

• CRISIS MANAGEMENT - THE UNWANTED EMAIL

There are several 'crisis' scenarios in which a regulated financial services institution might be required to disclose documents they hold. Three of the most significant are:

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

In the current environment; litigation continues to rise, the GFSC has found new and more formidable appetite, and foreign governments are reaching further and with more enthusiasm than ever before. There is an ever increasing chance of a business finding itself faced with one of the above scenarios.

So what can you as the business do to ensure that your position remains as strong as it can be when one of the above scenarios emerges?

There will be a very broad requirement to disclose any 'relevant' documents in the context of the subject matter of the investigation or proceedings. Anything loosely connected to the subject will, in all likelihood, need to be disclosed to the regulator, authorities or opposing party.

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.

There are several lines of defence to be deployed in minimizing the chance of being required to disclose embarrassing or critical documents.

Firstly, and as a general rule businesses should 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. This can be counter-intuitive where a natural reaction can be to engage in open and frank discussion with your colleagues by email about the perceived weaknesses of your position. Always try and speak to colleagues in person and think carefully about whether notes or minutes need to be taken, and if so what they say.

Secondly, It is vital to involve lawyers at an early stage to allow you to benefit from confidential advice that cannot be disclosed. 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 be guided by your lawyer.

Finally, and to further protect the privileged status of any advice that is provided by your lawyer, a core team within the business should be identified to deal with the crisis. Great care should be taken if anyone outside that team is required to input or enter into correspondence with the lawyers. The advice of lawyers, or any information relating to the situation should not be circulated outside that core team.

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.

FEBRUARY 2012

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