

Documents and Records: Ownership, Lien and Rights of Access

(Issued 1 September 2006 replacing the previous Section (Handbook Statement '1.302') of the same name.)

Further less formal guidance is available to members of the Institute, in a number of areas covered by this Section, including Technical Releases and the Helpsheets from the members' services section of the website at www.icaew.co.uk/members. In this section the masculine gender imports the feminine gender throughout.

Contents

	<i>Paragraph</i>
Introduction	1
Documents and Records	2–3
Ownership	
Determination of ownership	4
The capacity	5
The contract	6–8
The purpose for which documents and records exist	9
Document Retention	10
Members' policy	11–12
Lien	13
'General liens' and 'particular liens'	14
Conditions for the exercise of a particular lien	15
Special cases	16
Statutory book of companies	17
Accounting records of companies	18–21
Administrative receiverships and receiverships	22–23
Administrations and liquidations	24
Bankruptcy	25
Fee disputes	26–29
Data Protection	30
Rights of Access	
Basic principles	31–34
Requests for access from clients	35–40
Requests for documents by HMRC	41–43
Requests for documents by regulators	44
Freedom of Information Act 2000	45–48

Introduction

1 This Section has been issued to give guidance to members in practice on four matters.

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

Which documents does the member own?

1.1 Consideration under the heading 'Ownership' below is given to what documents or records are or are not owned by members. The question of ownership will be a matter of both law and fact and can often be a complex question to decide. This Section does not, and cannot, seek to determine ownership; rather it highlights the sorts of issues of which members need to be aware when seeking to determine ownership.

How long should the member retain documents?

1.2 Consideration under the heading 'Document Retention' below is given to those issues which a member is advised to consider concerning the adoption of a document retention policy.

If the client owns the documents does the member always have to hand them over?

1.3 Consideration under the heading 'Lien' below is given to what rights by way of lien a member has over documents and records not owned by him (including the exercise of lien in fee disputes).

What obligations does a member have to allow others access to documents which the member holds?

1.4 Consideration under the heading 'Rights of access by clients and third parties' below is given to the rights of clients and third parties to demand access to documents held by members (both those owned by a member and those owned by the client) and the related issue of allowing access to third parties.

1.5 The guidance reflects the law in England and Wales as at July 2006. It is also assumed that the member provides his services in a professional relationship governed by the laws of England and Wales. There may, however, be cases in which either by express agreement or by implication from the circumstances, a foreign law¹ will apply. In these circumstances a member is advised to consider taking legal advice from a lawyer qualified to practise in the jurisdiction in question.

1.6 Many of the issues which give rise to the need to consult this Section could be avoided (or the effects minimised) through the careful drafting of engagement letters. In this regard, members are referred to Section 9.1, 'Managing the professional liability of accountants', for more details.

¹ 'Foreign law' in this context should be read to include the law of Scotland and Northern Ireland as well as jurisdictions outside the UK which may differ from the law of England and Wales.

Documents and Records

2 In this statement, the term ‘documents’ is not confined merely to documents stored on paper, but extends to any information which can be understood by the senses or is capable of being made intelligible by the use of equipment. The term therefore covers information that is stored on microfilm or electronically, for example on hard disks, CDs and other media, including messages sent by e-mail and online sources.

3 Similarly, sections 221 and 222 of the Companies Act 1985 and the Companies (Registers and other Records) Regulations 1985 do not require the accounting records of a company to be stored on paper and, accordingly, members may be in possession of records of a client which may be stored on computer or some other non-paper format. The Companies Law Reform Bill currently contains similar provisions. This guidance will be updated if and when any changes come into effect.

Ownership

Determination of ownership

4 Determination of ownership is generally a mixed question of law and fact and can often be a complex question to resolve. Where particular documents and records are not owned by the member they generally belong to the client. In order to determine whether documents and records belong to the member it may be necessary to consider:

- a. the capacity in which the member acts in relation to his client;
- b. the contract between the member and his client usually as evidenced in an engagement letter; and
- c. the purpose for which the documents and records exist or are brought into being.

