

## When legally privileged material is accidentally sent to a recipient (Advertising Standards Authority Ltd v Mitchell)

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**Dispute Resolution analysis: Clara Hamer, barrister at 5RB, sets out how the case of Advertising Standards Authority Ltd v Mitchell re-emphasises the protection of legally privileged material in the case of accidental receipt.**

*Advertising Standards Authority Ltd v Mitchell* [\[2019\] EWHC 1469 \(QB\)](#), [\[2019\] All ER \(D\) 47 \(Jun\)](#)

### What are the practical implications of this case?

The case of *Advertising Standards Authority Ltd v Mitchell* confirms that legally privileged material should not be used or disclosed by an accidental recipient and, in that scenario, the law does not require the court to engage in a balancing of the public interest in upholding the privilege as against the public interest in allowing the documents to be used in litigation (*Al Fayed v Metropolitan Police Comr* [\[2002\] EWCA Civ 780](#), [\[2002\] All ER \(D\) 450 \(May\)](#), *Istil Group Inc v Zahoor* [\[2003\] EWHC 165 \(Ch\)](#), [\[2003\] All ER \(D\) 210 \(Feb\)](#) and *Lachaux v Independent Print Ltd* [\[2017\] EWCA Civ 1327](#), [\[2017\] All ER \(D\) 84 \(Sep\)](#)). The case is an important reminder of the circumstances in which an injunction may be granted for breach of confidence and the practical steps which may need to be taken in the event that an email is inadvertently sent to the wrong person, including the sending of a 'message recall' email and self-reporting to the Information Commissioner's Office.

### What was the background?

The Advertising Standards Authority (ASA) had been investigating a complaint about a billboard advert apparently funded by the respondent. It intended to send an email to a solicitor seeking legal advice, but had accidentally sent the email to the respondent instead. The email included the complaint, correspondence with the respondent, draft recommendations and earlier legal advice from the solicitor and counsel. The respondent had refused to provide suitable undertakings and stated that English law did not apply as he was not domiciled in England and Wales. He informed his followers on Twitter that he was being threatened with a 'super injunction'. The ASA therefore applied for an interim injunction in breach of confidence to restrain the respondent from using or disclosing the information (save that he could use the draft recommendations and the correspondence in the ASA complaint or related litigation). The ASA also sought an order that the respondent disclose what he had done with the email and the information it contained.

### What did the court decide?

The court granted the injunction (which was not a 'super injunction' as there was no prohibition on identifying the existence of the injunction or the applicant's interest in it) and disclosure order. Although there was some evidence that the respondent had Scottish connections, there was also evidence, including from separate legal proceedings, Companies House records and Twitter entries, which clearly suggested he was resident in this jurisdiction. The ASA was therefore likely to establish at trial that the English court had jurisdiction. The ASA was also likely to establish that the contents of the email complained of were confidential in nature, had come to the respondent's attention in circumstances importing a duty of confidence, and that his disclosure, publication or use of that information would amount to a breach of confidence. The confidentiality of the material was clear on its face and it was difficult to identify any public interest considerations that could weigh in the balance against the obvious public interest in upholding the confidence of the complainant to the ASA and the confidentiality of the ASA processes.

Moreover, there was no reason to depart from the default rule (following *Ashburton (Lord) v Pape* [\[1913\] 2 Ch 469](#), [\[1911-13\] All ER Rep 708](#)) that legally privileged material may not be used or disclosed by an accidental recipient. Allowing the respondent to use and disclose the privileged legal advice would cause harm to a number of public interests including the desirability of public authorities seeking and receiving legal guidance without inhibition. Further, identifying the complainant would tend to have a chilling effect on complainants generally, and the non-privileged material could give other advertisers an unwarranted and undesirable insight into the private thinking of their regulator.

*Interviewed by Stephanie Boyer.*

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