

## • CRISIS MANAGEMENT AND DISCLOSURE - THE UNWANTED EMAIL

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There are several "crisis" scenarios in which you, as a financial services institutions in Guernsey or Jersey, might be required to disclose documents you hold. Three of the most significant are:

- When involved in litigation (e.g. when a former client brings an action against you);
- You are investigated by the GFSC or JFSC; and
- When a company for which you provide services is under investigation (which could result in a notice from the Financial Investigation Unit or Financial Crimes Unit requiring disclosure of all documents relating to that company).

There is typically a very broad requirement to disclose any "relevant" documents in the context of the subject matter of the investigation or proceedings.

The requirement to disclose "documents" covers not only written material, but anything held electronically (including emails) and even audio material. It can be surprising to many that informal internal communications between colleagues can constitute discloseable documents. This can at best sometimes be embarrassing, but at worst open you up to incriminating your clients.

### HOW TO MINIMISE A REQUIREMENT TO DISCLOSE EMBARRASSING COMMUNICATIONS:

#### The first line of defence

The first line of defence, and as a general rule, avoid creating unnecessary records. It is prudent to keep in mind that any document you create about a client (including any internal emails discussing that client), could become discloseable in one of the above scenarios.

Once a crisis situation has arisen, it becomes even more important not to create unnecessary documents. It is vital to involve lawyers at an early stage to allow you to take advantage of the second line of defence outlined below.

#### The second line of defence

The only relevant documents that can be legitimately withheld from a requirement to disclose are those which are "Privileged". There are several different heads of Privilege, but of these Legal Professional Privilege ("Legal Privilege") is likely to offer the greatest assistance to the institution in crisis.

Legal Privilege is a complex area with several different limbs and advice should always be sought. As an overview it allows any communication from lawyers which offers advice (and in some cases also communications of a more general nature) to be withheld (on the basis that they are privileged). Communications to lawyers in seeking that advice can also be privileged.

Questions can arise over who constitutes a lawyer (e.g. in relation to in-house counsel), and not all communications with lawyers necessarily attract privilege, so it is always necessary to take advice.

Either in reacting to a crisis, or from a general interest in tightening up policies on document production to avoid embarrassing and potentially damaging disclosures, we are happy to help. Educating staff on the potential effects of the emails they create can go a long way to ensuring your company's paper trail can emerge from a disclosure exercise in a positive light.

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FOR MORE INFORMATION, PLEASE CONTACT:



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