The capacity

5 A member may act for a client either as principal or as agent depending on the nature of the work covered by the engagement. Examples of these are given below. The distinction is significant in relation to the ownership of documents created by the member during the engagement. As a general rule, where the relationship between the member and his client is that of principal and principal, documents prepared, acquired or brought into being by the member solely for his own purpose as principal belong to the member and only those documents brought into being by the member on the specific instructions of the client belong to the client. Where the relationship between a client and the member is that of principal and agent, documents brought into being by the member pursuant to the retainer normally belong to the client. In either case, documents and records provided initially by the client to the member will remain the property of the client.

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

The contract

6 It is recommended that members consider dealing with the issue of ownership of documents in the engagement letter with their clients. Any specific agreement reached between the member and his client relating to the ownership of documents produced by the member will override the principles referred to above. Although such an agreement does not have to be in writing, in the interests of certainty, it is recommended that any express agreement with the client is documented.

7 The table below comprises a non-exhaustive list of the capacities in which a member may act for a client. It is assumed in the table that the terms of the contract between the member and his client are silent on the question of ownership and therefore the principles referred to in paragraphs 4 to 6 above are implied. This table is intended to be indicative and helpful and is not intended to compromise a member's legal rights. If a member, without consent of the client, takes a contrary view to the position shown in the table he is recommended to seek legal advice.

Nature of work

8 The question of ownership will depend on the nature of the work to be done. For example:

Nature of work	Type of document	Who has ownership?
<i>Auditing</i>		
Preparation of audit report whether carried out under statutory provisions or not	Any documents prepared by member solely for purpose of carrying out his duties as auditor Audit Report	Member Client
<i>Accountancy</i>		
Preparation of accounting records	Accounting Records	Client
Preparation of financial statements from client's records	Financial statements Draft/office copy of financial statements ² Correspondence with third parties	Client Member Member ³

² If, however, the client has specifically asked for drafts to be prepared for him, they will belong to the client because then the drafts are the 'product' which is required by the client.

³ Provided that the client has not required the member to produce these documents for him (*Chantrey Martin & Co v. Martin* [1953] 2 QB 286).

Preparation of financial statements from incomplete records where not instructed by client to work from those records	Schedules	Member ⁴
Analysis of banking accounts prepared by member	Reports, memoranda or notes Drafts of the above	Client Member ⁵
Other accountancy	Records prepared by the member which are required by law to be kept by the client	Client
Other accountancy	File copies of any documents including drafts	Member
<i>Tax assistance and advice</i>		
Preparation and submission of accounts, returns and computations to the Inland Revenue or VAT returns to HM Revenue & Customs ('HMRC') and other tax compliance work	Accounts, schedules and computations, correspondence between the member and HMRC in relation to the same	Client ⁶
Agreement of the client's tax liabilities including those following an enquiry or investigation	Any documents	Client

⁴ However, in the case of a body incorporated under statutory provisions, the position is different. For example, section 221 of the Companies Act 1985 sets out the accounting records which a company must keep. Where schedules have not been kept by the client company but such schedules were prepared for the client company in order that it should comply with section 221 they would belong to the company.

⁵ See footnote 3 above.

⁶ *Chantrey Martin & Co v. Martin* [1953] 2 QB 286.

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

Nature of work	Type of document	Who has ownership?
Preparation of a report for a client to submit to HMRC in connection with an enquiry or investigation	The report and supporting schedules Papers used in preparing the report	Client Client
Provision of advice to a client on tax liabilities arising out of an enquiry or investigation	The report and supporting schedules Papers used in preparing the report	Client Member
Tax consulting, advice or planning	Drafts, internal memoranda, etc. Letters, reports or documents of advice	Member Client
<i>Consulting and advisory work</i>		
Corporate advisory services	Reports and other deliverables Other papers produced as part of the engagement but not provided to the client	Client Member
<i>Insolvency</i>		
Appointments as administrators, administrative receivers or liquidators	Any documents	Please refer to the footnote ⁷

⁷ As administrators, administrative receivers or liquidators, the fundamental duties of an insolvency practitioner are regulated by Insolvency Act 1986 and Insolvency Rules 1986. In that capacity, members may therefore wish to seek legal advice.

Appointment as a receiver	Any documents created as agent for the company which owns the assets to which the debenture relates ⁸	Company
	All other documents ⁹	Member

The purpose for which documents and records exist

9 The table below comprises a non-exhaustive list of the purposes for which documents exist which in turn may affect the question of ownership. Again, this table is intended to be indicative and helpful and is not intended to compromise a member's legal rights. If a member, without consent of the client, takes a contrary view to the position shown in the table he is recommended to seek legal advice.

