

ICSA Guidance on Access to the Register of Members: Proper Purpose Test

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1. Introduction

The register of members has historically been a public register and indeed under s356 of the Companies Act 1985 the register was open to inspection by any member without charge and any other person on payment of such fee as was prescribed. In addition, any person (whether or not a member) could require a copy of the register.

In recognition of the need to protect shareholders from being contacted for an improper purpose, the Companies Act 2006 (the 'Act') has made access to a company's register of members (be it an inspection or a request for a copy) subject to a 'proper purpose' test. These provisions are to be found in ss116–119 of Part 8 of the Act – *A Company's Members*.

Public access to annual returns filed at Companies House no longer provides an alternative way of obtaining shareholder names and addresses. In annual returns made up to dates after September 2008:

- a) public companies whose shares are traded on an EU regulated market (e.g. the Official List) only have to file the names, addresses and holdings of shareholders who have held 5 per cent or more of any class of shares at any time during the year in question;
- b) all other public companies and private companies only have to supply shareholder names and holdings, but no addresses, in respect of all shareholders.

2. Objective of this guidance

What is or is not a 'proper purpose' has not been defined in the Act, or in the Explanatory Notes to it, and will ultimately be a matter for the courts to decide. To date, we are not aware of any application to court under s117 being made so there is no judicial precedent on the point. The objective of this guidance note is to provide an industry view (determined by the working group listed in Appendix A) on, and to provide examples of, what should constitute a proper purpose and what is likely to be an improper purpose. This will provide a useful starting point for companies and their registrars in their assessment of the purpose specified as part of a request under s116.

However, it should be noted that what constitutes a proper purpose in any particular case is dependent on the facts and circumstances of that case.

3. What the provisions say (ss116–119)

Section 116 – Right to inspect and require copies

The register must be **open to inspection** to a member without charge and to any other person on payment of the prescribed fee. Any person (whether or not a member) may **require a copy** of the register, or any part of it, on payment of the prescribed fee. However, a person seeking to exercise either of these rights must make a request to the company which contains the following information:

- (a) in the case of an individual, his name and address;
- (b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation;
- (c) the purpose for which the information is to be used; and

- (d) whether the information will be disclosed to any other person, and if so:
- (i) where that person is an individual, his name and address,
 - (ii) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf, and
 - (iii) the purpose for which the information is to be used by that person.

Section 117 – Response to request for inspection or copy

Where a company receives a request which complies with s116, it must, within five working days of receipt of that request, either comply with it (i.e. allow inspection/provide a copy, as applicable) or apply to the court. A company cannot therefore simply decline a request. If it applies to court it must notify the person making the request. If the court is satisfied that the inspection, or copy, is not sought for a proper purpose, it shall direct the company not to comply with the request. The court may also order that the company's costs be paid, in whole or in part, by the person who made the request. It may also direct that the company does not have to comply with similar requests. If the court does not direct the company not to comply with the request, the company must comply immediately upon the court giving its decision.

Section 118 – Refusal of inspection or default in providing copy

It is an offence to refuse an inspection or to fail to provide a copy of the register without an order of the court and both the company and every officer in default would be liable to a fine and, for continued contravention, a daily default fine.

Section 119 – Offences in connection with request for disclosure of information

It is an offence for a person knowingly or recklessly to make, in a request under s116, a statement that is misleading, false or deceptive in a material particular. It is also an offence for a person who has obtained information under s116 to do anything that results in the information being disclosed to another person, or to fail to do anything with the result that the information is disclosed to another person, if they know, or have reason to suspect that that person may use the information for a purpose that is not a proper purpose.

4. Proper and improper purposes

There follows a number of examples of purposes which the working group consider to be proper or improper in respect of requests to inspect, or require a copy of, a register of members. **These lists are not intended to be exhaustive and a company's response to a request will depend on the particular circumstances of the case.** Clearly, whether or not a purpose is a proper purpose is ultimately a matter for the courts and, until there have been some cases before the courts, it will not be certain what line the courts will take.

Please note that use by the company of its own register is not caught by s117 and therefore register analysis, shareholder mailings/offers etc which are instigated by the company remain a matter for the company. Use by the company of its own register is therefore not covered in this guidance.

