



‘Regulation is a journey not a destination’

Part 1 – Introduction by Bailiwick of Guernsey Deputy Data Protection Commissioner Rachel Masterton

“The ODPa’s Project Bijou is all about sharing stories to help drive cultural change regarding good data protection practices. With that in mind, Bermuda Privacy Commissioner Alex White joins me to share his data protection journey, to discuss whether small jurisdictions can be global leaders in data protection, and what keeps regulators awake at night.”

Part 2 – Q and A with Bailiwick of Guernsey Deputy Data Protection Commissioner Rachel Masterton and Bermuda Privacy Commissioner Alex

Rachel – Hi Alex, how is it out in Bermuda?

Alex – Hi Rachel, doing very well. We can always talk about the weather, but I try not to be the first person to bring up the weather because it tends to make other people feel bad.

Rachel – Particularly today where we are. Thank very much for joining us, it’s a great pleasure to have you take some time out of your schedule to assist us with Project Bijou that we are running and to provide your thoughts around data protection and the introduction of legislation in the sunny island of Bermuda. I remember that we first spoke probably just over two years ago when you first started in office, quite an interesting time. How have you found it?

Alex – Yeah, it was in ‘the before times’ that we spoke, before we were even used to doing video conferencing so I think it was even just a regular old phone call in those dark ages before video conferencing became so prominent but yes, it’s been a strange time for the whole world of course, we’ve all had to readjust our priorities but it’s also I think shown how important the work we do is, because in Bermuda – I’m not sure if this is the same as for you in Guernsey – but **in Bermuda there were not a lot of organisations with an online presence or with apps or with delivery services or things like that and then we go into island wide lockdown and suddenly everyone is trying to start that up and use data in order to do it so it’s really showed the value of what we do and the frameworks we provide people.**

Rachel - Yes it’s been a very interesting time as you say and I don’t think we were all necessarily prepared to shift our workforces into home environments and the issues that brings, not least of which people keeping in contact with each other but just keeping businesses going and finding new and novel ways of doing things so yes, the challenge from a data perspective as well as thinking about coronavirus track and trace has kept us all on our toes. **As a small team of course, we are not a large organisation, we’ve had to think carefully about how we fulfil our statutory duties and I recognise that the plan you may have had in January 2020 was not likely the same as the plan you ended up with by June** but we’ve had to think of effective ways of working and trying to strike a balance between raising awareness and education of both organisations and individuals and then looking at some of the other roles that we have, the new powers that we have under our new law. Have you faced a similar dilemma and what’s been your priority up to now?



Alex – Yes, we’re, I think we are taking a similar approach to you because **we are focusing very heavily on education and awareness** and in fact our law right now is in a transition period so the investigations and regulatory function is not really in effect yet so we are even more lopsided and we are perhaps 100 percent focused on education and awareness but that’s so important especially in a community that did not have a strong precedent of data protection laws. **The law in 2016 here in Bermuda, the personal information and protection act (PIPA) was the first data protection law in the jurisdiction so there has been a lot of helping people to understand what does it mean to have a data protection programme, what does it mean I’m supposed to do and even, why is this important at all** and so we talk about what are the privacy harms that can happen and throughout all of these phases we are always educating and helping people to understand. **I feel like once people understand, they see the value and they want to do it, it’s just a matter of showing them something they might not have thought about before.**

Rachel - I think so. We have had data protection law for a lot longer than you have but interestingly, when a new law came into effect at the same time as the GDPR, the glorious 25th May 2018, for a number of organisations and individuals it was as if this was a brand new thing that hadn’t happened before so in some respects, even having had a history of it, we’ve really had to look at how we raise awareness so I can appreciate some of the challenges that brings as to getting people to engage as to why it’s even a thing and why it is something to be taken seriously. So for over the last 2 years obviously you’ve done a lot of work about awareness, what are the issues you are most concerned with or that have come up a lot over the time you’ve been at the commissioner’s office?

Alex (TC: 06:18) – So here’s an example of how **I think our jurisdictions are very similar** as I imagine this list will sound very familiar to you and frankly I’ve tried to steal ODPa materials wherever it’s relevant but we deal of course with a lot of financial institutions particularly the reinsurance industry and so we are dealing with those and helping people understand how you balance anti-money laundering regulations with the need to protect personal information and how that does not actually conflict, and we can make it work together and then talking about the tourism industry and recreational businesses and using personal information for those purposes and of course universal issues like how do we deal with personal information that relates to children, what special protections might be needed in the context of children or in the context of senior citizens who may not have an intuitive understanding of what technology is doing and why.

Rachel – **We’ve launched this year a new programme with our local youth commission to reach more children, to get into more schools in a bigger way to try and teach children using a bit of the pester power that they use so well to drive change** with their parents but also so that they recognise the importance for themselves of the things that they do and the data that they have so that’s been quite interesting to see the change. Of course, in ten years or so, they’ll be joining the workforce and hopefully that will lead to a shift in the way organisations are working because the people coming in, the staff will be asking questions that maybe aren’t being asked now so we’ve found that quite useful.