Purpose	Type of document	Who has ownership?
Communications between a member and his client	Letter received by the member from the client	Member
	File copy of letter sent by the member to the client	Member
Communications between members and third parties	Correspondence to and from a member acting as agent for the client	Client
	Correspondence to and from a member for purpose of obtaining specialist advice for the client	Client
	Correspondence to and from a member acting as principal ¹⁰	Member

⁸ The overwhelming majority of modern debentures provide that the receiver is the agent of the company and s 44 Insolvency Act 1986 deems any administrative receiver to be an agent of the company until the company goes into liquidation. However, there will be rare cases where neither of these conditions applies such that the receiver will be the agent of the debenture holder in which case documentation may be created as agent for, and be the property of, the debenture holder.

⁹ Members are reminded that the majority, if not all, documentation produced as receiver will be in the capacity of agent either of the company or the debenture holder (see footnote 8 above). Therefore, a member seeking to rely on a lien in such circumstances may wish to seek legal advice.

¹⁰ This would include documents which are not the end product of the member's work, for example: (i) documents confirming or otherwise the balance of an account between a third party and the client, such as those in respect of bank balances or custody of securities; and (ii) other documents which the member has obtained solely for his own use in carrying out his duties as principal. These will normally include correspondence between the member and the client's solicitors in which the member is giving or receiving information (as opposed to advice).

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

Purpose	Type of Document	Who has ownership?
Internal file notes	Files notes made where member acting as agent (i.e., tax compliance work) and preparation of file notes reflected in the fees charged to client	Client
	File notes made where member acting as principal	Member
	File notes prepared other than in relation to work done for the client	Member

Document Retention

10 For additional guidance, members are recommended to consider obtaining further professional or legal advice when drafting a document retention policy.

Members' policy

11 Members are recommended to have and implement a document retention policy in respect of their files and other documents.¹¹ Some problems or misunderstandings may be avoided if a member's document retention policy is communicated to clients although members should be aware that such communication may give rise to contractual commitments. Members are therefore recommended to make it clear to clients whether the document retention policy is a contractual obligation on the part of the member or not.

12 Members are also reminded that there are certain statutory and regulatory obligations which would govern the periods for retention such as rules regarding documents relating to a client's tax affairs or documents relating to regulated business such as financial services. Members are recommended to seek further professional or legal advice when formulating a document retention policy.

Lien

13 Members may be advised to seek further professional and legal advice when exercising liens.

¹¹ Ethics Advisory Services have a helpsheet on document retention policies which can be obtained from the Institute's website: www.icaew.co.uk/members.

‘General liens’ and ‘particular liens’

14 A lien is a right of a person to retain possession of the owner’s property until the owner pays what he owes to the person in possession. At law there are both general and particular liens. Only a particular lien is likely to be relevant to a member.¹² A particular lien is a lien over property which can be retained only until payment of a particular debt due in respect of that property is paid. An accountant has a particular lien over documents belonging to his client in respect of which the accountant has performed work for which he has not been paid the fee due.¹³

Conditions for the exercise of a particular lien

15 A right of particular lien (in the absence of any agreement to the contrary) will exist only where all of the following circumstances apply:

- (i) *The documents retained must be the property of the client who owes the money and not of a third party, no matter how closely connected with the client.*

Accordingly, where a member carries our work for both a company and its directors in their private capacities and where fees remain outstanding in respect of the work done for the directors personally, no right of lien will exist over the company’s documents.

- (ii) *The documents must have come into the possession of the member by proper means.*

Accordingly, if a member receives documents belonging to a client from a third party in error, the member would not be entitled to exercise a lien over them.

- (iii) *Work must have been done by the member in respect of the documents.*

A member may exercise a lien over documents where he has done work in respect of them. Case law indicates that a member’s lien would be undermined if a fee note is not submitted or an oral demand not made within a reasonable period of time.¹⁴ The Institute’s ethical principles, in particular the fundamental principle of integrity, oblige that a member acts not only with honesty but also with fair dealing. As such, a member who has not already issued an invoice in relation to such work or communicated to the client that there are fees due (and the amount thereof) must do so as soon as is practicable to ensure that both his legal position is maintained and that he complies with the Institute’s high ethical standards.

