

Confidentiality and Privacy

A quick guide

What are the main issues?

- The law in relation to confidentiality, specifically the overlapping issues of misuse of private information and misuse of confidential information;
- The UK GDPR in relation to personal information and special category data.

Confidentiality

Breach of Confidence is the Misuse of Confidential Information **NOT** the Misuse of Private Information.

The duty to treat information as “confidential” may arise in two main ways:

1. By express or implied terms of a contract (a confidentiality clause within a wider contract or a stand-alone confidentiality agreement or non-disclosure agreement (NDA)).
2. From a principle of equity, that is, that information obtained in confidence cannot be disclosed without the discloser's consent or misused to prejudice the discloser.

Ensure you differentiate between:

- confidentiality in equity which encompasses the duty not to disclose information and not to misuse information, and
- the obligation not to misuse personal information which is different (the causes of action are however very similar)

Three requirements

It is generally accepted that for information to be protected under the equitable doctrine of confidentiality, three requirements must be met:

1. The information itself must have the **necessary quality of confidence**.
 - a. To be confidential, the information must, apart from contract, "have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge"
2. The information must have been imparted in **circumstances importing an obligation of confidence**.
 - a. An obligation to keep information confidential may either be : Imposed by contract; Implied because of the circumstances of disclosure; Implied because of the special relationship between the parties concerned (for example, that of employer and employee).
3. There must be an **unauthorised use (or misuse) of that information** to the detriment of the rights holder.

Confidential vs. Private Information

Breach of confidence (sometimes also referred to as misuse of confidential information - see above) is based in equity, while misuse of private information is a tort which developed by virtue of the "horizontal effect" of human rights law.

The principal test for determining whether or not information is private is to ask "whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy".

UK GDPR and Data Protection Act 2018

The UK GDPR, as supplemented by the DPA 2018, can therefore be used to a certain extent by both private individuals and celebrities to prevent publication of information, including photographs or films of them, where such information, photographs or films constitute personal data.

The UK GDPR requires that personal data are obtained, held and processed fairly and lawfully, and gives individuals the right to access data being held about them.

The Information Commissioner's Office (ICO) is responsible for policing and enforcing the data protection regime in the UK.

What are personal data?

Personal data is "any information relating to an identified or identifiable living individual" (the data subject). An identifiable individual is someone living who can be identified, directly or indirectly, by reference to:

- An identifier such as a name, an identification number, location data or an online identifier.
- One or more factors specific to their physical, physiological, genetic, mental, economic, cultural or social identity.

Processing means:

- Collection.
- Recording.
- Organisation.
- Structuring.
- Storage.
- Adaptation or alteration.
- Retrieval.
- Consultation.
- Use.
- Disclosure by transmission, dissemination or otherwise making available.
- Alignment or combination.
- Restriction.
- Erasure or destruction.

What are special categories of personal data?

- Racial or ethnic origin.
- Political opinions.

- Religious or philosophical beliefs.
- Trade union membership.
- Genetic data.
- Biometric data for the purpose of uniquely identifying a natural person.
- Data concerning health.
- Data concerning a natural person's sex life or sexual orientation.

Examples of issues concerning Privacy and Confidentiality

- Lost paper based files (could be confidential data shared with a staff member, that is provided under an obligation of confidence as well as a data breach under UK GDPR)
- Sharing of Examination Board information, including names, with a student by a staff member (definitely confidential information, remember the declaration read out at the start of an Examining Board, also if it includes names or personal/special category data at data breach)
- Sending an email with criminal conviction data of an individual to another student in error

How to avoid Privacy and Confidentiality Issues?

- Lock your office;
- Avoid having any paperwork with personal information lying about (remember that people can get into your office, even when you are not there);
- Ask people (students for example) to leave your office if you are accessing certain types of data;
- Lock your screen when you leave your space, even if only for a few minutes;
- Consider what you are sharing with students before you share it.