the seller must ensure that the buyer understands that they can only use the information for the purposes for which it was originally collected. Personal information should not be used in a way that would be outside of the reasonable expectations of the individuals concerned. For example, selling the asset to a business for a different use is likely to be incompatible with the original purpose and likely to breach the first data protection principle. Where the buyer intends to use the personal data for any other purposes than for the purposes for which it was originally collected, consent for the new purpose will need to be obtained from each data subject. Any consent from a data subject must be freely given, specific and informed.

Where personal data is disclosed through the sale of the data as an asset of the company, an acknowledgement needs to be obtained from the buyer that the buyer will become the data controller of the personal data from the date of sale. Fair processing requirements under the first data protection principle require that information is given to all the data subjects to notify them that the buyer has taken over the personal data, the purposes for which the buyer intends to use the data and of their rights under DPA 1998. A sale and purchase agreement should normally contain an undertaking by the buyer to deal with such notifications.

How long should personal data be retained by insolvency practitioners and at what point can this be destroyed?

Under the fifth data protection principle, personal data processed for any purpose shall not be kept for longer than is necessary for that purpose. DPA 1998 does not specify how long is 'necessary'. In practice, this means that the length of time personal data is kept will be dependent on legislation and good business practice and will need to be continually reviewed. In deciding how long to retain personal data, the insolvency practitioner will need to consider the purpose for which the data is held (with information that is no longer needed for the purpose securely deleted). Information should also be updated, archived or securely deleted if it goes out of date.

In *Re Southern Pacific Personal Loans Ltd,* when deciding what should be done with such data held by SPPL, the court gave weight to the fifth data protection principle. It held that as SPPL was only holding data relating to fully redeemed loans, which was no longer required for the purpose of administering those loans, liquidators were entitled to dispose of the information. However, two exceptions to this general principle were expressed by the court:

- that sufficient data should be retained to deal with the DSARs; and
- that sufficient data should be retained to deal with claims that have been/are received as proofs of debt in the liquidation.

The court held that the right course was to advertise for claims against the company, inviting claimants to submit proofs and setting a date by which such proofs must be lodged. Provided that adequate publicity was given to such notification and sufficient time allowed for the submission of proofs, the liquidators were

entitled to proceed with the confidential destruction of records and distribution of assets without regard to any possible claims which had not been notified to them.

Is there a tension between the costs of compliance with data protection laws and the obligations to not deplete the funds available for distribution in an insolvency situation?

A number of tensions can arise when insolvency practitioners are trying to ensure that they maintain funds within the business, while complying with the requirements of DPA 1998. For example, often the costs of complying with the data protection principles – such as the requirement to process data in accordance with the rights of data subjects, the requirement to ensure that adequate security is in place to protect the personal data, and the requirement to process data fairly – can have a material impact upon the available distribution of funds to the creditors. These costs will need to be continually balanced against obligations not to deplete funds.

What steps can insolvency practitioners take to protect themselves from liability?

As stated above, insolvency practitioners should ensure they have registered with the ICO in their personal capacity when required.

Insolvency practitioners must adhere to the non-disclosure obligations contained in DPA 1998. There are some limited exceptions in relation to non-disclosure – for example, where disclosure is required by any enactment, rule of law or court order, such as information required to be disclosed by the Insolvency Act 1986, the Insolvency Rules 1986, SI 1986/1925 or CDDA 1986. Before disclosing any personal data, an assessment should be made to ensure the disclosure complies with DPA 1998.

Where personal data is disclosed through the sale of the data as an asset of the company, an acknowledgement needs to be obtained from the buyer in the sale agreement that the buyer will become the data controller of the personal data from the date of sale and will deal with any notifications to data subjects that they have taken over the personal data, the purposes for which the buyer intends to use the data and of their rights under DPA 1998.

As discussed above, where personal data is disclosed through the sale of the data as an asset of the company, an acknowledgement needs to be obtained from the buyer in the sale agreement that the buyer will become the data controller of the personal data from the date of sale and will deal with any notifications to data subjects that they have taken over the personal data, the purposes for which the buyer intends to use the data and of their rights under the DPA 1998.

Take away points

- Personal data covers a wide range of information – basically, any data which relates to a living individual or from which an individual can be identified.
- All insolvency practitioners that are 'data controllers' (as defined in the DPA 1998) need to register with the ICO – ignore this at your peril, as it's an offence to process personal data unless the data controller is registered.
- Take adequate measures to protect personal data when disclosing information to third parties as part of any sales process – this may, for instance, require redaction of personal data or undertakings from the buyer to be included in the sale and purchase agreement to deal with the notifications to data subjects are required to be made under DPA 1998 on the sale of the business.
- Retain personal data only for so long as is needed for the purpose(s) for which it is being processed, and securely delete it when it is no longer needed for that purpose – your firm should follow a clear policy outlining when and how personal data should be stored, updated, archived and/or securely deleted.
- Your firm should implement a detailed data protection policy for dealing with personal data in connection with an insolvent company and bankrupt individuals – train your staff on what it says and on proper personal data handling practices. Your firm will also need to ensure that its internal functions that deal with personal information (eg HR, Payroll and Marketing) are similarly compliant.

Interviewed by Anna Jeffrey.
The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

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Mark Gleeson

Mark is a partner in the London office of Squire Patton Boggs specialising in data protection, privacy and freedom of information.

Mark has considerable experience of advising leading private and public sector organisations, both nationally and internationally, on information law. He advises on both a compliance and strategic basis. He has advised on and managed a large number of multijurisdictional data projects.

He has particular expertise in advising on the exploitation and monetisation of information including the use of data including behavioural and location information. He has advised on a number of cutting edge data analytics projects including loyalty schemes, mobile payments, video analytics and telematics. He has acted on behalf of clients under investigation by regulators, law enforcement and industry bodies in relation to data protection compliance. He has pursued and defended civil matters in tribunals and before the courts.

Rachel De Souza

Rachel specialises in data protection and has experience advising on a diverse range of data protection matters including: undertaking full compliance reviews, advising on the commercial use and exploitation of data, drafting tailored data protection policies and procedures, advising on the implications of the EU Draft Data Protection Regulation, advising on cross-border data flows, dealing with registrations and advising on complaints-handling (including subject access requests and dealing with the ICO).

Helen Kavanagh

Helen is the UK based Professional Support Lawyer for the Squire Patton Boggs Restructuring & Insolvency practice. Her experience includes advising on all aspects of contentious and non-contentious restructuring, recoveries and insolvency work. Before becoming a professional support lawyer, Helen worked as a transactional lawyer in private practice for 17 years.

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