

Customer Information Orders & Account Monitoring Orders

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Introduction

We are operating in a climate of increasing international investigations. There are a number of investigative tools available to seek information from Guernsey institutions in support of international investigations. These include a range of mechanisms under The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (**Guernsey POCA**).

This Guide considers how Customer Information Orders and Account Monitoring Orders may be obtained, how to respond to them, and issues which may arise.

Both such orders may apply to financial services businesses (**FSBs**).

Parallel Provisions

This article focuses upon the powers under Guernsey POCA. However there are parallel powers in the following laws:

- Drug Trafficking (Bailiwick of Guernsey) Law, 2000
- Terrorism and Crime (Bailiwick of Guernsey) Law, 2002
- The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007

Customer Information Orders and Account Monitoring Orders are obtainable to assist other jurisdictions with investigations. However, it is necessary to identify what the investigation concerns to ensure that the correct statutory power is available and whether it is engaged by the request for assistance.

Customer Information Orders

The power to seek information regarding the customers of FSBs (**Customer Information Order**) comes from section 48A of Guernsey POCA.

Customer Information Orders require a FSB to provide any customer information held relating to the subject of the application. Customer Information Orders may be sought against named FSBs, a particular description of FSBs (eg banks) or all FSBs.

'Customer information' is defined as information as to whether the person holds, or has held, an account or safe deposit box with the FSB and if so for further information such as the customer's identity, address, connected persons, balances and recent transactions.

Account Monitoring Orders

The power to seek the monitoring of the accounts of the customers of FSBs (**Account Monitoring Order**) comes from section 48H of Guernsey POCA.

Account Monitoring Orders require a named FSB to provide to Guernsey authorities account information of the description specified in the order for a maximum of 90 days. This time may be extended. By contrast to Customer Information Orders, Account Monitoring Orders are required to name the particular FSB to

which the order is to apply, a category of FSBs will not suffice. They can however be more encompassing regarding the account to which they apply - a named account, a particular description of account, or all accounts held by the subject at the named FSB.

'Account information' is defined as information relating to the account held at the FSB specified in the application.

Common Provisions

Both Customer Information Orders and Account Monitoring Orders are a more recent addition to Guernsey POCA, inserted into that 1999 law by 2007 by amending legislation from 2007.¹

They require an application, to which HM Procureur must have consented, and are typically made ex parte in chambers. The court may grant an order if all of the following conditions are satisfied:

- That there must be reasonable grounds for suspecting that the subject of the application has engaged in or benefited from criminal conduct or committed a money laundering offence;
- That there must be reasonable grounds for believing that the customer information or account information which may be provided is likely to be of substantial value to the investigation; and
- That there must be reasonable grounds for believing that it is in the public interest for the customer information or account information to be provided.

The orders may be made on such terms and conditions as the court thinks fit.

Responding to Customer Information & Account Monitoring Orders

A statement in response to a Customer Information or Account Monitoring Order may be used as evidence against the respondent in proceedings other than criminal proceedings, such as civil or regulatory proceedings.

The response may not be used as evidence against the respondent in criminal proceedings, save for in exceptional circumstances including perjury, perverting the course of justice and breaches of Guernsey POCA.

Failure to respond or providing an inadequate response may constitute a criminal offence.

- Non-compliance with a requirement is punishable by up to six months in prison and/ or a fine of up to £ 10,000.
- Knowingly making a false or misleading statement, or recklessly makes a statement which is false or misleading in a material particular can result in up to two years of prison and/ or an unlimited fine.

Issues

Conflicting obligations

Respondent FSBs must have regard to their customers in addition to the authorities. Although the legislation provides that a Customer Information and/ or Account Monitoring Order will override other restrictions on confidentiality and non-disclosure, FSBs must nevertheless be careful in how they provide their response.

The power allows the authorities access to specified information. By contrast to other powers under Guernsey POCA and under other legislation, it does not compel the production of documents. Information may be required to be provided in such manner as the police specify. Respondents must take care not to exceed the authority of the compulsion, for example by providing more information than required. This is particularly important where there is mixed information in which duties of confidence are owed to persons other than the subject of the investigation (e.g. in joint or pooled accounts). Information may need to be extracted from documents or documents may require considerable redaction.

This can be particularly onerous where a FSB has limited resources and a short time to respond.

¹ Inserted by Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Amendment) Law, 2007.

Should the Order be challenged?

By contrast to other provisions under Guernsey POCA, there is a specific power in sections 48G and M to apply to vary or discharge a Customer Information and Account Monitoring Orders. This power may be exercised by the authorities and also by anyone affected by the order. The court has the power to discharge or vary the order on such terms and conditions as it thinks fit.

The difficulty for FSBs responding to these orders is that the information on the face of the orders is sparse. As the respondent FSB is not usually the subject of the investigation, they will likely be lacking the information as to why the order was made. But engagement with the subject of the order places the respondent at risk of committing tipping off offences where the investigation links to money laundering.

However if the respondent FSB does have additional information, challenges to the appropriateness and extent of the order should be explored and all decisions documented if only to defend the FSB against later criticism from their customer.

Tipping Off

A respondent FSB will not automatically be guilty of tipping off if matters connecting to a Customer Information or Account Monitoring Order are discussed with a third party. The tipping off offence is only triggered where the investigation connects to money laundering. Accordingly, where the investigation does not connect to money laundering, engagement with the subject of the order *may* be possible. This is a tricky area on which advice should be sought.

Other considerations

If served with an Account Monitoring Order or notice pursuant to a Customer Information Order, FSBs should consider whether this gives rise to other reporting obligations. In particular:

- Whether a suspicious activity report (**SAR**) to the Financial Intelligence Unit ought to be raised; and/ or
- If there are matters which ought to be disclosed to the Guernsey Financial Services Commission in accordance with Principle 10 of the Code of Principles of Conduct of Financial Business.

These are not automatic consequences of being served with an Account Monitoring Order or notice pursuant to a Customer Information Order, but are aspects which should be considered.

Conclusions

Guernsey POCA is one of the Bailiwick's key pieces of anti-money laundering legislation. Customer Information and Account Monitoring Orders are important investigative tools available to authorities under this statute. The information obtainable under them is more limited than that available under other powers such as Production Orders.

Such orders must be handled with care. On receipt, respondents should keep in mind that their obligations may extend some way beyond what is on the face of the order, and have regard to other stakeholders. If in doubt FSBs should seek legal advice.

Contacts



Robert Shepherd
Senior Partner & Advocate, Mourant Ozannes
Guernsey
+44 1481 731 418
robert.shepherd@mourant.com



Sally French
Senior Associate & Advocate
Guernsey
+44 1481 739 341
sally.french@mourant.com

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