

BUSINESS TAX CENTRE LIMITED



GUIDANCE ON CA2006 – DISCLOSURE OF RESIDENTIAL ADDRESSES AND MAINTENANCE OF THE COMPANY REGISTERS

- Chapter 1 Registrars Powers**
- Chapter 2 Registers of Directors' and Secretaries**
- Chapter 3 Register of Members**

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Introduction

The Companies Act 2006 introduces a new regime for the disclosure of residential addresses. This affects both directors and shareholders. This will affect many procedures we have undertaken in the past from the allotment of shares, appointment of officers to the filing of the annual return.

This regime is effective from 1 October 2009 although there is a short period of transition for existing companies. This guidance will look at the requirements for the disclosure of addresses, the register of directors and secretaries.

Chapter 1 – Registrars Powers

Under the 1985 Act all directors and secretaries must provide as a matter of public record their usual residential address. This would be entered onto the public record at Companies House and was entered into the register of directors for each company of which they are a director. The only exemption to this rule was when a director believed that he may be of risk of a serious threat of violence or intimidation such as from political or terrorist extremists, he could make an application to court for a confidentiality order. Where this was granted a service address was entered on the public record and the usual residential address is kept on a second, secure section whose access is restricted to law enforcement authorities.

In essence it is this approach which forms the basis of the system under the 2006 Act. All directors, whether they were appointed before or after the 1 October date will be given the option of providing a secondary address to use as a service address, which will be declared on the public record. The usual residential address will still be submitted to Companies House but will be held on the secondary secure register. Company secretaries will only have to supply a service address.

The usual residential address becomes protected information, thus affecting the company register and prevents the company and its officers from using or disclosing the usual residential address or the fact that his service address maybe also be his residential address without his consent.

Clients of the professional should be educated in the use of service addresses to stop misunderstandings occurring. Staff of professional firms will need training to understand their responsibilities regarding these new areas of client confidentiality. Any careless breach may leave the firm open to a civil action from disclosing this protected information.

Permitted Use and Disclosure by The Registrar of Companies

The Registrar is required under the Act (s242) to omit this protected information from the public registers. He is not obliged however to check all previously submitted documents or those which are newly submitted to ensure that an address has not been inadvertently disclosed. The Registrar still accepts 'documents in good faith'; therefore the responsibility will fall upon those charged to file the documents. In many instances that will be the professional in the course of his duties on behalf of a client.

Section 243 of the Act allows the Registrar to communicate with the director at his home address. It also allows the Registrar to disclose the protected information to 'a public authority' which means any person or body having a public function, and to a credit reference agency, for the purpose of those furnishing information relevant to the financial standing of individuals.

Protection Against Disclose to Credit Reference Agencies

As with the 1985 there is a procedure for further confidentiality and not having the address being made available to credit references agencies, where there are grounds to believe there is a serious risk of violence or intimidation or been employed by a relevant organisation such as the police or GCGQ.

This application can be made under s243 and in all cases the applicant the application must contain a statement on the grounds which it is made and be accompanied by supporting evidence. A director who has a confidentiality order under the 1985 and is still in force at 1 October 2009 will be treated as if he had made a successful application under the 2006 Act.

Power of Registrar to Disclose a Usual Residential Address

Where the Registrar believes that a service address is ineffectual he may put the usual residential address on the public record. This may happen when communications sent by the registrar to the director and requiring a response within a specified period remain unanswered, or where there is evidence that service of documents at the service address is not effective to bring them to the notice of the director.

Before doing so the registrar will first send a further warning letter to the director and to every company he is a director of. If after considering any representation received, the registrar decides to put the home address on the public record, he must first notify them again of his intentions. The effect of this procedure by the registrar under s245 is that every company the director is involved with must put the directors' residential address on its register of directors as his service address and the director would not be allowed to file service addresses other than his home address for a further five years (s246).

Chapter 2 - Register of Directors and Secretaries

Given the effect of service addresses for directors and secretaries, from 1 October 2009 all companies under the 2006 Act will be required to file information in three separate registers, namely:

1. A registers of directors including service addresses (s162).
2. A register of directors residential addresses (s165), and
3. A register of secretaries (s275).

