

LMA Market Guidance: Your Duty of Confidentiality

Importance of Maintaining Confidentiality

It is important for market integrity, for each Syndicate¹ corporately and for each employee of a Syndicate personally that confidential information received in the workplace is not disseminated publicly. Syndicates receive and process data, much of which is sensitive or confidential, in relation to which certain obligations exist.

This guidance provides a brief outline as to those obligations, particularly those imposed upon underwriters and claims handlers both in their commercial and personal capacities when handling information on a daily basis. Breach of confidentiality can have serious ramifications for both Syndicates and individuals. Further information is available in the links provided, by contacting the LMA lma@lmalloyds.com or Michelle Crorie at Clyde & Co: michelle.crorie@clydeco.com.

Legal obligations

Common Law Confidentiality

There is a common law duty not to use confidential information without consent. A breach of this duty entitles a party to sue for damages or to seek an injunction to prevent disclosure.

Information is confidential if it has "*the necessary quality of confidence about it*". This is information which is not in the public domain and is material to the third party. By way of example it could be profit margins or expansion strategies of a business; competitor analysis; anything which is Special Category Personal Data (see below); an individual's employment intentions or personal relationships.

Data Protection Rules: Personal Data

The Data Protection Act 1998, UK Data Protection Bill 2017 and the EU General Data Protection Regulation (GDPR) (effective 25 May 2018), place restrictions upon the handling of personal data. This note is not intended to provide guidance on the detail of that extensive regime but focuses on issues of confidentiality specifically.

Personal Data is very broad and can include anything from which an individual can be identified. Special Category Personal Data (previously Sensitive Personal Data) includes medical information about an individual. This category of data is handled by underwriters and claims personnel routinely within the Lloyd's market. There are requirements in relation to data including:

- Data must be retained and transmitted securely - consideration should be given to encryption or password access or the use of secure internet sites;
- Data should only be provided to those who need it for a purpose related to its provision - e.g. if the data was provided for the underwriting of a contract of insurance, it could be provided to a claims handler if a claim arises, but not to another employee for their interest or entertainment;
- Those to whom data is transmitted should have agreed to abide by an appropriate obligation of confidentiality - e.g. loss adjusters, TPAs, through provisions in the relevant outsourcing or services agreements;

¹ The term "Syndicate" is used in this note to describe a syndicate and its managing agent

- Other parties who are either controllers or processors under the data protection legislation will be bound by their own duties and obligations as controllers, for example brokers, coverholders, co-insurers or reinsurers. Relevant terms of business agreements with brokers (TOBAs), binding authority agreements with coverholders, and insurance and reinsurance contracts may usefully include confidentiality provisions.

Trade Secrets

Certain information may be categorised as a "trade secret", for example something which is a unique selling point of a particular business, and if this confidential information is disclosed, damages can be very high. The current duties exist under English common law but the EU Trade Secrets Directive will codify this, coming into force in June 2018. In the USA, individuals who disclose trade secrets may receive a heavy fine or a custodial sentence.

Legal Advice/Documents in Legal Proceedings

Where an individual employee receives a copy of legal advice provided to a Syndicate by a retained law firm, the contents are confidential and privileged. Disclosing all or any part of that legal advice to a third party, including potentially the fact that legal advice has been obtained, is likely to be a breach of that confidentiality and/or remove privilege. Guidance should be sought from the lawyer who provided the advice before making a disclosure.

Disclosure of legal advice may be contrary to the interests of the Syndicate or any co-insurers, may adversely impact a third party e.g. an insured who is making a claim, or prejudice the rights of another party e.g. reinsurers.

Similarly most information obtained or produced for the purposes of legal proceedings is confidential and privileged. Certain documents will already be public or will enter the public domain during the process if they are referenced in open court or filed publicly. However, if the information has not entered the public domain, disclosure could be contempt of court, punishable by a fine or a term of imprisonment, the severity of which vary between jurisdictions.

Contractual Obligations

Contracts and settlement agreements often contain confidentiality clauses, the breach of which will entitle a party to sue for damages. Contracts should be checked carefully.

In addition Syndicates might be asked to enter into a Non Disclosure Agreement (NDA) to enhance and codify the protections available to a party if there is an inappropriate disclosure. Such agreements may be entered into at the underwriting or claims stage (or both).