¹² General liens are those liens which allow the creditor to retain possession of any property belonging to the debtor in respect of any debt; not necessarily a debt which relates directly to the retained property itself. Members are advised that it is not likely to be worthwhile to assert a general lien in law against a client unless they are expressly given the right in their contract with the client.

¹³ In *Woodworth v. Conroy* [1976] QB 884 at 890, Lawton LJ said ‘accountants . . . have at least a particular lien over any books of account, files and papers . . .’

¹⁴ *Albemarle Supply Co v. Hind* [1928] 1 KB 307, *Woodworth v. Conroy* [1976] QB 884.

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

- (iv) *The fees for which the lien is exercised must be outstanding in respect of such work and not in respect of other unrelated work.*

Where documents belonging to, or created for, a client relate to an earlier or different engagement for which no fees are outstanding, no right of lien can be exercised over those documents in respect of other engagements for which fees are outstanding. For example, where a member is holding documents which relate to the preparations of a client's financial statements, the member may not exercise a lien over those documents in respect of unpaid fees which relate to tax advice provided to the same client.

Special cases

16 There are various special cases where the normal position regarding the existence and enforcement of liens does not apply. Special cases may arise as a result of the provisions of a particular statute, or from considerations of general public policy and include the following.

Statutory books of companies

17 An established line of authority exists in which the courts have held that no lien can exist over books or documents of a registered company which, either by statute or by the articles of association of the company, have to be available for public inspection or to be kept at the registered office or some other specified place or to be dealt with in any special way.¹⁵ Accordingly, documents such as the register of members and directors' minute books cannot become the subject of a lien.

Accounting records of companies

18 *NB. The guidance set out in this Section reflects the law as at July 2006. However, the question of what constitutes accounting records is currently the subject of significant debate with changes proposed in the Company Law Reform Bill. The guidance will be updated in due course to reflect any developments.*

19 A lien cannot be asserted over accounting records as defined in section 221 Companies Act 1985 ('Accounting Records') because such records are required¹⁶ to be kept at the company's registered office or at such other place as the directors think fit, and must at all times be open to inspection by the company's officers.¹⁷

20 Accounting Records cover a wide range of documents and are not limited, say, to double entry ledgers and journals.¹⁸ Examples of what might constitute Accounting Records are as follows:

¹⁵ *Re Capital Fire Insurance Association* [1883] 24 Ch.D 408 and *Re The Anglo-Maltese Hydraulic Dock Co Limited* [1885] 54 LJ Ch. 730. These cases concerned solicitors' liens; however, the same principles apply to accountants.

¹⁶ By s 222(1) Companies Act 1985.

¹⁷ *DTC (CNC) Ltd v Gary Sargeant & Co* [1996] 1 BCLC 529.

¹⁸ Technical Release *Accounting records* (FRAG 5/92) contains guidance on the interpretation of s 221 Companies Act 1985.

- sales invoices;
- purchase invoices;
- cheque books;
- paying-in books; and
- bank statements.¹⁹

21 Whilst it might, from the above list, appear to a member that practically all documents which constitute accounting records (in its widest possible sense) will be Accounting Records, the statutory requirement is only that the company should keep accounting records (i) which are sufficient to show and explain the company's transactions and (ii) which are such as to disclose with reasonable accuracy the financial position of the company at any time and to enable the directors to ensure that any balance sheet and profit and loss account prepared under the Companies Act 1985 complies with the requirements of that Act. Accordingly, where, for example, a company keeps a purchase ledger, the underlying invoices are unlikely to be Accounting Records.

Administrative receiverships and receiverships

22 Where a member has a lien over the books of account or other documents of a company, the appointment of a receiver does not affect the lien.

23 Although a debenture may prevent a company from creating any mortgage or charge in priority to the debenture, a member's lien is not a mortgage or charge created by the company. Debenture holders cannot therefore prevent a member from acquiring a lien. Such a lien would be untouched by debenture holders taking possession and appointing a receiver.²⁰ Even where a receiver is appointed by the court, the lien will be unaffected unless the court orders otherwise.

