Disclosure to third parties: when should you share?

OMB Large Corporate

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19 March 2024

When you are asked to disclose information to third parties, we consider the risks involved and how to avoid them.

Key Points

What is the issue?

An area that is causing increasing and ongoing problems for advisers is the thorny issue of the provision of information to parties other than the client.

What does it mean to me?

It is important to remember that confidentiality to clients remains following the termination of the engagement with the client.

What can I take away?

It can be possible to help a client if they would like your work to be disclosed to third parties. However, the issue is risky and advice should be taken.

Tax practitioners should be aware of risk issues that can arise in their professional practices, and they should avoid the unseen ‘potholes in the road’ that may cause difficulties further down the line. Many issues can be prevented with the use of carefully drafted engagement letters, making it clear what the adviser is and is not doing.

However, an area that is causing increasing and ongoing problems for advisers is the thorny issue of the provision of information to parties other than the client. Obviously, HMRC is one of the main bodies requesting the disclosure of third party information. Some of the other key situations include the provision of information to:

- new tax advisers after the existing relationship ends;
- banks and other lenders seeking information to assist them in relation to finance decisions; and
- other parties (including advisers) in relation to work undertaken by the current adviser but for a different transaction.

All of these scenarios can give rise to tricky issues of confidentiality, reliance and risk. The issues to consider are listed below to help the professional facing a request work out what to do and avoid problems with their client

and regulator.

Professional clearance letters

One common problem arises when advisers receive a letter from a former client's new adviser seeking professional clearance and further information to enable the new adviser to take up the appointment.

It is important to remember that confidentiality to clients remains following the termination of the engagement with the client. Advisers should not simply reply to the request for clearance but need full written consent (which can be by email) from their former client to respond to the request. That consent is not implied by the receipt of the request for clearance.

Providing information to the new adviser is a breach of confidentiality if the client has not consented that it may be so supplied. The safest thing to do, therefore, is to send the request to your former client and ask for written confirmation that you may respond to it. When that confirmation is received, you have consent not only to provide information to the new adviser but also regarding the extent of the information to be supplied.

This issue gets more complex when there has been a dispute between the adviser and their former client. This could arise if the relationship broke down due to contentious reasons. We consider a few scenarios below:

- **A refusal to pay fees:** In this scenario, it is acceptable to advise the new advisers that you have outstanding fees that remain unpaid. Take care not to become hostile in the correspondence in that respect.
- **A failure to correct errors in the reported tax position:** Great care has to be taken in this scenario. A money laundering report may have been made but, of course, you must take care not to alert your former client that a money laundering report has been made ('tipping off'). However, you have to give correct information to the new adviser. It would be sensible in this scenario to take legal advice as to the extent of the information to provide to the new adviser about any contentious issues.

Requests for information from HMRC

This is another area where we see problems arising. Too many advisers respond to requests for information from HMRC where the request is informal, so that client information is provided when HMRC has no statutory right to that information. It may well be that it is in the client's best interests for the information to be provided but it should not be provided without formal informed consent.

If HMRC does make an informal request for information relating to a client, it is perfectly acceptable to advise HMRC that the information can only be provided under the appropriate statutory notice.

Provision of information under a statutory notice does not require client consent. However, the adviser does have a duty to check whether the notice is valid, both in terms of the extent of the notice and procedurally. Again, it may be in the client's best interest to provide information under a notice that is procedurally invalid or where a challenge could be raised as to the extent of the notice but the client would have to give informed consent before doing so.

Failure to consider these issues and advise the client accordingly means that client confidentiality could be breached and a claim could follow. All too often, we see advisers providing information to HMRC under requests which are invalid, out of time or excessive, which should not have been supplied.

The adviser must consider whether it is appropriate to supply the information and whether client confidentiality is being breached, and take specialist advice if they are unsure whether or not they should comply with the request.

Requests for information from banks

We frequently see requests from banks, lenders and other organisations for an ‘adviser’s certificate’ or letter. These are made out to be very simple documents and are intended to support clients when they are seeking to enter into financial transactions such as a mortgage, a loan or other financial situations, perhaps to guarantee care home fees for a family member.

Often, the request will be made to secure a loan by the client’s business, and the loan in question will be sought by the client, a director or a shareholder.

Usually, the adviser is not told the purpose of the loan, the amount of the loan or the amount of any equity against which it is being secured, and so cannot assess the risk. They may not even be told the name of the entity granting the loan, so do not know who is going to rely on the information they are being asked to provide.

The adviser may be asked to complete a certificate, which is effectively being used to guarantee the underwriting of the loan. The certificate normally has tick boxes and does not allow for caveats to be added. It can ask the adviser to confirm facts which they cannot know for certain, as they may relate to issues that the advisor has only been informed of by their client.

The adviser will first have to identify whether they are acting for the person who is taking out and is responsible the loan. If the adviser decides to help the individual taking out the loan by providing information to the bank, they must think about what they know, as opposed to what they have been told. For example, they know what is in the filed tax return (if they filed this) but they do not know what assets the client holds.

Even if the client supplies a bank statement, they do not know if funds were removed after the bank statement was supplied. The adviser cannot say that the client has a certain amounts funds in their account; only that they have been supplied with a bank statement by the client, copy attached. Great care should be taken over the drafting of these statements. Legal advice should be sought to ensure that the adviser does not end up effectively being a guarantor for the loan.

My rule of thumb is that if you are so confident that what you are saying is right that you are prepared to lose your home over it, then sign the letter. But don’t sign if you have any doubt whatsoever because you could end up being liable. If you are unsure, seek advice on how to draft the letter.

Supplying information to new advisers for unintended purposes

You may be asked to disclose work that you have undertaken for one purpose, and which will be used by new advisers for another purpose. This can be a thorny area and advice should be sought.

Perhaps you carried out work for a client who purchased a business in year one. In year three, that same client wants to sell the business and the buyer’s advisers are interested in the work you carried out as part of their due diligence.

It would be normal to ask the buyer's advisers to sign 'hold harmless' letters before supplying copies of that work. These in essence allow them to see the work but they confirm that the work was done for one purpose and not the purpose the buyers intend; therefore, the buyers will not rely on the work and will bring no claims on the work.

Legal advice will be needed to ensure that you are protected from claims in relation to the provision of this work. Don't rely on any drafts provided by the buyer!

You may also be asked to allow a third party to see ongoing work at the time that work is being done. In this case, you should allow that third party to be provided with the work on consideration that they become a party to the engagement letter and be bound by all the terms. Legal advice will be needed to ensure that the contract is effective to protect the release to the third party.

If the third party wants to be able to rely on this information, a 'reliance letter' will be required, and a fee is usually charged to reflect the risk. Again, this requires legal advice to ensure that the appropriate caveats are put in place with the relevant protections. Again, don't rely on the draft provided by the other side!

It can therefore be possible to help a client if they would like your work to be disclosed to third parties. However, the issue is complex and risky. Advice should be taken before allowing third parties to be supplied with the advice given to a client for one purpose, to be used for another, thereby increasing your risk profile significantly.