Consideration should be given to permissible disclosure within the NDA including the following:

- How will information pass within the Syndicate.
- How will information pass to the following market.
- What is the consequence of a breach by the following market².

² Where NDAs are desired, we encourage market participants to use the market model agreements, to increase market efficiency, tailored as appropriate, e.g. [LMA9016](#). This provides for damages or injunctive relief for breach of the confidentiality undertakings.

Regulatory Obligations

ICO

The Information Commissioner's Office (ICO) is the UK's independent body set up to uphold information rights. The ICO should be notified of data breaches e.g. inappropriate disclosure of Special Category Personal Data.

The ICO can undertake audits, enforce data protection policies, issue cautions or monetary penalties or institute criminal prosecutions and in certain circumstances may prevent organisations from processing personal data going forwards.

FCA

The Financial Conduct Authority (FCA) will usually defer to the ICO in matters of data protection, but as insurers' regulator will collaborate with the ICO in any investigation. The FCA also has the power to sanction breaches of confidentiality which contravene its principles and rules.

In 2015 the FCA published [TR15/13](#) which sets out standards for UK-based and FCA-regulated firms. Firms are encouraged continually to review their practices and procedures for handling confidential information both from a market abuse and conduct of business perspective. Inappropriate use or dissemination of confidential information is said to impact the FCA's operational objectives of: protecting consumers; ensuring market integrity; and promoting effective competition.

Lloyd's

Lloyd's, too, has the power to take enforcement or other regulatory action.³ The Lloyd's Minimum Standard on Governance⁴ requires Syndicates to safeguard the security, integrity and confidentiality of information in all areas of insurance practice, including underwriting and claims functions. This minimum standard requires that all relevant legislation, such as the Data Protection Act, GDPR and any local applicable data protection regulations are met.

Personal Responsibility

Each employee will have an employment contract which is likely to contain reference to a confidentiality obligation, or will have signed a separate confidentiality agreement. Disclosure of information to a third party received in the course of employment where the disclosure is found to be inappropriate might result in disciplinary proceedings or dismissal for gross misconduct.

Individuals should remember that disclosure can take a variety of forms including in person, by telephone or by email and could be a summary of the content of a document rather than provision of a document itself.

³See: [Market Bulletin Ref.Y4750](#), 13 December 2013 and [Market Bulletin Ref.Y4280](#), 14 May 2009.

⁴[MS3: Lloyd's Minimum Standard](#) (Governance), s1.4

Penalties and Sanctions

Serious financial and reputational consequences can be brought to bear on individuals and companies that breach confidentiality, for example:

- Breach of confidentiality - litigation against the individual and Syndicate for financial loss arising from disclosure.
- Breach of data protection requirements - fine up to €20m or 4% of annual global turnover, whichever is higher; potentially criminal proceedings or preventing from processing data.
- Disclosure of trade secrets - litigation against the individual and Syndicate for substantial financial losses.
- Disclosure of legal advice/litigation documents - litigation against the individual and Syndicate for financial loss arising from disclosure; possible contempt of court proceedings resulting in fine or imprisonment.
- Breach of NDA - the sanction specified in the NDA.
- Breach of other regulatory requirements in relation to confidential information - fines; removing the right to operate; enforcement action.

Media Relations

Most Syndicate employees are not authorised to speak to the media. Communicating with the media (verbally or in writing), including insurance journalists, could be a breach of employment terms resulting in disciplinary action or even dismissal for gross misconduct. Where contact with the media is specifically authorised, employees should ensure that information that is subject to confidentiality obligations is not disclosed. Any information that relates to a placement, live contract or on-going claim is likely to be confidential.

Mitigation Measures

Syndicates should consider enhancing their confidentiality procedures and refreshing these with their employees. Enhancement options include:

- Training to refresh employees' understanding of their own personal obligations and the serious potential consequences for individuals who breach confidentiality.
- Entering into an NDA for sensitive underwriting information ([LMA9016](#) or [LMA9133](#) (cyber)).
- Entering into an NDA for claims with particularly sensitive information e.g. high profile individuals (LMA intends to publish a new model wording).
- Ensuring all third party agreements contain express confidentiality requirements.
- Ensuring that all reinsurers also keep information confidential (see LMA clause [LMA5056a](#)).
- Consider codenames for claims with particularly high profile or sensitive facts and/or codenames for risks of a similar nature.

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