

Data Protection Notification - Issues for Company Administrators

What is Notification?

The Data Protection (Jersey) Law 2005 (the "DPL") maintains a public register of data controllers. The register entry for an individual data controller includes the name and address of the data controller and a general description of the types of data processing undertaken by the data controller in question.

Problems for Providers of Company Administration Services

In Jersey, providers of company administration services often administer a large number of companies - having to make notifications in respect of them all would be a large management (not to mention financial) burden.

However, do company administrators have to make a notification in respect of each company that they administer? It is apparent that providers of company administration services will need to consider in each case whether notification is needed.

The answer depends on where the data controller of the administered company is and also what that company is doing.

The definition of "Data Controller" under the DPL (see Article 1(1)) is a "person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed".

A "data controller" is as distinct from a "data processor". A data processor is a person or entity who process personal data on behalf of a data controller - a good example is an outsourced payroll provider. The key difference for the purposes of notification is that merely being a data processor does not give rise to a notification obligation.

The key question is therefore one of which entity is processing personal data in Jersey - the company administrator acting on instructions received from outside the jurisdiction, or the company itself?

If the personal data is held, used, disclosed etc by the company itself here in Jersey, then it is likely that the company will need to make a formal notification to the Data Protection Commission.

For example, ACME Trustees Limited may administer a UK registered company. If the management of that company and the ultimate decision makers regarding what data is collected etc are based in the UK, then they will need to notify the UK Information Commissioner - generally speaking no Jersey notification will be needed since the ACME Trustees Limited (as company administrator) will be acting solely as a data processor (for which no notification is needed).

If the company acts on its own behalf in Jersey in processing personal data, notification will be required.

In particular if the directors who actually form the management of the Company are based in Jersey then the company will need to notify with the Data Protection Commissioner.

A helpful way to analyse such issues is to consider whether what goes on in Jersey is essentially the company in question acting by its own hand - eg whether it has a Jersey branch - or whether it is simply asking the company administrator to carry out certain processing on its behalf.

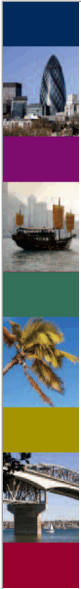
Whilst there is no hard and fast rule, we would expect most companies which simply have their administration performed in Jersey not to require a notification to the Jersey Data Protection Commissioner.

However, where a company has all of its directors in Jersey and all of its board meetings take place within Jersey, it is likely to be difficult to argue that data controller is not also undertaking processing of personal data in Jersey.

Data Protection - Formal Requirements

The DPL requires that data controllers register with the Data Protection Commissioner. There are exceptions to the obligation to register, but in Jersey these are unlikely to apply to many data controllers.

Guidance on the Jersey data protection regime is available on the Commissioner's website (www.dataprotection.gov.je). Registration is by a standard form notification determined by the Commissioner. A prospective controller can register by two methods:



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- It can call the Commissioner's office. The Commissioner's staff will ask questions about the nature of the controller and send out a partially completed form, to be completed and submitted by post.
- It can complete an online application form, print it out and submit it by post.

Notifications cannot be submitted online.

The registration fee is £50 (see paragraph 6(1) of the Data Protection (Notification) (Jersey) Regulations 2005).

A notification lasts for one year. The Commissioner notifies controllers before notifications expire, and explains the renewal process, although the JDPL does not strictly require the Commissioner to do so. The renewal fee is also £50 (Regulation 6, Data Protection (Notification) (Jersey) Regulations 2005). There is no grace period for notification. A controller should not start processing personal data, unless it is exempt processing, until it is registered. There is, however, a grace period in respect of changes to a notification - a notification must be given within 28 days of the change to which it relates (Regulation 10, Data Protection (Notification) (Jersey) Regulations 2005). It should be noted that registrations under the Data Protection (Jersey) Law 1987 (superseded by the DPL) are effective until their expiry.

Sanctions

Processing of personal data without a registration (unless within an exception) is a criminal offence punishable by a fine of up to Level 4 on the Standard Scale (currently £5,000) in the case of summary prosecution (broadly speaking prosecution through the Magistrates Court) but unlimited in the case of prosecution on indictment (broadly speaking through the Royal Court).

Processing which falls outside the scope of a registration is also an offence, with the same sanctions, but in that case there is a defence of having exercised all due diligence to comply.

Exemptions and Exceptions

The Data Protection (Notification) (Jersey) Regulations 2005 provide that certain forms of processing do not require notification to be made. In summary, where the only processing being undertaken relates to the following, notification is not required:

- where processing is for any one or more of the purposes (in relation to the staff of the data controller): of appointment, removal, pay, discipline, superannuation, work management and any other personnel matter;

- where processing is for any one or more of the following purposes so far as they relate to the conduct of any business or activity carried on by the data controller –
 - keeping accounts,
 - deciding whether to accept any person as a customer or supplier,
 - keeping records of purchases, sales or other transactions in order to ensure that the requisite payments or deliveries are made or services provided by or to the data controller in respect of those purchases, sales or other transactions, or
 - making financial or management forecasts;
- Processing undertaken by some Not For Profit Organisations
- Processing personal data for personal, family or household affairs (including recreational purposes)
- Maintenance of a Public Register - Processing that is for the purposes of keeping a register required by Part 9 of the Companies (Jersey) Law 1991 or for doing anything else required or permitted under that Part.

As previously noted, the other factor to consider is the function of the company. Are they simply acting on behalf of another data controller as a data processor for the purposes of that relationship (eg processing data on behalf of another data controller)? Data processors are not required to notify.

Action

As can be seen, providers of company administration services should undertake a thorough review of companies which they administer in order to determine whether a notification should be sent to the Data Protection Commissioner.

The key questions for providers are:

- Is the Company being administered in Jersey acting on its own account in Jersey, or is the administrator simply processing data on behalf of a data controller elsewhere?
- Where are the directors?
- Does an exemption apply?

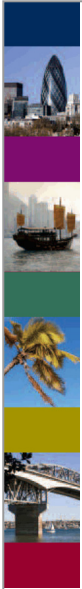


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