

Group Briefing

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Breach of confidentiality - There is no 'off-the-record'!

ARTHUR COX - KEY CONTACTS



JOANELLE O'CLEIRIGH
PARTNER, LITIGATION AND DISPUTE RESOLUTION
+353 1 618 0402
joanelle.ocleirigh@arthurcox.com



COLIN ROONEY
PARTNER, TECHNOLOGY & INNOVATION
+353 1 618 0543
colin.rooney@arthurcox.com



SHANE MCCARTHY
ASSOCIATE, LITIGATION AND DISPUTE RESOLUTION
+353 1 618 0659
shane.mccarthy@arthurcox.com

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The UK Supreme Court has found that a public body, HM Revenue & Customs (“**HMRC**”), breached its duty of confidentiality to a taxpayer after a senior official disclosed confidential information to journalists which was later published in a national newspaper (*R (on the application of Ingenious Media Holdings plc and another) v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 54).

The decision offers valuable guidance for organisations in respect of the duty of confidentiality owed to third parties. Though not binding on the Irish courts, this decision may be of persuasive authority and organisations involved in the handling of client / third party information should take note.

BACKGROUND

The taxpayer in this case is a company which promotes film investment schemes. In June 2012, the then Permanent Secretary for Tax gave an off-the-record briefing to journalists from a national UK newspaper concerning film investment schemes. Some comments made by the Permanent Secretary were later published in the newspaper (citing a “*senior Revenue official*”), including comments implicating the company in tax avoidance schemes and statements pertaining to the company's founder.

The UK Supreme Court reversed earlier judgments by the High Court and the Court of Appeal, ruling that the information supplied to the journalists was confidential in nature and that HMRC owed a duty of confidentiality to the taxpayer in respect of such information.

DUTIES OF CONFIDENTIALITY

The UK Supreme Court acknowledged the well-established ‘*Marcel*’ principle of confidentiality which dictates that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty – to the person from whom it was received or to whom it relates – not to use it for other purposes.

Duties were also owed by virtue of statute in this instance, namely section 18(1) of the Commissioners for Revenue and Customs Act 2005 which states that HMRC officials may not disclose information which is held by HMRC in connection with a function of HMRC. The UK Supreme Court noted that HMRC had previously invoked said provision as a reason for refusing to give certain information to the House of Commons Public Accounts Committee.

NARROW INTERPRETATION OF EXCEPTIONS TO OBLIGATIONS OF CONFIDENTIALITY

While HMRC's statutory duty of confidentiality permits disclosure to the extent reasonably necessary for HMRC to fulfil its primary function, the UK Supreme Court noted that any statutory exceptions to the general duty of confidentiality would need to be explicitly stated in the legislation. Lord Toulson, who gave the leading judgment in this case, took the view that Parliament's intention in drafting the Act was not to provide a wide ranging exemption from confidentiality. Lord Toulson further noted that in passing the Act, Parliament could not have envisaged that it was authorising HMRC officials to discuss its views of individual taxpayers in off-the-record discussions whenever they thought it would be expedient for some collateral purpose connected with its functions.

DISCLOSURE OF INFORMATION 'OFF-THE-RECORD'

The UK Supreme Court ruled that disclosure of confidential information on the basis that such disclosure was 'off-the-record' is not a defensive shield to evading such obligations, stating that an impermissible disclosure of confidential information is no less impermissible just because the information is passed on in confidence.

COMMENTARY

- » All organisations should be cognisant of the stringent duties of confidentiality owed to third parties by virtue of statute, contract and on application of established legal principles.
- » Exception(s) to obligations of confidentiality may be construed narrowly by the Courts.
- » Organisations that handle client / third party information must have effective practices and procedures in place to ensure that they are compliant with obligations of confidentiality and data protection; and
- » Disclosure of confidential information on an 'off-the-record' basis does not relieve a person of obligations of confidentiality.

arthurcox.com**Dublin**

+353 1 920 1000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com