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Guernsey: Strictly confidential...but not secret

By Peter Niven, Chief Executive of Guernsey Finance

Guernsey features alongside the United Kingdom and United States on the OECD 'white list' that was published at the conclusion of the G20 summit in London at the start of April. Here, Peter Niven, Chief Executive of Guernsey Finance, tackles the issues of confidentiality, secrecy and transparency that are at the heart of the debate on the role of international finance centres.

One of the things I remember vividly about my first day at work was the "talking to" I had from my new branch manager on the need for the utmost confidentiality when it came to customer information – that was in Lloyds Bank back in 1975. And how right he was to lecture me on the need to ensure customer confidentiality. But of course what he was telling me was nothing new.

Confidentiality is not a recent phenomenon.

Banking has traded on that concept since the Joint Stock Banks were born out of the coffee houses of the City of London and even before that in the banking houses of Renaissance Italy.

And so it is today and banking in Guernsey is no exception to this. Indeed it is true to say that all players in the wider financial services marketplace adhere to this concept. For Trust Companies, for example, this duty is no less real but in this case arises through their fiduciary relationship with their clients.

But this confidentiality is not enshrined in the Law neither in Guernsey nor indeed in the UK – it is case Law that gives us our marker and the Tournier Case of 1924 in particular is the reliably held English Court precedent. This case decided that a bank **owes all its customers a duty to keep their affairs confidential**. But importantly it also gives us 4 occasions when this duty can be over-ridden and specifically these are:

- where the law compels it
- where there is a duty to the public to disclose the information
- where the bank's own interests require it, and
- where the customer permits it

(This principle is also enshrined in the BBAⁱ Code of Banking Practice to which most of the banks in Guernsey subscribe)

And here I believe is where the distinction lies between confidentiality and “secrecy”.

Guernsey, again like the UK, does not have a banking secrecy law and sees no reason to have one unlike, say, Switzerland. But how many times have we heard the comment in newspapers and the media in general of “secrecy” in so-called “tax havens”. All very emotive stuff and designed to catch either the reader’s or the viewer’s eye. And to an extent the statement is correct – e.g. Switzerland and Liechtenstein – but only to that extent.

Unfortunately the truth, and certainly in relation to Guernsey, is far less exciting! Guernsey, unlike those other jurisdictions, has never passed any specific law relating to banking secrecy and has no intention of doing so.

I believe that whilst there are these overriding areas where there is potentially a break in that duty of confidentiality we must ensure that for the vast majority of clients that confidentiality is real and seen to be real. So, with the increasing amount of information which is stored electronically and which can be transmitted at the touch of a button there have to be comprehensive safeguards to maintain a proper respect for a client’s right to privacy. For this reason Guernsey, and many other jurisdictions, have comprehensive data protection Laws to do just that.

A comprehensive series of Laws is also available to ensure that the island mitigates, as far as it possibly can, the potential abuse of the international finance system, of which the island is a part, to fund the drugs trade, terrorist activities or hide the proceeds of crime through money laundering. Whilst these events, wherever they happen, are big news stories they are a small percentage of the number of transactions that pass through the system on a daily basis and equally represent a small number of the total customer base. That said there is no place for that type of business anywhere and we as part of the international community play our full part in seeking to chase out that bad business. We must in those cases be prepared to divulge information and under the law we have that duty to disclose.

At the same time as accepting the need for confidentiality, the new watchword in the international financial community is **transparency**. Tax transparency in particular has been highlighted by the OECD in its Harmful Tax Practices Projectⁱⁱ launched over 10 years ago and where 32ⁱⁱⁱ international

finance centres, including Guernsey, have agreed to participate and enter into Tax Information Exchange Agreements (TIEAs) with OECD members and, indeed, non-OECD members alike. This initiative took a long time to gather momentum in the absence of the originally proposed “level playing field” that was promised at the outset to ensure that no economic harm would befall the smaller jurisdictions. This has proved far too difficult to achieve however and with very few TIEAs signed by December 2005 the OECD has now revised the way in which transparency will be measured and with the prospect of further “blacklisting” if the newly prescribed number of Agreements have not been signed in a certain timescale there has now been a flurry of activity on this front

Guernsey in particular has signed 13 in all including Agreements with the US and the UK and it is likely that this momentum will be kept up in 2009 and beyond.

But what price confidentiality?

Well, to be quite honest, I believe at no cost to confidentiality where this remains fully intact for those who are undertaking legitimate business.

Only those with something to fear will indeed have something to fear.

There have been many scaremongering stories about “leaky buckets” and information being made available to all and sundry and at the drop of a hat but in each case this could not be further from the truth. In each TIEA there is a very specific procedure for accessing information and this ensures that there is an underlying *bona fide* reason for the information request and that fishing expeditions will not be allowed.

Indeed there have been cries that this will be the end of private client business for those who sign up. Well if it means that those clients who have been sailing close to the wind decide to up sticks and move to another more accommodating jurisdiction then we should say “so be it”. We really don’t need any of that business; there is far too much good business out there to have a long held reputation tarnished by the one or two “not so good apples”.

Also included in this concept of transparency is an understanding of the underlying ownership of corporate vehicles and looking at the requirement to maintain details of beneficial owners of companies. On this basis too I am afraid that it is a question of “do as I say and not do as I do” when we hear the rhetoric from the US Senate as a specific example. Firstly, we have in place a TIEA with the US and have since 2006 – so matters of both a criminal and civil nature can therefore be dealt with under existing legislation and the TIEA. Are they aware also of the new Companies law in Guernsey which requires details of beneficial ownership of Guernsey companies to be available

through the directors or the corporate service provider to ensure that the authorities on the island can access them if necessary and under the appropriate Law or Agreement?

Perhaps they should look closer to home and in particular the new Vice President's home State of Delaware which by their own definition could be classed as a "tax haven" with over 600,000 companies many of which are shell companies lacking any transparency, with no requirement for the disclosure of beneficial owners and therefore potentially vehicles for tax evasion and money laundering. For Delaware also read a number of other US States.

Coming out of the recent economic crisis there are inevitably going to be calls for even greater transparency and again the rhetoric in the run up the US election reinforced this. But with greater transparency must come the level playing field – this time the level playing field that requires standards to be maintained by everyone and not just dictated to those that are the seen as the easiest ones to bully. Let's have agreed standards and standards to which we all adhere without fear or favour.

At the end of all this I believe that for those clients who are doing good legitimate business they will have nothing at all to fear from the any of the initiatives to enhance transparency in all the world's financial centres. Client confidentiality still has a pivotal role to play in our day to day business.

ⁱ British Bankers' Association. For the full code see <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=347&a=13086>

ⁱⁱ The OECD "Harmful Tax Practices Project" was launched in 1998. The original report sought to establish the criteria for identifying "tax havens" and focussed on 2 main areas: a tax regime with no or minimal taxes and a lack of transparency or insufficient channels of information exchange to tax authorities in OECD member countries. See <http://www.oecd.org/dataoecd/1/17/37446434.pdf> for a 2006 update on the project

ⁱⁱⁱ From the original list of 35 "Tax havens" that were identified by the OECD under their criteria, 32 agreed to participate fully in the initiative leaving Liechtenstein, Andorra and Monaco on the list