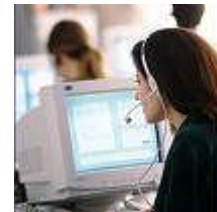


Whiteheads Bulletin

Intercepting Communications



In this new world of data protection and freedom of information, it is often difficult to know what you can and cannot do in relation to information. Written disclosure of information can often be easier to manage but what happens with other forms of communication?

One of our clients recently approached us with a conundrum – a member of the public had made a complaint to them about the fact that a phone call they made to our client had been recorded. They came to us find out whether this was a case of breaking data protection rules or if it was for “staff training purposes”?

In order to come up with a response to this, we set about doing research into this confusing area of law. The relevant piece of legislation that covers this area is the ‘Telecommunications (Lawful Business Practice) Regulations’, (the regulations), which specifically govern the obligations of a business including any body that could be construed as acting as a public authority.

According to the relevant legislation, we have concluded that:

- The recording of any telephone conversation either from or to another party is known as “interception” under the relevant law and any private recording system linked to a telephone line accessible by a significant proportion of the general public would be covered.
- The question of criminal liability when recording phone calls comes down to making sure that the intercepting party is the ultimate controller of the recording system. If this is the case, then there can be no liability regardless of whether consent of the other (intercepted) party can be established.
- Under these regulations, interceptions without consent are allowable in a variety of circumstances including:

- Establishing the existence of facts relevant to the business e.g. keeping records of transactions and other communications in cases where it is necessary or desirable to know the specific facts of the conversation.
- Ascertaining compliance with regulatory or self regulatory practice or procedures relevant to the business
- Demonstrating standards, which are or ought to be achieved by persons using the telecom system e.g. monitoring for purposes of quality control or staff training etc.

If the recording of the conversation is for the above purposes then no consent is required. On the other hand however, if the recording were for marketing or market research purposes, explicit consent **would** be required for intercepting such a call.

Furthermore, the regulations impose the duty that, when intercepting transmissions, “*all reasonable efforts*” are made to inform all parties involved. This means for example that the possibility of recording telephone conversations made or received should be detailed on the business’ letterhead, on its website and in standard information packs on the organisation’s regulatory procedures in order to make reasonable efforts to inform a third party.

It is also useful to note that any transmissions intercepted by way of a private telecommunications system are admissible as evidence in court.

A further issue to bear in mind is that the employees of the business will also be party to intercepted transmissions so reasonable efforts must be made to inform them of the possibility of interception. This issue can easily be resolved by, for example, including a specific clause in each employee’s employment contract.

The above is an overview of the situation as it concerns our clients’ day-to-day systems but there are also different considerations with regard to offshore interception sites, the implications of not accessing intercepted recordings for an extended period and the specifics of possible legal actions, which may ensue.

If you wish to discuss any of the issues raised in this bulletin, make any comments or if you have any further enquiries please feel free to get into contact on info@whiteheadsols.co.uk.

John Lloyd Jones