This differs from the singular register of directors and secretaries under the 1985 Act.

Should the Registers be Split?

This is a big question for existing companies who currently have the one register for the directors and secretaries. The transitions provisions contained within the 8th Commencement Order state that any registers of companies under the 1985 Act will be treated as two separate registers, that is a register of directors and a register of secretaries, this complies with the requirements of s162 and s275 of the Act.

This is good news for existing companies, since it means that it is not necessary to physically split the information into two separate registers although a company can do if it so wishes. For those who are using lose leaf type registers this would be a relatively easy task, the same may be said where the register is held in electronic, though this may be dependent on the programme provider. Companies may struggle if their registers are held in a bound book.

Register of Directors, What will it Contain?

The details for directors who are individuals will take a starting point of that under the 1985 Act, namely;

- Full name,
- Previous name
- Business occupation
- Nationality
- Date of birth

The CA2006 under s163 for individuals prescribes the following;

- No need to show other directorships as required under the 1985 Act.
- The register must not show shadow directors
- The register should show a service address rather than the usual residential address.
- There must be a totally new entry showing the country or state or part of the UK in which the director is usually resident.

The requirement for former names has been amended under the 2006 Act. It will not be necessary to show any former name if;

- The name was changed or disused before the person reached the age of 16 (18 under the 1985 Act).
- The former name has not been used in more than 20 years, and
- The name is the former name of a peer which is different from his title.

However, under the 1985 Act there was an exemption regarding the maiden name of a married woman which meant that it did not have to be disclosed, under the 2006 this exemption has been abolished. All married women are now required to show their maiden name unless one of the above exemptions applies.

Register of Secretaries, What will it Contain?

S277 requirements for secretaries will be the same as the requirements of the 1985 Act except for the following amendments;

- The requirements for former names will change to match that of directors.
- It will not be necessary to show the usual residential address but a service address instead.

Service Addresses

To effectively use service addresses we must first understand the requirements for them. A service address is defined under s1141 as 'an address at which documents may be effectively served upon that person'. The conditions for this are laid out in the Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008. Regulation 10 states that 'the service address must be a place where the service of documents can be effected by physical delivery and the delivery of documents is capable of being recorded by the obtaining of an acknowledgement of delivery'.

It should be noted however that a person who is a director or secretary of more than one company can file a different service address for each company he is an officer. This can mean that a change of service address at one company does not trigger changes at the others.

It would common for the service address to be that of the registered office, especially when that address is other than a residential address. (This may cause concern for those professionals offering registered office facilities whilst working from home, especially in controlling the use of service addresses). One concession under the Act is that the service address may be listed and filed as simply 'the company's registered office' and not having to enter the full address. This could be particularly useful if the company changes its registered office, meaning no amendments need to be filed for the individual directors.

So from 1 October 2009 we must all comply with the new requirements and be used to the idea of service addresses. In the transitional provisions of the 8th Commencement Order it states that in the case of an existing company, the relevant existing address of a director or secretary to be a service address on 1 October 2009. It is this existing address that will be entered in the both registers as both a service address and usual residential address.

Where this usual residential address has been used as the service address under the transitional arrangements and the director decides to change this service address to one other than his usual residential address, you must remove the residential address from the register of directors, since it will now become protected information, and replace it with the new service address. The home address will now only be shown in the register of directors' residential addresses.

Register of Directors' Usual Residential Addresses, What does it Contain?

This register is not required to give any details regarding corporate directors'; therefore it can only apply to individuals. It must simply contain;

- The directors' full name, matching that of the registers of directors, and either
- If the address is the same as the service address, an entry to that effect, or
- If the address is different from the service address, the full address must be entered.

All companies have a duty to keep a register of directors' residential addresses from 1 October 2009.

Residential Addresses – Protected Information

We have discussed earlier in this guidance about the powers and restrictions placed upon the registrar over the protection rights of residential addresses. We shall now discuss the prohibitions placed upon a company.