Data Protection Act 1998 ('DPA')

Besides s117, companies do, however, need to bear in mind the provisions of the DPA. Every company has a duty to ensure that personal data, which it controls, is not disclosed unlawfully or unfairly. It follows that a company (including its registrars) will be obliged to make sure the purpose underlying a proposed disclosure is a proper one to avoid the risk of a claim by a shareholder that his data protection rights have been infringed. Such a claim could be brought under section 13 of the DPA by any affected shareholder. The courts have, up to now, only awarded nominal damages for breach of section 13 of the DPA, but there is no reason, in principle, why substantial claims could not be admitted under the section. The risk of such claims should therefore be carefully balanced against the costs of a court

application in guiding a company's decision as to whether or not to comply with a request to inspect, and/or for a copy of, the register.

However, when dealing with the DPA it is always important to retain a sense of perspective. There are numerous exemptions under the DPA which would make the processing of personal data lawful where otherwise there might seem to be an obstacle to so doing. For example, if a company is requested to provide details of the register for a purpose which is related to the prevention or detection of crime or for the protection of the public from dishonesty or malpractice, then the company would be perfectly justified in making the disclosure.

Register of debenture holders (ss743–747) and register of interests disclosed (s793 and ss808–814)

Please note that, to the extent applicable, the purposes listed below could apply equally to requests for access to registers of debenture holders (ss743–747) for which there is a similar access procedure.

Consideration also needs to be given to the proper purpose procedure in respect of access to the register of interests disclosed (s793 and ss808–814). However, the procedure for refusing access to, or a copy of, an entry on the register of interests is slightly different to that under ss116–117 and ss743–747 in that the company may refuse a request if the company is not satisfied that it is made for a proper purpose. It is then up to the person making the request to apply to court.

A. Examples of proper purposes

- a shareholder, or his attorney under a power of attorney, checking that the shareholder's personal details are accurately recorded on the register;
- shareholders or indirect investors wanting to contact other shareholders about matters relating to the company, their shareholding or a related exercise of rights. Such matters might include:
 - general representations about the activities or management of the company
 - communications in connection with the exercise of member rights under the Act, such as garnering of support for a requisition, circulating a member's statement relating to a resolution to be put to a shareholder meeting, communications concerning requests for an independent scrutiny of a poll, the publication on the company's website of audit concerns and voting/support for a particular course of action;
- any other persons/bodies wanting to contact shareholders about matters relating to the company, the shareholdings or a related exercise of rights, including general representations about the activities or management of the company and the encouragement of an exercise of member rights under the Act;
- a request from a regulatory or statutory body (e.g. from the FSA, HMRC or the Takeover Panel);
- a request related to takeover offers and private acquisitions, such as a bidder or potential bidder or anyone acting on their behalf requesting access to the target's register prior to a bid being announced;
- register analysis for the purpose of producing statistical research data, which would be of general public interest, but in which no individual or personal information would be subsequently disclosed;
- checking the shareholdings of a deceased person by the executor (or a solicitor appointed by the executor) for probate purposes;

- checking a register entry by a stockbroker to confirm ownership of shares before processing a transaction relating to the shares;
- a request from a regulated provider of financial services or credit reference agency for the purpose of performing credit or identity checks for the purposes of the Money Laundering Regulations or as an anti-fraud measure on a particular shareholder in connection with the provision of credit services to that shareholder or a company associated with that shareholder;
- creditors or potential creditors checking a shareholding before accepting security over the shares of that member or before advancing credit facilities or other financial accommodation on the security of those shares;
- persons seeking shareholder information with a view to enforcing a judgment whether by charging order, stop order, stop notice, third party debt order or otherwise;
- an administrator, liquidator, receiver, supervisor of a company or individual voluntary arrangement or a trustee in bankruptcy or court appointed receivers seeking to identify title to assets.

B. Examples of improper purposes

- any purpose that could be unlawful (e.g. obtaining personal information for the purposes of identity fraud or purposes that might abuse someone's rights under the DPA 1998);
- any representation or communication to members that the company considers would threaten, harass or intimidate members or would otherwise be an unwarranted misuse of the member's personal information;
- offers relating to securities;
- requests from agencies which specialise in identifying and recovering unclaimed assets for their own commercial gain by then contacting and extracting commission or fees from the beneficiaries, where the company is not satisfied that such activity is in the interests of shareholders;
- any other purpose not related to the members in their capacity as members of the company or to the exercise of their shareholder rights (e.g. commercial mailings).

5. Further guidance and recommended best practice

If an application is made to inspect or obtain a copy of the register which gives more than one purpose, at least one of which is considered improper, it is **recommended best practice** to refuse the whole application and refer the matter to the court.

