

Common Law and the Duty of Confidence

(from: *Privacy and data-sharing: The way forward for public services; Annex A: the legal framework*)

Common law

A.59. Common law jurisdictions have established torts to protect individuals' rights to privacy. Torts are essentially civil wrongs that provide individuals with a cause of action for damages in respect of the breach of a legal duty. A number of common law torts afford protection to individuals' private interests and their confidential information. For instance, the tort of defamation will protect individuals from certain forms of public dissemination of personal information for which there is no basis in fact; and the tort of trespass will protect individuals from intrusion on their private property. However, with regard to the use and disclosure of personal information, the tort of breach of confidence is clearly the most relevant.

Breach of confidence

A.60. The common law tort of breach of confidence deals with unauthorised use or disclosure of certain types of confidential information and may protect such information on the basis of actual or deemed agreement to keep such information secret. The majority of cases have concerned trade secrets. However, the courts found no particular obstacle in accepting that personal information may be protected by a duty of confidence¹. To establish that a breach of confidence has occurred, the following conditions must be satisfied:

- *the information in question must have the necessary "quality of confidence"*². The nature of the information is relevant - the law "will not intervene to protect trivial tittle-tattle". With regard to personal information, it should not be in the public domain or readily available from another source³ and should have a certain degree of sensitivity;
- *if disclosed, the information must be communicated in circumstances giving rise to an obligation of confidence*. An obligation of confidence must exist, although this may be implied from circumstances (for instance, a photographic studio has been found to owe a duty of confidence with respect to its clients). An obligation of confidence is imposed by law if the circumstances are such that a person knew, or ought to have known, that the information is to be treated confidentially⁴. The duty of confidence owed by certain persons is well

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established, for instance doctors, lawyers and bankers all owe duties of confidence to their clients. Further, where information is obliged to be provided to a public authority, an obligation of confidence will generally arise⁵; and

- *there must be an unauthorised use of the information by the party under the obligation of confidence.* Unauthorised use need not be dishonest⁶ and it seems unnecessary to prove damage or detriment to establish a breach of confidence, although the damage or distress suffered will be relevant in determining the remedies applied by the court.

The duty of confidence and public authorities

A.61. Information provided to public authorities will often, though not exclusively, be subject to an obligation of confidence. The courts have generally recognised three circumstances in which a public authority may ignore the duty of confidence it owes with regard to a particular information item:

- where there is legal requirement (either under statute or a court order) to disclose the information (for instance, notification of certain diseases to public health authorities);
- where there is an overriding duty to the public (for instance, the information concerns the commission of a criminal offence or relates to life-threatening circumstances)⁷; or
- where the individual to whom the information relates has consented to the disclosure.

A.62. Furthermore, while there is an obligation on the part of the recipient of the information “not to take unfair advantage of it”, the purpose for which the information may be used need not necessarily be that for which it was provided. A breach of confidence will only occur where the disclosure of information is an abuse or unconscionable to a reasonable man.

A.63. The recent Court of Appeal judgment in the *Source Informatics case*⁸ cited with approval the following passage from an Australian case⁹: “the courts should not be too ready to import an equitable obligation in a marginal case ... [else] the administration of business and government... might be unduly obstructed by use of too narrow a test”. Notwithstanding such a view, there can be no *carte blanche* for the broad dissemination of confidential information by public authorities. As stated by Lord Keith in *Spycatcher (No 2)*¹⁰: “as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence”.

Citizen’s Charter and privacy statements

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A.64. While not essential to establishing that a public authority owes a duty of confidence to an individual, statements in Citizen's Charters of a vast range of public authorities contain commitments with regard to confidential information. For instance, the Inland Revenue *Taxpayers' Charter* states:

"In handling your affairs, we will:

- *deal with them on a strictly confidential basis, within the law*
- *respect your privacy*
- *find a private room or space for you if you visit us to discuss your affairs, should you prefer it."*

A.65. Such statements should leave citizens in no doubt that when they impart information to these public bodies they are owed a duty of confidence with respect to the use to which that information is put. It has also been suggested that statements such as these in Citizen's Charter documents may give rise to a legitimate expectation on the part of the public to be consulted prior to any change in the use to which confidential information is put¹¹⁰.

Applying the duty of confidence in the context of privacy and data-sharing

A.66. As noted in earlier chapters, the strictures of the DPA and HRA, at least in regard to personal information, are now pre-eminent in this area. However, as evidenced by the *Source Informatics case*, the common law tort of breach of confidence still applies today, not least in the way that public authorities handle confidential information. That case concerned the collection and sale of anonymised data from pharmacists revealing GPs' prescribing patterns to Source Informatics for marketing purposes. The ruling at first instance suggested that the sale of such anonymised data represented a breach of the pharmacists' duty of patient confidentiality. However, the Court of Appeal, overturning the initial judgment, held that the disclosure of information by pharmacists did not constitute a breach of confidence, provided the identity of the patients was protected.

A.67. While it is clear that the common law remedy for breach of confidence may have a broad application to personal information collected by public authorities, its precise application will depend on a range of circumstances. The circumstances in which information subject to a duty of confidence may nonetheless be disclosed would certainly allow public authorities to share data, recognising as they do that a legal requirement or an overriding duty to the public could permit data-sharing notwithstanding a duty of confidence. However, since the action for breach of confidence has a broad application to personal information provided to public authorities, public authorities must be mindful of the extent of the duty

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they owe in considering whether to take part in data-sharing exercises or whether they are precluded from so doing.

¹ For instance, *Stephens v Avery* [1988] 1 Ch 455 Browne-Wilkinson V-C accepted that “nothing in principle or authority... [supported] the view that information relating to sexual conduct cannot be the subject matter of a duty of confidence”.

² *Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd* (1948) RPC 203, Per Lord Greene MR. This requirement is normally satisfied by demonstrating that the information is not “public property and public knowledge”.

³ *Elliott v Chief Constable of Wiltshire and others* Times Law Reports, 5 December 1996.

⁴ *Coco v A N Clark (Engineers) Ltd* (1969) RPC 41.

⁵ *Marcel v Commissioner of Police for the Metropolis* [1992] 1 All ER 72.

⁶ *Seager v Copydex Ltd* [1967] 2 All ER 835.

⁷ *Church of Scientology v Kaufman* [1972] 2 QB 84.

⁸ *R v Department of Health, ex parte Source Informatics Ltd* [2000] 1 All ER 793.

⁹ *SmithKline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* (1991) 99 ALR 679.

¹⁰ [1990] 1 AC 256.

¹¹ *Private lives and public powers: A guide to the law on the use and disclosure of information about living individuals by public bodies*, Data Protection Registrar p.26. The administrative law doctrine of legitimate expectations, although well developed in European case law, is in its infancy in English law. If applicable, the doctrine would act in such a way as to require a public authority which had given an express promise to treat information in a particular way to be held to its promise until such time as it had undergone a process of public consultation on the proposed change in practice.