S240 defines protected information as both or either of;

- The usual residential address of a director who is an individual;
- The information that his service address is his usual residential address.

The company is prohibited under s241 from using or disclosing protected information without the consent of the director except for the purpose of communicating with him directly or the following exemptions;

- In order to comply with an obligation to send information to the Registrar,
- In order to comply with an order from a court for disclose of the directors address.

There is however no offence provided within the Act for a breach of s241, however the professional advisor may find himself open to a civil action for a breach of client confidentiality for a breach.

The prohibition can be viewed as follows under s241;

- If someone requests the director's usual residential address from the company, it must refuse it unless one of the above exemptions applies;
- If someone requests a director's service address, it may provide them with it even though this is the director's usual residential address.
- In disclosing the service address, the company must not give any indication that this is also the director's usual residential address,
- If the company is asked if that is the service address the same as the residential address the company should refuse to confirm that is the case.

It should also be noted that information does not cease to be protected once an officer leaves a company.

Transitional Provisions For Company Registers

The transitional provisions make a number of important transitional arrangements. The provisions state that an existing company does not have to comply with the requirements of the 2006 with regard its registers until the earlier of;

- The date to which the company makes up its annual return on or after 1 October 2009, and
- The last date to which the company should have made up that return.

These exemptions from altering the registers of all companies at 1 October 2009 do not apply in relation to the following;

- A director or secretary whose appointment is notified to the Registrar on or after 1 October 2009, regardless whether his appointment was prior to that date.
- A director or secretary whose registered particulars are required to be altered on or after 1 October 2009 because they have changed, regardless whether the changes happened prior to that date.

The provisions also provide that the company must remove from its registers any entries relating to shadow directors on 1 October 2009 and also the removal of any particulars in the registers required under the 1985 Act but not the 2006 Act does not give rise to notification to the registrar.

Chapter 3 - Members Residential Addresses and the Register of Members

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.

- 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:
- 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;
- All other public companies and private companies only have to supply shareholder names and holdings, but no addresses, in respect of all shareholders.

The 2006 Act will make some deregulatory changes to the requirements to keep a register of members. It will keep the public right both to inspect and to obtain a copy of a company's register of members (ss113–128). However it gives companies the right to apply to court for permission to refuse an inspection or copying request that they believe is not being made for a proper purpose. Anyone who makes a request for inspection or copying must state their personal details and the purpose for which they are making the request. These proper purposes rules (s119) were commenced on 6 October 2007 but only apply after a company has filed its first annual return after that date.

Companies have historically had statutory immunity from claims relating to entries after 20 years; the CLR recommended that this period be reduced. The 2006 Act provides for a period of 10 years in keeping with the Law Commission's recommendation on the statute of limitation. It also makes the same reduction to the period for which companies are required to keep past members' details, and enables this old information to be kept separately from information on current members (s121 and s128).

These sections came into force on 6 April 2008 subject, however, to transitional arrangements in the Fifth and Sixth Commencement Orders which require a copy of any details relating to former members to be kept for up to 20 years if they ceased to be a member before 6th April 2008.

There is no specific guidance contained in the explanatory notes to the Companies Act, but the following is considered 'best practice' in the absence of case law.

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:

- In the case of an individual, his name and address;
- In the case of an organisation, the name and address of an individual responsible
- for making the request on behalf of the organisation;
- The purpose for which the information is to be used; and
- Whether the information will be disclosed to any other person, and if so:
 - (a) where that person is an individual, his name and address,
 - (b) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf, and
- (c) 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 under 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.

What are Proper and improper purposes?

There follows a number of examples of purposes which you may consider to be proper or improper in respect of requests to inspect, or require a copy of, a register of members. 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.

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.

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.
- A request from a regulatory or statutory body (e.g. from the FSA or HMRC);
- 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;
- Checking the shareholdings of a deceased person by the executor (or a solicitor appointed by the executor) for probate purposes;
- 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.

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;
- 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).

Further recommendations

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 to refuse the whole application.

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 to limit access to these particular record(s) and not to provide the entire register.

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.