I see you’ve got a [mid-Atlantic privacy compass](#) on your website and also your Latin motto that I can see you’ve done some jiggling with which I was really quite pleased to see because I’m a bit of a Terry Pratchett fan and he does quite a bit with Latin in ways that probably Latin purists don’t like



but I was quite interested in the direction that you are taking things in and what seems to be driving your organisation. I don't know if you can elaborate a little bit on that please?

Alex – Yes, I'm happy and thank you for mentioning the Latin, that's something that I get a silly amount of pleasure out of myself. So Bermuda's motto is *Quo Fata Ferunt* which is 'Whither the Fates May Take Us' and it's from Virgil's Aeneid and it ties into the founding of Bermuda because Bermuda was founded by a shipwreck in 1609 when the English first came here and said, this is pretty great, why don't we stay here and so I'd like to put a little tongue-in-cheek into that so we said *Quo Data Ferunt* which is 'Whither the Data Takes Us' so that's what we need to **follow from a regulatory perspective, we need to understand what we are doing with information and why and we need to be willing to be able to pursue it in order to make sure there is justice for individuals** and so in a similar way I wrote this mid-Atlantic privacy compass, trying to think about how we can balance the European model of strong data rights with a north American model of regulatory engagement and interventions and a lot of people think of those things as mutually exclusive but I'm not convinced that's the case and in fact, something that I talk about all the time is that privacy means business. That's **another phrase we use a lot, is how can privacy programmes help organisations be more efficient and more profitable** so I think the best thing that we can do is show them the value of these things, of how it makes dollars and sense for them to do it. **(TC: 09:33)** I joke that the mid-Atlantic privacy compass was my plague, King Lear, Shakespeare apparently wrote King Lear during the plague so I wrote a lot of that during the Covid lockdowns but the idea being, **what are the ideas we need to balance in order to make this function as a society** and so we've got the compass rose and the different main points, the cardinal directions and there's lots of nautical puns so I'll try not to spoil all of them for anyone who does want to take the time to read it but generally the ideas are, at a fundamental level, to make sure we are truly protecting personal information as a society and acting in ways that are appropriate for the general public good. **We have to start thinking about ethics as a priority, as much of a priority as making a profit so how can we shift that and how can we create incentives that help individuals be encouraged either to act at an individual level or on an organisational level in a particular way** and so some of the other points are about community and how we are all working together, it's not an adversarial relationship, we all need to chip in and understand that people are not perfect, we all make mistakes and how can we move beyond that without thinking about it in a punitive way and one of my favourite points is that **we have to think also about regulation and guiderails as not being a limitation to innovation.** I love the example, there's a jazz pianist called Keith Jarrett and he was doing a concert in the 70s and I think the piano was broken and so the keys were not working so he had to improvise while skipping over the keys that didn't work and it ended up pushing him to do some very different things and it ended up being a very famous concert for him. And so I think we should take inspiration from that and think how can we use these guardrails to come up with win-win solutions.

Rachel (TC:12:17) – Yes I think all too often, data protection ends up seemingly being a blocker and often that's not the case and it's not the intention that it's there to stop good ideas or innovation or anything like that, but just to make sure that it's done in a way that fosters trust and confidence, trust being something else that is on your compass I see so that's all good to see. So taking on board your compass and the work that you are doing, how has your regulated community responded so far as you set out on your enforcement or your regulatory journey?



Alex - Yes that's another pun I use, I say **regulation is a journey and not a destination**. We are never going to get there, we are always going to be moving there...

Rachel – Yes, it's never done!

Alex – That's right so generally I would say my perception is that people tend to give a sigh of relief once we've met because they realise that our goal as an office is not punitive. We're not coming in to throw our weight around or create headlines with fines or things like that, we want to be corrective and do the right thing and understand what the right thing is. In fact we did a community survey last year, with the business community about their awareness of the law and what it means and I was absolutely delighted because one hundred percent of all respondents said that the privacy law was a good thing for the community, you can't beat that. The problem was that a much lower percentage said that they fully understand what they have to do at an organisational level and that's where we get into education and awareness component of things and helping people to understand what it means they have to do and how they can understand what the risks are that they are trying to accomplish.

Rachel – **(TC: 14:28)** You've cropped up in various places over the past couple of years with international work and looking at the list on your website of the different bodies you are a part of, you are obviously looking at international co-operation and co-operation between jurisdictions, how do you feel that can benefit the community in Bermuda and the regulated community as well as privacy in general?

