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Handled with care – High Court approves SFO's treatment of seized electronic devices

The High Court has given judicial approval to the Serious Fraud Office's newest procedure for identifying and returning privileged documents it finds on electronic devices seized in arrests or raids. ***Neil Swift*** *and* ***Edward Einfeld*** *of Peters & Peters study the ruling.*

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The Serious Fraud Office (SFO), like other law enforcement agencies such as the police, has the power to seize electronic devices even where those devices may contain irrelevant or legally privileged documents. [1] However, following a well-reported case in 2012 (*Rawlinson*) [2], the SFO had to amend its procedure where it is claimed that seized devices contain legally privileged material. The SFO is now required to use non-SFO lawyers (usually junior counsel) to review the potentially privileged material, determine claims of privilege and ensure that only non-privileged documents are passed on to the investigative team.

The issue raised in *McKenzie v SFO* [3] was: do external contractors need to be involved as soon as the devices are seized? Or can the SFO's own IT team conduct key word searches to narrow down the potentially privileged documents so that they can be reviewed by the external legal team?

Facts

The SFO seized the mobile telephones and computers of a director of a company accused of bribery. [4] Neither the company director nor his lawyers indicated that the equipment contained legally privileged material. Two weeks later, the SFO notified the company director's lawyers that one of the seized telephones may have privileged material on it. The lawyers then told the SFO that all of the devices contained privileged material. The SFO invited the company director to identify search terms that could be used by the SFO's internal IT department to identify potentially privileged material. The SFO proposed that the results of those search terms would be reviewed by an external legal team, in accordance with the SFO's internal policy for handling LPP material ("the policy"). The company director's lawyers refused, asking for the SFO to employ IT contractors independent of the SFO to conduct the electronic searching. The SFO refused.

The company director made an application for judicial review of the SFO's refusal. The company director made three arguments:

1. The SFO's policy is inconsistent with the Attorney General's Guidelines on Disclosure (2013).
2. The common law rules that "*jealously guard*" privileged materials held by a person's former lawyers should equally apply to privileged materials held by investigative bodies.
3. The *Rawlinson* case which forced the SFO to employ external lawyers to review seized documents for privilege should be extended to require that even the searching team be external to the SFO.

The High Court rejected all three arguments. The High Court agreed that a seizing authority:

"*has a duty to devise and operate a system... which can reasonably be expected to ensure that [potentially privileged] material will not be read by members of the investigative team...*" [5]

However, the High Court found that the SFO's procedures for identifying potentially privileged material were sufficient to prevent the SFO's investigative team from accessing it. The process of separating out potentially privileged documents by conducting electronic searches is performed by the SFO's IT department, which is independent of the investigative team.

When discussing potential weaknesses of the SFO's proposed process, the High Court said that the process should not be "*judged against the yardstick that either those in the IT department or the investigating teams will act in bad faith*". [6] The Court said that there could be no basis for a suggestion of bad faith, particularly in this case because it was the SFO that prompted the company director to consider whether the devices might contain privileged material.

Ultimately, the Court found that investigative bodies do not need to treat potentially privileged documents with the same 'kid gloves' that law firms use to protect privileged communications with former clients.

Worth considering

In the future, if a person has concerns that the SFO's procedure for reviewing their seized devices is deficient, he or she will have the burden of establishing that.

What is not clear from the judgment is how the documents separated out by the SFO's IT teams are then passed on to the external lawyers for review. The policy makes it clear that LPP material is properly isolated and promptly returned without having been seen by an SFO investigator or a lawyer involved in the investigation. If in a particular case there is evidence that a member of the SFO's investigative team arranged for the potentially privileged documents to be reviewed by the external lawyers and, through that process, was able to access those documents, there may well be an argument that SFO's process is deficient.

Another issue that was not explored is the potential prejudice of requiring a person to identify search terms that might turn up legally privileged material. It may be that search terms that would most effectively turn up privileged documents might themselves expose confidential matters on which legal advice had been given. One possible solution would be to open up a direct channel of communication with the IT function.

Finally, the Court expressly reasoned that the *Rawlinson* case did not prevent the SFO from conducting a "*preliminary sift*" of hard copy documents before having those documents reviewed by external lawyers. However, the issue of reviewing hard copy paper material remains open because this case did not involve a review of the SFO's procedures for that type of document. Cases like *Ex P Bramley* [7] and *R (S) v Chief Constable of British Transport Police* [8] directly review issues arising out of the seizure of hard copy material and will likely have greater application to future cases dealing with this issue. As a result, persons concerned about the possibility of an SFO investigative team accessing potentially privileged material may still ask the SFO to justify their proposed hard copy document handling procedures.

There may be other issues thrown up by specific cases. These all need to be managed as part of developing the relationship between defence lawyers and the SFO.

Notes

1. Under *section 51* of the *Criminal Justice and Police Act 2001*.
2. *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1634 (Admin) (*Rawlinson*).
3. *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin) (*McKenzie*).
4. The SFO used their powers under *section 54* of the *Police and Criminal Evidence Act 1984* (PACE) and *section 2(3)* of the *Criminal Justice Act 1987* to do so.
5. Paragraph 34 of *McKenzie*.
6. Paragraph 37 of *McKenzie*.
7. *R v Chesterfield Justices ex P Bramley* [2000] QB 576.
8. [2014] 1 WLR 1647.

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