

DATA HOLDER NOTICES UNDER SCH 23 FINANCE ACT 2011

by Aparna Nathan

INTRODUCTION

In my experience, there has been an increased incidence of clients receiving data holder notices under the provisions of paragraph 1 Sch 23 Finance Act 2011 (“FA 2011”). These data-holder notices usually require the recipient to provide information of a specified sort which it is assumed the recipient will hold.

Recipients of data holder notices (known as “relevant data holders”) include employers, persons making payments in respect of public lending rights or copyrights, persons making payments of interest. Even broader in conceptual terms than these categories of relevant data holders is the category set out at para 17(1) Sch 23 FA 2011: a relevant data holder is a “person by whom licences or approval are issued or a register is maintained”.

It follows that any body that maintains a register is a relevant data holder and may be the recipient of a data holder notice. Consequently, clubs of any sort, unions and other bodies that maintain a register may well need to consider their position if they receive a data holder notice. Should such a body automatically hand over the requested information? In my view, the answer is, “no”.

POINTS TO CONSIDER

Data Protection Act

The relevant data-holder has certain obligations (such as non-disclosure) under the Data Protection Act 1998. However, a

body may be able, in appropriate circumstances, to rely on the exemption from the non-disclosure provisions which is set out in s.35(1) Data Protection Act and which provides:

“Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.”

Accordingly, in order to be able to rely on s.35(1) Data Protection Act 1998 and furnish the relevant data to HMRC, it is imperative that the request for data is validly made. If the data-holder notice is invalid but a relevant data holder nevertheless provides the information to HMRC, the relevant data holder could be in breach of its obligations under the Data Protection Act.

Validity of the Notice

The first point to consider is whether the relevant data notice is validly issued: in other words does it comply with the requirements of Sch 23 FA 2011.

The “relevant data” that may be sought from a relevant data holder falling within para 17 Sch 23 DA 2011 in such circumstances are set out in para 15 Data-gathering Powers (Relevant Data) Regulations SI 2012/847 (“the Regulations”) which provides:

- “(a) the name and address of anyone ...to whom an entry in the register relates or related;
- (b) particulars of the ...entry;
- (c) information relating to any application...for entry on that register.”

The word “address” found in para 15(1) Sch 23 FA 2011 is defined by para 47 Sch 23 FA 2011 as “including an electronic address”. If the data holder notice requests details of the private address of the persons on the register, it would be appropriate to ask HMRC why they are seeking the private address given that a business address would be less sensitive

and could arguably achieve a similar end.

Second, consider carefully whether the items of information listed under in the data holder notice are consistent with the items of information that the HMRC is permitted to request.

Third, check to see whether the data-holder notice specifies the reason why the relevant data is being sought. It is not appropriate for HMRC to request data without indicating clearly why they are seeking that data. Support for this view is at para 2(1) and para 3(2) Sch 23 FA 2011. Para 2(1) provides that:

“The power in paragraph 1(1) is exercisable **to assist with the efficient and effective discharge of HMRC’s tax functions** –

- (a) Whether a particular function or more generally, and
- (b) Whether involving a particular taxpayer or taxpayers generally.” (emphasis added)

Assuming that there is some statement in the data holder notice of the intended use to which the information sought will be put, it is necessary to assess whether that statement of intended use is too broad or unspecific to meet the requirement in para 2(1) Sch 23 FA 2011.

If, on such an assessment, it appears that the statement of intended use of the data sought is too broad and unspecific, it is entirely appropriate to ask HMRC to clarify their reasons for seeking this data.

Fourth, under para 3(2) Sch 23 FA 2011, HMRC are not permitted to specify relevant data in a data-holder notice:

“unless an officer of Revenue and Customs has reason to believe that the data could have a bearing on chargeable or other periods ending on or after the applicable day¹”.

It is entirely reasonable therefore to establish whether the data holder notice gives sufficient details about why HMRC are seeking the data sought and what bearing that data has on chargeable periods falling within the four years preceding the date of the data holder notice.

It must be remembered that HMRC have a duty to exercise their powers in a reasonable and proportionate manner. As a consequence, it is appropriate to consider whether the information sought achieves a balance between the interests of (1) the relevant data holder, (2) the individuals whose details are sought on the one hand and (3) the ends sought to be achieved by HMRC on the other hand.

In appropriate cases, the European Convention on Human Rights may also be in point and should be considered.

CONCLUSION

What is clear is that it is by no means true to say that the recipient of a data holder notice under Sch 23 FA 2011 must automatically hand over the data sought. It is imperative to consider the recipient's obligations under the Data Protection Act 1998 and to establish whether the data holder notice is validly made. Any necessary clarification should be sought from HMRC in appropriate cases and should, if properly presented, result in a mutually satisfactory outcome.

Endnotes

1. "Applicable day" is the first day of the period of 4 years ending with the day on which the notice is issued (para 3(3) Sch 23 FA 2011).