On the perks of international co-operation

Alex – I'll confess I have an interest in international and comparative law so it's something I wanted to do in general. Also it makes a lot of sense for a small jurisdiction to get involved at the international level. If an organisation is founded in Bermuda or Guernsey or some other small jurisdiction and they want to grow and expand, they are going to reach a point very quickly where the only way they can grow and expand is by extending into another jurisdiction so they have a very strong interest in making sure that whatever we talk about is either consistent with or interoperable with what is happening in another jurisdiction so we can at least speak the same language and you can say *"Ok, if Bermuda is X and Guernsey is Y, then X plus what is Y, what do you need to do to get there?"* So we have to have those conversations and it can be good for organisations, it can reduce their compliance costs, it can promote consistency, and from a totally selfish, practical point of view it's good for me when I go to talk to organisations because they see that I'm not being unreasonable, I'm making the same requests that you are seeing elsewhere and also as a new jurisdiction with a new law it gives us an opportunity to inherit the precedent of other places as well and I believe we should consider our colleagues around the world as if nothing else as persuasive precedent. **Just because a guidance is issued in another country, it doesn't mean it's irrelevant to us, best practice in Guernsey is probably best practice in Bermuda so why reinvent the wheel?**

So there's a lot of benefits from that perspective but it's also good for individuals as well and I don't want to be solely focused on the business community. **(TC:17:08)** Individuals have their rights protected at a higher level because that raises the level around the world, it makes sure that everything is consistent around the world and also let's face it, a lot of the actors that we are going to run into online may not necessarily be based in your jurisdiction so having the ability to engage



with colleagues internationally who may have direct authority over them can help you protect individuals' rights.

Rachel - So if I was to ask what keeps regulators awake at night, is there anything that springs to mind, is there something that is your nightmare or your big area of concern?

Alex – well my joking answer would be that in Bermuda we have very loud tree frogs that chirp all night long but the honest truth is that after about a week I was totally used to them and I actually love listening to them while I lie in bed now but in all seriousness, I think **one thing that everyone is going to struggle with, even the biggest regulators, is the scale of the mandate.** We are given essentially a whole of society mandate in a lot of cases and that means a lot of different use cases for personal information. There are principles that organisations have to follow but it means that the organisation itself has to look at what it is doing in its own context and make a judgement and so while it might be tempted, to use a biblical example, for us to come down from the mountain and hand out stone tablets and say here you go, just do this. That's not going to work in all circumstances, and we are really better off if we can build something collaboratively with the community because I don't like to assume that I just know more than them and I can just tell them what to do.

(TC:19:10) The second component I'd say is the speed of technological change. That's something that's incredibly difficult to stay on top of and even if we put out guidance today on a piece of technology it could change or the application could change tomorrow and so we've got facial recognition technology on CCTV cameras and now **people are saying we can use this facial recognition technology to recognise people's emotions while they are talking or whether they are telling the truth or whatever they claim to be able to analyse so now we have to be able to think about this whole other layer** or people have been talking for a while about quantum computing and if quantum computing can accelerate computers to the extent that is claimed, it means that pretty much everything that is encrypted now is going to be able to be decrypted very quickly and so how do we think about that? **So that's really what keeps me up, thinking about these new issues, governments developing digital identity, which can be very privacy intrusive because suddenly someone's able to be individually identified wherever you go but there's also benefits if we can harness it right, and we can put an individual in control of their data flows and they can see who is accessing their data at any given time so there's a lot of potential as well but it's a lot to stay on top of.**

Rachel – I think that is one of the things we are looking at, the breadth and speed of change. Of course both of our jurisdictions have some elements of industry that are very well regulated and have been regulated for a while and so a new area of regulation, a new set of rules to comply with, that's another part of what we do in a day and then you've got the other sectors of industry who haven't had to do this before and who do want the answers and it's trying to, I think, bring those areas of industry on board and say, you know the answers to these questions better than we do in some circumstances because they know their business and **it's never going to be that we can categorically provide them with the answers they want so it's almost skilling them up so they have got the trust and confidence in themselves to go off and find the answers** but now I'm going to be sad that I don't have tree frogs keeping me awake at night. I'm a little bit jealous.

Alex - well you've got to come visit!



Rachel – Yes, I see in fact you are on the global privacy alliance executive committee now so it may be sooner than I thought.

Alex – Yes we are very optimistic to host the global privacy community at some point in the future, right here in Bermuda. I hope that we'll be able to make a concrete announcement about those things in the future but not just yet.

Rachel – That's understandable and I just want to say thank you very much for your time, it's been very interesting to find out how another small jurisdiction is dealing with such a big global issue and starting from scratch as you have, you should be very proud so thank you very much for your time.

Alex – Well thank you and thank you for more than just having me speak, because the ODPA is an office that I have often looked to for ideas about how to approach different issues or as I said before, sometimes specific approaches or language maybe suspiciously similar in our two jurisdictions and so I'm very grateful for the work that you do and I hope you know that it's having an impact outside your shores.

Rachel - That's lovely thank you very much.

Bermuda and Guernsey are both small jurisdictions, but size is no barrier when it comes to our aspirations for setting the standard internationally for what good data protection practices should look like. There was in fact so much to discuss that we didn't have time to talk about their privacy, innovation and knowledge sharing or '[pink sandbox](#)' and the opportunity this provides for innovation. But perhaps that's a topic for another time. **(TC: 23:25)**