

# KENT CARTY UPDATE

March 2021

## DATA PROTECTION ISSUES IN COMPLAINTS TO CORU

### **COVERT RECORDINGS BY SERVICE USER WITHOUT THE CONSENT OF THE SOCIAL WORKER**

The Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993 (“the 1993 Act”) provides that only single party consent is all that is required for secretly recorded telephone to be considered legal.

The 1993 Act only applies to telephone calls and not to meetings or calls held over the internet via Skype, WhatsApp, Facetime, etc or covert recordings of meetings and private conversations.

Further, while a secretly recorded telephone conversation is not illegal, concerns may arise regarding the non-consenting participant’s rights under GDPR regarding the use of personal data and their constitutional right to privacy.

In each instance it will be necessary to assess the context in which a recording was made, including the intended purpose of the recording and whether it may be deemed reasonable, proportionate, or necessary to admit the recording for the intended purpose.

*Single party consent is only required for the recording of a telephone conversation.*

In the case of a social worker recorded in the course their employment by a service user, it is arguable the social worker was acting in their public professional role and are not entitled to right of privacy.

It is also important to understand covert recordings can be admissible in Court proceedings depending on the circumstances of the recording and the reasonableness of the recording.

For example, in 2005, in the case of *Cogley v RTE*<sup>1</sup> the High Court considered whether covert filming at the Leas Cross Nursing Home by RTE for use in an investigation report was admissible. The nursing home objected to the footage being used and argued there was no permission for the recording and that it breached the reasonable entitlement to privacy and confidentiality of staff and patients. Mr Justice Clarke weighed those rights against the right of RTE to freedom of expression in the context of investigate reporting on matters of public concern and refused an application to restrain RTE from using the footage in the documentary.

### **ADMISSIBILITY OF INFORMATION PROVIDED TO CORU**

Section 40(6) of the Civil Liability and Courts Act, 2004 (“the 2004 Act”) provides that documents to which the in-camera rule would normally apply can be disclosed in respect of a

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<sup>1</sup> [2005] 4 IR 79

disciplinary complaint. This applies to information supplied by the Complainant and the Registrant in response to a complaint.

This means that the Complainant is entitled to submit documentation to CORU in support of a complaint that would otherwise be governed by the in-camera rule.

By extension a social worker, in order to defend their position, is also entitled to refer to the documents, case files, or proceedings which would otherwise be governed by the in-camera rule.

However certain documents will be subject to restrictions that prevent them from being used otherwise than in the original matter in which they were received or created or obtained, including a court-ordered report.

If this is the case then the party seeking to rely on the document outside of its original purpose, will have to obtain the leave of the Court to permit its use or obtain consent from all relevant parties in order for CORU to have the document properly before it in evidence.

If the Complainant does not permit the document to be relied upon by the social worker then CORU will have to consider whether it is appropriate for the Complainant to be allowed to continue with the complaint, considering whether the document or other item or facts could potentially exculpate the social worker.

## **DATA PROTECTION CONCERNS**

Every case will have to consider on its merits whether there is any breach of GDPR by a Complainant who submits information containing the personal data (to include video or audio recordings) of parties who are not the subject of the complaint to CORU.

In some cases, the information of those third parties will have a connection to the facts relevant to the complaint. The third parties may be important participants or witnesses even if not the subject of a complaint themselves. In other cases, it will not be necessary for the third parties to be identifiable in relation to the fair determination of the complaint.

*CORU must also determine the necessity and the extent of the disclosure of personal data of persons who are not the subject of the complaint.*

CORU should determine whether the information is necessary for the purpose of the complaint and whether it should request the Complainant to redact or remove the personal data before considering the information.

It may, in certain cases, be disproportionate for CORU to require the redaction or removal of personal data if the information is objectively relevant to the complaint and the Complainant does not have the resources to undertake redaction or removal of identifying data. CORU will look at the proportionality and relevance of the materials.

CORU must also determine the necessity and the extent of the disclosure of personal data of persons who are not the subject of the complaint. This may then place an obligation upon CORU to redact (or ensure that the complainant redacts) personal data in documents or pixelates or otherwise removes identifying features of individuals in audio or video recordings.

Once CORU has commenced an investigation then it is responsible for ensuring compliance with GDPR and the 2018 Act.

It is the responsibility of each party, including the Complainant, the Registrant, the employer/ data controller and CORU to ensure they abide by their own obligations under the 2018 Act and GDPR.

### **THE USE BY CORU OF WORK EMAIL ADDRESS**

If a work email address is provided to CORU by the Registrant this implies consent that CORU can use this email address to correspond with the registrant, if necessary, irrespective of any privacy concerns that may otherwise apply.

It may be prudent for Registrants to provide personal email address for the purpose of corresponding with CORU.

### **EMPLOYER CONSENT AS DATA CONTROLLER**

Section 47 of the 2018 Act provides that the processing of special categories of personal data shall be lawful where the processing is either:

- (a) necessary for the purposes of providing or obtaining legal advice or for the purposes of, or in connection with, legal claims, prospective legal claims, legal proceedings, or prospective legal proceedings, or*
- (b) otherwise, necessary for the purposes of establishing, exercising, or defending legal rights.*

Further Section 60(3)(a)(iv) of the 2018 Act places restrictions on the obligations of controllers and the rights of data subjects to the extent that the restrictions are necessary and proportionate;

*in contemplation of or for the establishment, exercise, or defence of, a legal claim, prospective legal claim, legal proceedings, or prospective legal proceedings whether before a court, statutory tribunal, statutory body or an administrative or out-of-court procedure*

Therefore, if a Registrant states that they need to provide information in their defence of a complaint, no issue should arise under GDPR or the 2018 Act to prevent the Registrant from submitting personal data concerning an individual to CORU.

While it might be best practice to seek permission of the Registrant's employer to engage Sections 47 and 60 of the 2018 Act, it is the role of CORU, not the Registrant's employer (including TUSLA and the HSE), to adjudicate on any aspect of the defence of the complaint. Relevant submissions can be made to CORU as arise on the facts of the case.

Finally, it could be argued that that the lodging of a complaint contains a degree of waiver of the confidentiality of the Complainant's personal data so it can be referred to by the subject of the complaint to defend the complaint against them.

Gavan Carty and Tara Nolan

Kent Carty Solicitors

**If you require any further assistance, or a referral to Kent Carty Solicitors, please contact Danielle McGoldrick of Irish Association of Social Workers at [officemanager@iasw.ie](mailto:officemanager@iasw.ie).**