Administrations and liquidations

24 Where a company is the subject of an administration order, or is in liquidation or has a provisional liquidator appointed, a member cannot exercise a lien over any records of the company where the administrator or liquidator has no other way of obtaining possession of such records and so must hand them over.²¹ There is one exception, however, where the documents held by a member give title to property (for example, title deeds, share certificates or bills of lading), have been pledged or are held as security for some liability of the company and are held on that basis. This, however, is a difficult area and members may wish to take legal advice on the operation of the exception in any particular case.

Bankruptcy

25 As in liquidations, a member cannot exercise a lien over any records of the bankrupt, except where the lien relates to documents which give title to

¹⁹ *DTC (CNC) Ltd v. Gary Sargeant & Co* [1996] 1 BCLC 529.

²⁰ *Brunton v. Electrical Engineering Corporation* [1892] 1 Ch. 434.

²¹ Section 246 Insolvency Act 1986.

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

property and are held on that basis.²² Again, the exception is a difficult area and members may wish to take legal advice.

Fee disputes

26 If a client offers a smaller sum in satisfaction of a greater debt a member is not obliged to accept that amount in full settlement. If, however, a member wishes to accept such sum in part payment, the member is advised to make the client aware of this fact (preferably in writing) at the time of acceptance to avoid adversely affecting the member's legal rights.

27 Members are expected to take reasonable steps promptly to resolve any dispute relating to fees.²³ Reasonable steps might include seeking to negotiate, communication with the client, alternative dispute resolution, serious documented consideration of the client's representations or legal action.

28 Nevertheless, where a legal right of lien exists, the Council supports the exercise of that lien in appropriate circumstances. Institute guidance on how to handle or avoid complaints²⁴ indicates the right exists to persuade an otherwise reluctant client to pay an outstanding bill. Thus the continued exercise of a lien in circumstances where a dispute is to be resolved by formal means (e.g., arbitration or litigation) may be inappropriate. If a member wishes to continue to exercise a lien in such circumstances the member is strongly advised to seek legal advice on the position.

29 Before seeking to exercise a lien, a member is advised to consider whether it falls into any of the special cases outlined in this statement. In all but the most straightforward situations a member is recommended to consider whether legal advice is appropriate. Where a member takes legal advice which supports the decision to exercise a lien or where a member's circumstances fall clearly within the situations set out in this statement the member will ordinarily have met the standards required by the Institute but may need at the same time to consider whether any of the circumstances affect the ethical position. In this regard, members may wish to consult the Ethics Advisory Services helpline or a support member.

Data Protection

30 The Data Protection Act 1998 applies to 'personal data'.²⁵ Members who decide how and why personal data is processed, must comply with the rules set

²² Section 349 Insolvency Act 1986.

²³ Section 3.3, Professional accountants in practice, Part B, paragraph 240.4F.

²⁴ Section 2.8, *The Duty on Firms to Investigate Complaints – Guidance on How to Handle or Avoid Them*.

²⁵ In other words, data which relate to a living individual who can be identified from those data (or a combination of those data and data which is or is likely to come into the possession of the person processing the data). Members are reminded that personal data may also be 'sensitive personal data' and are referred to the Act if in doubt as to the requirements.

out in that Act regarding fair and lawful data processing. These rules are more commonly known as the data protection 'Principles'. These 'Eight Principles' form the backbone of the Act and apply to all forms of processing. All members who decide how and why personal data is processed have a personal responsibility under the Act to comply with the Eight Principles. Members are therefore advised to consider the Act in the context of any requests for documents or information which may result in the transfer of personal data without the consent of those to whom the personal data relates. For specific guidance, members are referred to Technical Release *Data Protection Act 1998 and its Application to the Major Practice Streams of Accountancy Practices* (Tech 07/04).

Rights of Access

Duties of members to their clients and the powers of third parties to require access: the basic principles

31 Members are reminded that, regardless of whether particular documents are owned by a member or his client, confidentiality is an implied term of every client engagement. In consequence, voluntary access to information or documents should be given only:

- after obtaining the client's consent; or
- where the member's duty of confidentiality to his client is overridden by the powers of third parties to require access to, or compel production of, documents; or
- where the member has a legal right or duty to disclose the information; or
- where the member feels obliged to volunteer information in the circumstances discussed in Section 7.1, 'Professional conduct in relation to defaults or unlawful acts'.

