

A-Z Guide

AUDIO RECORDINGS



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Use This Guide to Understand

- When covert audio recordings may breach the Privacy Principles
- When covert audio recordings will be admitted by the Court as evidence
- Whether good faith is breached by covertly recording a confidential conversation
- How you can protect yourself against a covert audio recording being made

The Legality of Covert Audio Recordings

This A-Z Guide deals with the legal issues surrounding covertly made audio recordings of conversations.

The law in relation to covertly made audio recordings is constantly evolving, and each case is determined on its merits, so it is not possible to make generalisations of when it is acceptable to covertly record a conversation and when it is not. However, this guide traverses the current law to give you some guidance on the topic as it stands now.

There are several implications of covertly recording a conversation. The first is privacy. Covertly recording a conversation may breach the Privacy Act 2020. However, there is some dispute about whether this is the case. The Courts have held that covert audio recordings may not breach Information Privacy Principle 3 or 4 but whether or not they breach Principles 1 or 2 has been relatively untested.

The second implication is admissibility. There is no guarantee that a covertly recorded conversation between an employee and yourself will be admitted into evidence before the Employment Relations Authority or Employment Court. In deciding whether or not to admit such evidence the Authority and Court will examine a number of factors, the primary one being fairness.

If you want information about the use and disclosure of information recorded on an audio device covertly or otherwise, then you should also refer to the following **A-Z Guides**:

- Privacy
- Surveillance



Breaches of the Privacy Act

Whether or not covert audio recordings breach the Privacy Act 2020 has not been tested very often. However, it was examined by the Court of Appeal in *Harder v Proceedings Commissioner* 2000 3 NZLR 80.

The Court found that covertly recording a telephone conversation does not automatically breach Information Privacy Principle 3. This principle is concerned with the collection of information from a subject, but not the manner in which it is collected. The Court stated that knowing that information is being collected is enough to avoid a breach of the Principle. The person does not, necessarily, have to know about the manner in which the information is being collected. In the Harder case, answering questions was held to be enough for a person to know that information was being collected.

Principle 4 deals with the manner in which personal information is collected. It states that personal information shall not be collected by unlawful means OR by means that intrude to an unreasonable extent upon the personal affairs of the individual concerned. Basically, Principle 4 aims to prevent people being induced into supplying personal information by unfair means.

Due to the different circumstances of each case, the determination of whether the covert audio recording was made “unfairly” is made on a case-by-case basis. In the Harder case, the covert recording of a conversation between a defence lawyer and a witness for the prosecution was deemed to not be made unfairly.

On the other hand, the Privacy Commissioner in *Case Note 16479 2001 NZPrivCmr 6* found that an employer who covertly recorded an investigation meeting with an employee did breach Principle 4. The Privacy Commissioner stated that recording a meeting will not always be held to be unfair; there must be something about the circumstances which makes collecting the information in this way unfair.

In this particular case the Privacy Commissioner believed that by the employee not being aware that the conversation was recorded, the manager misled the employee about the way in which the notes will be recorded. The employee’s responses may have been different, or he may have taken more time to answer, if he had been aware that the conversation was being recorded. The unfairness lay not in the fact of the recording, but because the employee was not told it was being recorded.

The Admissibility of Audio Recordings

The admissibility of covertly audio-recorded conversations and/or the transcripts of these, is also determined on a case-by-case basis.

In *Talbot v Air New Zealand* 2 ERNZ 356; the Court of Appeal said:

“Between employees and employers there are reciprocal obligations of fidelity, confidence and fair dealing...There may well be cases where tape recording is a breach of the duty of fair dealing –for instance as regards at least some conversations, the use of a concealed body microphone to record face-to-face conversations.....but the subject does not lend itself to generalisations.”

In this case, the transcript of a telephone conversation was admitted, because although the person being recorded was not aware of that fact, he was aware that he was on speakerphone and that two other people were listening.



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The Authority has also held that whether or not covert audio recordings are accepted as evidence will depend on “fairness”. An important part of the employment relationship is trust, confidence and fair dealing. A covert recording can undermine these duties so the Authority or Court must take this into account when making its decision. However, this must be balanced against whether it is fair to deny a party the right to have their version of events supported by the audio recording.

The fact that many people find covert recordings abhorrent will not be taken into account. The only relevant consideration is whether admitting the recording is fair to both parties.



Mutual Obligations

Both you and your employees are bound by the mutual duty of trust and confidence and good faith. It has been argued that secretly recording conversations is a breach of these obligations.

In *Talbot* the Court of Appeal held:

"In some circumstances, the surreptitious recording of conversations may undermine the confidence and trust that is at the heart of good continuing working relations between employer and employee and their representatives and breach acceptable standards in employment relations."

The duty of good faith, created by the Employment Relations Act 2000, may also be breached by the covert recording of a conversation. Whether or not good faith is breached, or one of the implied duties of trust and confidence, will once again be determined by the individual facts of the case.

You should always remember that there is risk attached to covertly recording a conversation with your employees.

How to Protect Against Covert Recordings

The inclusion of a clause in an employee's employment agreement that deals with covert recordings may be appropriate, even desirable, in some circumstances. It may also serve as a deterrent against such conduct. An employment agreement can contain any provisions that you and an employee agree on, so long as the agreement meets the requirements of the Employment Relations Act 2000.

Such a clause could provide that neither party shall, in any circumstances, covertly record any conversation between:

- The employer and the employee; or
- The employer and any person connected with the affairs of the employee; or
- The employee and any other employee of the employer.

This clause may be enhanced by providing that a breach of this clause is a serious breach giving rise to cancellation. Alternatively, a breach could be considered to amount to serious misconduct. However, the employee, under such a clause, could consider the conduct of an employer in breach of it to be a serious breach as well, allowing him or her to cancel the agreement.

If you want advice or assistance with the drafting of your employment agreements, or clauses such as this, contact your EMA Advice Employment Relations Consultant.

Conclusion

In some circumstances, covert audio recordings of a conversation will be a breach of the Privacy Act 2020; it is dependent on the facts of each particular case. The Employment Relations Authority and the Employment Court may allow the admission of



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secretly recorded conversations into evidence; however, once again each case must turn on its own merits. The primary consideration is fairness.

If you are faced with a situation involving the secret audio recording of a conversation you should seek independent and specialist advice to determine how best to handle that situation.



Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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