If an application is made to inspect or obtain a copy of the register where access to an entry in relation to only a single shareholder or limited number of shareholders would suffice, it is **recommended best practice** to limit access to these particular record(s) and not to provide the entire register.

Where a register is provided for analysis for research purposes, it is **recommended best practice** for the company to impose certain conditions, for instance, that no individual personal information is disclosed to a third party and that shareholders should not be contacted directly. This might be helpful later if a shareholder sought to say that his data protection rights had been infringed.

Where market practice has been that shareholder details are provided by companies to certain types of organisation without addresses (as these have no relevance to the enquirer), the working party considers that the practice can continue under the new regime. An example would be the provision of data on significant holdings for the market/trading desks which aim to facilitate liquidity in the market by analysing movements in large shareholdings, without the need for addresses.

For the avoidance of doubt, in the absence of any evidence that the purpose is not as stated, the company is entitled to rely on the information provided. Where any doubt exists as to whether a purpose is proper, or indeed whether the person requesting the information (whether by way of inspection or a copy of the register) will use it for the purpose specified (which might be a 'proper' purpose), companies should undertake such further enquiries as are reasonably possible within the time available. It should be made clear to the person requesting the information that failure to provide adequate responses within the remainder of the five days might trigger an application to court because there is no flexibility under s117. A careful audit trail of any enquiries made should also be kept.

If an organisation is using a register for a proper purpose, the organisation should not use the communication with shareholders as an opportunity to promote their own services. It would be reasonable, however, to explain the nature of their organisation in the communication and provide contact details for shareholders.

6. Applying to court

In light of the brevity of the five day window within which the register must either be supplied or an application to court must be made, it is clearly advisable for companies to develop procedures to deal with s116 requests including internal guidelines, which could be based on the ICSA guidance, as to what constitutes a proper purpose so that decisions can be made quickly.

In-house legal and/or external lawyers should be consulted to agree a process that enables the company secretary to undertake any enquiries that are to be made, while ensuring that the five day deadline for a court application can be met. It is clearly advisable that where there is doubt about the purpose and further enquiries are being made, the lawyers are alerted immediately so that preparations can be made in case a court application is required.

Procedure in England and Wales

The procedure is governed by section I of the Practice Direction to part 49 of the Civil Procedure Rules. This requires proceedings to be started by a Part 8 claim form. It is unclear whether the rest of the procedure set out in Part 8 will apply. However, it would be advisable for the company to file any written evidence on which it intends to rely when it files its claim form. This written evidence will be in the form of a witness statement prepared in accordance with the requirements of part 32 of the Civil Procedure Rules. The witness statement will need to provide an explanation of the relevant events and the reasons for the company not complying with the request.

The application should be made to the Companies Court (part of the Chancery Division) of the Royal Courts of Justice (address: Strand, London WC2A 2LL). For small companies, it may be possible to apply in the local county court, but this will require consideration in each case. The application must be made by 4pm on any given day and will need to be made in hard copy, together with the prescribed fee. The forms are downloadable from the Court Service (website: www.hmcourts-service.gov.uk).

Section 117(2) requires the company to notify the person making the request of the application to court. Practice Direction 49(5)(3) states that where that Practice Direction requires a party to proceedings to notify another person of an application, such notification must be given by sending to that other person a copy of the claim form as soon as is reasonably practicable after the claim form has been issued. Although Practice Direction 49 does not directly require a company making an application to court to refuse a section 116 request to send the other party a claim form, when read in conjunction with section 117(2), a court is likely to view that it would be appropriate for the company to send the person making such a request the claim form as soon as it has been issued.

Procedure in Scotland

The procedure in Scotland has not been formally detailed and until the Court Rules are amended or the court provides some other form of guidance, the process is open to the court's interpretation. It would seem likely that a company would apply by way of petition to have the request ruled upon and it is likely that applications under section 117(1)(b) would be made to the Court of Session though it might be possible to have them heard in the Sheriff Courts.

As noted above, on a company's successful application under section 117 to refuse a request for inspection (or copy of the register), the Scottish court's approach is similar to that of the English court and the court can order the company's expenses (as opposed to the company's costs, in England) to be met by the person making an unsuccessful request if it is satisfied that the inspection or copy is not sought for a proper purpose.

It is impossible to predict the length and cost of cases generally because so much depends on the approach taken by the party requesting the inspection/copy of the register. It may be a quick hearing, without much additional evidence. However, if the various grounds put forward by the company are disputed at length, it might become a lengthy and expensive process.

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Appendix A

The working group was comprised as follows:

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