32 Members are reminded of the overriding nature of statutory and other provisions when considering confidentiality. Where public bodies, office holders and regulators (including European institutions) seek access to, or production of, information or documentation in a member's possession under the relevant statutory or regulatory powers, a member is under an obligation to his client to take reasonable steps to satisfy himself that any power is being exercised correctly. Members are reminded that such powers may not extend to requiring members to produce documents which are subject to legal professional privilege. In circumstances where a member believes he may hold documents which are subject to such privilege and where he is being required to produce or give access to such documentation, the member is recommended to take legal advice.

33 It is recommended therefore that members ask the entity requesting the information or documentation to state the source of its power and any statutory or regulatory limitations on those powers before releasing any documentation or providing information. If the documentation sought belongs to a client and the member is unsure of the requesting body's power, it

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

will usually be open for the member to seek the client's consent to disclose. However, provided that the request is made pursuant to a legitimate power, the member's duty of confidentiality will be overridden. Members are reminded that it may not be appropriate to seek the client's consent in all circumstances. This is particularly true in matters subject to the money laundering reporting regime.²⁶ If in any doubt as to whether it is appropriate to seek a client's consent, members should seek advice from the Ethics Advisory Services or legal advice as appropriate.

34 In certain circumstances, where the power being exercised or the obligation on the member is not clear, the member may wish to take legal or professional advice.

Requests for access from clients

Access for the client himself

35 If a client requests access to documents which belong to him then, subject to any lien, access ought normally to be given. Where the documents requested belong to the member, the member's response to such request is more difficult to determine as a member's willingness to assist will depend on the circumstances in which access is being sought. Giving access may increase the risk of litigation against the member, even where no obvious likelihood exists. However, there are circumstances where allowing access would result in the client being better informed, thereby reducing such risks.

36 Where a director or directors of a client company seek access to documents which either belong to the client company or contain confidential information relating to the client company in connection with the personal affairs or interests of those directors rather than in furtherance of the company's interests, members should obtain authorisation from the board of directors or, where appropriate, from outside shareholders, before permitting access.

37 A client who is an individual also has certain rights under the Data Protection Act 1998 to be provided with a copy in permanent form of all personal information that is held by a member about them whether contained on client files or otherwise. Copies are obtained by the client making a Subject Access Request. The Institute has issued further guidance on the requirements of the Data Protection Act in the form of Technical Release *Data Protection Act 1998 and its Application to the Major Practice Streams of Accountancy Practices* (Tech 07/04) which is available to members. Where the documents to

²⁶ See Section 7.2, 'Anti money laundering (proceeds of crime and terrorism); second interim guidance for accountants', Tech 49/05 'Money Laundering: The Proceeds of Crime Act 2002 as amended by the Serious and Organised Crime and Police Act', and Tech 02/06 'Guidance on changes to the Money Laundering reporting requirements: the exemption from reporting knowledge or suspicion of money laundering formed in privileged circumstances'. See also Section 7.1, 'Professional conduct and disclosure in relation to defaults or unlawful acts'.

which the data subject has requested access are subject to a lien, the data subject is generally entitled to have communicated to him a description of the data held by the member and the type of information held in those data.²⁷ Members seeking to exercise a lien in respect of an individual's documents who receive a Subject Access Request from that individual are warned that there is a balance to strike between compliance with data protection legislation and their legal right of lien. Members may wish to seek legal advice in such circumstances.

Access for the benefit of a third party

38 Sometimes investigating accountants are engaged by a third party to review aspects of the affairs of a company for the purpose of disposals, acquisitions or investments. Access to the working papers of the auditors or the tax advisers of such a company will frequently assist the investigating accountants to perform this task. However, in recent years, auditors and tax advisers have been reluctant to permit such access due to the risk of unintentionally creating duties of care to third parties. The audit or the tax advice will not have been planned and performed in contemplation of any particular commercial transaction and it is for the relevant third party to arrange for appropriate due diligence work to be performed.

39 As discussed above, an auditor's working papers belong to the auditor and so an auditor is not obliged to give access to them in this situation. The position may be the same for the tax adviser depending on the nature of the work performed and the terms of any engagement letter. However, refusing access is unhelpful to the client company who is normally a willing participant in the transaction. An alternative way forward is for members to have a developed policy regarding access to working papers, providing certain conditions are met.

