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Are the Panama papers protected by legal professional privilege?

By Adam King

The reporting in the press of the leaked (or hacked) data from Mossack Fonseca has led the Financial Conduct Authority to write to around twenty banks and other financial institutions, requiring them to inform the FCA of any links to the Panamanian law firm. And it's a tight deadline. "*Beyond 15th April, we will require updates on any significant issues or relationships identified and a full response…when your investigation is concluded*" the letter reads. Difficult issues of Legal Professional Privilege (LPP) are likely to arise.

First of all, do the banks have to answer the FCA's question? The second 'P' in 'LPP' is a privilege against disclosure – a privilege afforded to a client in a lawyer-client relationship, and it applies even (or perhaps especially) to requests from regulators and prosecutors such as the FCA.

Normally, the mere fact of a client having taken legal advice will not be privileged; nor will the identity of the lawyer and client; nor even, on one view, will the fee notes. But this is not a normal situation.

The rationale behind LPP is the public benefit in people being able to obtain legal advice as to their rights and obligations without being inhibited by the fear of disclosure. So where, as here, disclosure of the mere identity of the lawyer might result in the client suffering a disbenefit (e.g. by the nature of the advice – offshore investment – becoming guessable) there is at least an argument that LPP should apply.

A roughly analogous case is the well-established principle that a collection of documents that are not in themselves privileged (because they existed before legal advice was taken) will become privileged in their entirety if the collection "betrays the trend of legal advice".

A second question might be what is the relevance of the fact that the data was apparently stolen? A client bank might think, not unreasonably, that this puts them in a better position: if the data has only come to light as a result of theft, shouldn't they be protected?

The simple answer is "No, not really". LPP is a privilege against disclosure; it is not a privilege against use or admissibility. A lawyer's inadvertent disclosure of a privileged document does not necessarily prohibit its use by an opposing party. Indeed – somewhat surprisingly – even the fact that a privileged document was deliberately and dishonestly taken in breach of a lawyer's professional code of conduct does not necessarily mean it cannot be used – a striking example perhaps of how the American so-called "fruit-of-the-poisonous-tree" doctrine does not apply in the UK.
And what about confidentiality in general? Only confidential documents can be privileged. And if the data has been leaked, could that undermine privilege? This is a trickier question.

A document does not lose its privileged status simply because it has been seen by a third party; it depends on the circumstances and extent of the disclosure. As the Court of Appeal put it in *Bourns Inc v Raychem Corp and others* in 1999, "*the crucial question is whether the document and its information remain confidential in the sense that it is not properly available*

for use." If a document is put in the public domain, it is in no sense confidential and therefore cannot be privileged.

Here, the Panama papers have not been put in the public domain, but extracts and summaries are being made public on a daily basis. A good argument can certainly be made that privilege has not been undermined by loss of confidentiality – yet.

Another consideration – perhaps at the forefront of the minds of FCA investigators – is the so-called "fraud exception": broadly speaking, a document cannot be privileged if it has been prepared in furtherance of crime or fraud. But where there has so far been little suggestion – let alone hard evidence – that Mossack Fonseca have actually been involved in fraud or crime, it is hard to see how this can bite.

Very large data leaks, unlawful – or even criminal – though they may be, sometimes go unpunished, such is the public interest – and public appetite – for the results: "*Steal a little and they'll throw you in jail/Steal a lot and they'll make you King*", as Bob Dylan once said. But on the other hand, as Vice-Chancellor Sir James Knight-Bruce once said in a famous judgment on the law of privilege (*Pearse v Pearse*, 1846), "*Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.*"

Adam King is a barrister at QEB Hollis Whiteman (www.qebholliswhiteman)

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