



Data Protection – Release of Personal Information

by Peter Atkinson

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Access to our personal information appears to be increasingly common and there have been recent developments in this area. In a recent Guernsey Press article, it was reported that hundreds of Islanders have had their financial affairs passed to the UK tax authorities and that shocked residents had received letters from their banks and credit card companies telling them that the details of their accounts have been handed over to HM Revenue & Customs (“HMRC”).

A number of people are reported to have complained to Guernsey’s Data Protection Commissioner saying that the UK authorities had unfairly accessed private information. The Commissioner was quoted as saying that he would consider taking action against HMRC if he received enough complaints.

What is worthy of note is that the information disclosed was not in the Island of Guernsey but was, in fact, accessible in the UK by the banks who were asked to provide it. From the legal viewpoint, no action has been taken in Guernsey to access local residents’ accounts, but nonetheless their financial affairs have been disclosed.

HMRC has alleged that British residents have failed to disclose the existence of offshore accounts and is taking direct action to ascertain details. The European Savings Tax Directive was introduced in 2005 in order to address this very situation - where residents within the European Union had bank accounts in other financial centres. The intent was that the interest arising on those accounts would be disclosed to the tax collecting authorities in the jurisdiction in which the taxpayer was resident. Certain jurisdictions, including the Channel Islands, the Isle of Man and Switzerland adopted a different course whereby a taxpayer can either authorise disclosure of the interest arising on his account to his home revenue authority, or alternatively agree that tax be withheld in the place where his bank account is situate.

It is believed that the amount raised through the European Savings Tax Directive within the finance centres has not been as much as revenue authorities had expected. Indeed, the ambit of the Directive may yet be extended to include entities other than individuals, particularly trusts and companies.

In the interim HMRC, with the authority of the Special Commissioners in the UK, have served notices on certain banks in the UK requiring them to disclose details of all account holders who have a UK address or who pay debit or credit cards out of an offshore account. Having been served with these notices, and having been unsuccessful in resisting them, the banks have been required to hand over the information.

The notices are seeking information going back 6 years. Notably, when the information about an account has been authorised to be exchanged under the EU Savings Tax Directive, then the account is excluded from disclosure.

One issue which was raised in proceedings in the UK was whether or not the banks in question had the information within their ‘possession or power’ which was a necessary pre-cursor to the enforcement of the notices. The Special Commissioners found that the relevant information was within the banks’ possession or power. They also found that the definition of a ‘document’ included anything in which information of any description was recorded. This includes information stored on a computer hard disk.

HMRC have been successful in obtaining information pursuant to the disclosure notices. It is believed that this process will continue and that it may well be extended to include other financial services companies in the UK. For instance, it may well be that information will be sought from pension providers, life insurance companies, stockbrokers, independent financial advisers and even international property agents.

It may come as a surprise to island residents that information which they have given to a financial service provider in Guernsey, may result in it being handed over to HMRC in the UK.

The Data Protection (Guernsey) Law is, of course, one which is designed to protect data within the Bailiwick of Guernsey. Data is not only computerised information but also information contained in any filing system. The data is subject to protection under Guernsey Law and should not be disclosed without the individual's permission. There are, of course, exemptions, including crime and the assessment or collection within or outside the Bailiwick of any tax or duty, but if the individual cannot have a tax liability in the UK (because he is a long term Guernsey resident for instance) and information is still disclosed, he could rightly complain to the local Data Protection Commissioner that the institution to which he entrusted his financial affairs within the Bailiwick of Guernsey has released information.

There appears to be a disparity between the small amounts collected under the European Savings Tax Directive to date and the considerable sums which HMRC believe they are going to collect by virtue of this latest initiative in the UK. There are many legitimate reasons for holding a bank account in Guernsey, and indeed using Guernsey for other investments and financial services. Persons resident overseas, working overseas, or indeed working in the UK but non-domiciled in the UK, are all able to benefit from an arrangement with a financial institution in Guernsey.

The contention – often made – that people have an offshore account simply because they want to evade paying tax is wrong; the island seeks to persuade those who believe that tax evasion is endemic in Guernsey that they are misinformed. In addition, local institutions and the Data Protection Office must strenuously protect the confidentiality of a customer's private affairs, and continue to guard against incursions on privacy by foreign jurisdictions. Local residents may wish to ascertain from island banks and businesses precisely where their personal financial information will be stored, or could be accessed.

What no one wishes to receive is an unwarranted request for information from HMRC following disclosure and it is that – the possibility of an official enquiry, rather than any need to account for tax – which is likely to cause the most damage to our financial services businesses in the island.

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