40 The reluctance to permit access can be largely overcome by the use of client authorisation and 'release' letters. The purpose of these letters is to deal with any confidentiality issues and to provide a framework within which members can make their papers available and provide explanations while limiting as far as possible any additional risks. For specific guidance, members are referred to further guidance issued by the Institute. At the time of issue of this Statement, this is contained in Technical Release *Access to Working Papers by Investigating Accountants* (Audit 04/03) which contains templates for the necessary letters.

Requests for documents by Her Majesty's Revenue and Customs (HMRC)

41 It is likely, as a result of merger between Her Majesty's Inland Revenue and Her Majesty's Customs and Excise, that the powers of access to information will change to some extent.

42 The VAT provisions are addressed to 'every person who is concerned (in

²⁷ Section 7 of the Data Protection Act 1998.

9.4 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

whatever capacity)' in a supply of goods and services including a customer. Such persons may be required to furnish information to the Commissioners.²⁸ However, it is questionable whether it includes an accountant in possession of the books and records because he is not concerned in any way with actual supplies of goods and services made by his client and so a court order could be necessary to compel an accountant to release such documents.²⁹ Members in doubt should seek legal or professional advice.

43 In respect of direct tax HMRC have wide powers to require information of both the taxpayer and 'others' which can include the member. Members should consider the authority cited by the authority seeking access and if in any doubt should seek legal or professional advice.

Requests for documents by regulators

44 In the event that a member receives a request for documents or information from a regulator, including but not limited to the Financial Reporting Council (FRC), the Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB), the member is strongly recommended to take legal advice.

Freedom of Information Act 2000

45 Members are referred to further guidance issued by the Institute. At the time of issue of this Statement, this is contained in *Technical Release Guidance on the Implications of the Freedom of Information Act 2000* (Audit 02/05).

46 The Freedom of Information Act 2000 ('FOIA') gives individuals and businesses a general right of access to information held by public authorities in England and Wales, whether obtained before or after the Act came into force on 1 January 2005. A wide range of bodies are listed as being public authorities³⁰ for the purposes of FOIA including: Government Departments, the Financial Services Authority, the Inland Revenue and the Bank of England.

47 In addition, the Secretary of State may by order designate as a public authority for the purposes of the FOIA an entity that is providing, under a contract made with a public authority, a service whose provision is a function of that authority.³¹ This may have implications where a public authority outsources the performance of one of its functions to a third party such as internal audit services to a member, in which case that member could become subject to FOIA in respect of the outsourced services only.

48 FOIA provides a right of access to all recorded information held by

²⁸ See para 7 of VAT Act 1994, Schedule 11.

²⁹ See in particular the cases relating to *AE Hamlin* [1983] STC 780 and *EMI Records* [1986] STC 374.

³⁰ The ICAEW is not a public authority under the Act.

³¹ Section 5 Freedom of Information Act 2000.

public authorities or on their behalf, which could include information relating to a member or a member's business (where, for example, the member has provided services to a particular public authority), subject to certain exemptions. Any person making a request to a public authority for identified information is entitled to be informed in writing by the authority whether it holds information of the description specified in the request and, if so, to have that information communicated to him. No reason need be given for the request. The public authority generally has 20 working days to respond and can charge a fee. In general, any information held by the public authority can be requested under the Act. However, there are several exemptions to the general right to information which public authorities can use to refuse disclosure. Some exemptions are absolute while others are qualified. Public authorities can only invoke qualified exemptions where the public interest in disclosing the information is outweighed by the public or private interest in invoking the relevant exemption. Exemptions to note are (i) a qualified exemption for personal data if to disclose the information would breach the Data Protection Act; (ii) an absolute exemption if the requested information was provided to the public authority in confidence (i.e., if the information was disclosed it would be an actionable breach of confidence);³² and (iii) a qualified exemption for commercially sensitive information and trade secrets. It should be noted that third parties, such as members, do not have the right to prevent disclosure, as it is up to the public authorities to determine if the exemption applies. However, it is expected that public authorities will consult third parties when appropriate.

³² Although this itself would be subject to a public interest test under the common law relating to confidence.