

**Our Reference:** LOB/CMcC/JOC//RT007/334/

21 February 2024

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**Re: Joint Oirachtas Committee and Public Accounts Committee  
Requests for detailed personnel information from RTÉ**

Dear Kevin

We refer to our previous letter of advice dated 5 October 2023 and the request for us to reconsider this advice in the context of RTÉ's desire to be as transparent as possible regarding the terms on which certain employees left RTÉ.

The position regarding the voluntary disclosure of current and former employee personal data on an individualised basis to the Public Accounts Committee ("**PAC**") and/or Joint Committee on Tourism, Culture, Arts, Sport and Media ("**JOC**") remains as set out in our earlier letter (copy enclosed for ease).

As previously advised, employees and former employees have a legal entitlement that their personal data (and particularly sensitive personal data) arising from their employment is not made publicly available. If such information is published, we remain of the view that this would contravene employees' contractual and statutory rights thereby exposing RTÉ to avoidable legal challenge.

There are different reasons leading to settlements with employees. In the case of RTÉ, some employees left following negotiated discussions documented by way of settlement agreements. Settlement agreements are contracts that are regularly entered into where an employment relationship comes to an end and there are claims pending, threatened or likely to arise. Such agreements will be found to exist, in our experience, in the public, private and commercial semi-state sectors.

In such arrangements, employees agree to waive their right to pursue any form of legal claim and/or withdraw any claims in being (as applicable) against their employer in consideration for the payment of an ex-gratia termination payment. The terms are generally arrived at having regard for the legal risk associated with terminations or legal claims, the cost of defending such claims and the subsequent award that may be made by the Workplace Relations Commission (the "**WRC**"), Labour Court or the civil courts. These agreements bring finality and certainty. Confidentiality provisions are routinely contained in such agreements.

It is worth noting that the WRC offers a mediation service to resolve legal rights claims pursued by employees. Section 39 of the Workplace Relations Act 2015 provides that "*the Director General<sup>1</sup> may, where he or she is of the opinion that a complaint or dispute is capable of being resolved without being referred to an adjudication officer under section 41, refer the complaint or dispute to a Mediation Officer*".

The WRC's standard confidentiality clause provides: "*Mediation is conducted in private and the terms of any settlement are not published. Information furnished at mediation may not be published or disclosed except on the order of the High Court or Circuit Court or with the consent of the person furnishing the information and of any other person to whom the information may relate. Any person who discloses information in contravention of the Act may be guilty of an offence.*"

We can confirm that any employee who departed RTÉ on foot of a directly negotiated settlement did so on the basis that the terms of such agreement would remain confidential as between the parties. We are also aware of certain agreements reached through the WRC mediation process with associated confidentiality. It is clear to us that should the terms of these agreements be contravened by RTÉ then this would amount to a breach of contract and in the case of those agreements reached by way of mediation before the WRC - both a breach of contract and a criminal offence.

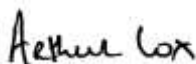
The precedent of *Gunning v Coillte Teoranta*<sup>2</sup> is also relevant. In that case, the relevant Minister requested that board of Coillte withhold a contractually earned bonus from an employee. The board acceded to this request. The High Court determined that this amounted to a breach of contract and awarded the outstanding bonus to the employee. The High Court concluded that contractual rights existed and political argument to disregard those rights did not withstand legal scrutiny.

This question was further considered by the High Court in the case of *Keating v. Shannon Point Port Company*<sup>3</sup>. In that case, the High Court stated: "*...an obligation to comply with the Ministerial directives might give rise to difficulties if the effect of it were to give rise to an interference by an outside agency who is not a party to the contract with the vested constitutional property rights of the employee*". This is very relevant in this case given the impact disclosure would have on the rights of the former employees in question.

While we fully appreciate the request for transparency, we must advise you to exercise extreme caution having regard for the civil and criminal consequences attaching to such disclosure as referred to above.

Finally, we understand that this advice may be distributed outside of RTÉ. Advice of this nature is ordinarily subject to legal advice privilege. If it is published or otherwise shared then such disclosure should be limited for the specific purpose of cooperating with requests from the PAC, the JOC or as may otherwise be required by the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. The waiver should not be considered a waiver of the privilege attaching for any other purpose, nor a more general waiver of privilege in respect of the subject matter of this advice.

Yours faithfully



ARTHUR COX

Encl. Letter 5 October 2023

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<sup>1</sup> of the Workplace Relations Commission

<sup>2</sup> [2015] IEHC 44

<sup>3</sup> [2022] IEHC 505