

## Client guidance note

### Can I record meetings or conversations secretly or without obtaining consent?

*This publication gives general guidance only. It may not always apply and should not be relied on in place of specific legal advice.*

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Recordings of things said or done by others are often used as evidence in legal disputes to help a judge determine which party's version of events is correct.

However, care should be taken as recording may be illegal depending on the nature of the information, and the circumstances in which it was obtained.

#### Why make recordings?

In many legal disputes the parties will need to ask a judge, to some extent, to determine which party's version of events is correct. In civil (i.e. non-criminal) proceedings, the judge will decide which party's version of events they prefer based on the "balance of probabilities": Is party A's or party B's version of events more likely to be true?

The outcome of a dispute, therefore, will often be determined by the evidence available. It is for this reason that a party in an actual or potential dispute may wish to obtain a recording of things said or done by others. In practical terms, this may only be possible if the subject does not know that they are being recorded.

#### What are the legal issues?

Assuming that a recording has already been made, the following issues will arise:

- How was the recording obtained?
- Does the recording breach any laws?
- Can the recording be used as evidence in court?

#### How was the recording obtained?

The Regulation of Investigatory Powers Act 2000 regulates covert recordings made by public bodies such as the police and public authorities. However, there is no law which prohibits a member of the public from covertly recording a conversation or a meeting of which they are a part.

[Circumstances of the recording](#)

Whilst simply recording a conversation is not illegal in and of itself, the steps taken to obtain the recording may be.

The case of *Jones v University of Warwick* related to a personal injury claim. Inquiry agents posed as market researchers as a way of getting into the claimant's home. They secretly filmed the claimant to obtain evidence that her injuries were not as bad as she had purported them to be.

The inquiry agent's deception was illegal in that it amounted to trespass in the claimant's home and a violation of her right to privacy under Article 8 of the European Convention on the Protection of Human Rights (**ECHR**).

### **Does the recording breach any laws?**

Depending on their content, covert recordings may raise issues of breach of privacy, breach of confidence, or breach of the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR).

#### Breach of privacy

Article 8 of the ECHR provides that everyone has a right to respect for their private and family life, their home and their correspondence. The question is, therefore: is the content of the recording private? This will turn on the facts of each case, but as a general rule, if disclosure of the recorded information would give substantial offence to a person of ordinary sensibilities placed in similar circumstances to that individual, then it is likely to be private.

Even if a covert recording containing private information is not shared or made public, the 'intrusion' of the recording alone may be a breach of privacy.

#### Breach of confidence

To establish a breach of confidence, information must be:

- confidential in nature;
- imparted in circumstances where confidence would be expected; and
- disclosed in a way that is detrimental to the person imparting the information.

Whether there has been a breach of confidence will depend on the facts of each case.

#### Breach of the DPA and GDPR

Under the DPA and GDPR, personal data includes "any information relating to an identified or identifiable natural person". Depending on the nature of a covert recording, it may well fall under this definition.

For individuals, there is an exemption under Article 2 of the GDPR which allows data to be used "in the course of a purely personal or household activity" (because the UK's DPA works alongside the GDPR, this exemption also applies to the DPA). In such circumstances, where the use has no connection to a professional or commercial activity, the GDPR and DPA do not apply to the recording. However, if an individual discloses

such a recording to a third party business, for example, the business itself cannot benefit from the exemption and it will have to comply with the requirements of the GDPR and DPA in relation to the recording.

So, for example, a company director may record a meeting with a company representative if the director has a dispute with the company – this is because discussing his position as a director is, for him, a “personal activity”.

However, the company representative cannot rely on the “personal activity” exemption if they record the meeting with the director on behalf of the company, as they will be acting in their professional capacity.

### **Can the recording be used as evidence?**

The Civil Procedure Rules govern legal proceedings in England and Wales. Recordings obtained without someone’s consent can be used as evidence in legal proceedings. They are “admissible”.

However, under Rule 32.1(2) “the court may use its power under this rule to exclude evidence that would otherwise be admissible.”

Therefore, a court may use Rule 31.1(2) to exclude from the proceedings any evidence that has been obtained illegally, unfairly, or improperly. This includes, for example, evidence obtained in breach of the ECHR (i.e. breach of privacy), and could also encompass evidence that has been obtained covertly or without consent.

In the case of *Jones v University of Warwick*, mentioned above, the court did not exclude the covert recording that had been obtained after deceiving the claimant into inviting the inquiry agents into her home. There were numerous reasons for this decision which relate to the facts of the case. One reason was that the video recording had formed part of both parties’ expert evidence, and to dismiss it would have required entirely new experts.

The court said that “it was not possible to reconcile perfectly the conflicting public interests that arose, namely, on the one hand, that in litigation the truth should be revealed and, on the other hand, that the courts should not acquiesce in, let alone encourage, a party to use unlawful means to obtain evidence.”

Although the evidence was allowed, the court penalised the defendant (who obtained the evidence) by ordering them to pay a significant portion of the claimant’s legal fees.

### **Conclusion**

It is possible to make covert recordings of meetings and conversations for use in legal proceedings.

However, care should be taken. Depending on the nature of the information, and the circumstances in which it was obtained, a recording may be illegal. Illegality alone may lead to a claim against anyone who obtained the recording.

There is also a possibility that a court will exclude recordings obtained via illegal means from legal proceedings or, if they are not excluded, the party that obtained them may be penalised.

For further guidance and information on this topic please visit our [commercial dispute resolution](#) page.