

SFO OPERATIONAL HANDBOOK

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Corporate Co-operation Guidance

This document is for guidance only. It assists in assessing the co-operation from business entities (herein referred to as "organisations"). Decisions in each case will turn upon the particular facts and circumstances of that case.¹

Co-operation by organisations benefits the public and advances the interests of justice by enabling the Serious Fraud Office ("SFO") more quickly and reliably to understand the facts, obtain admissible evidence, and progress an investigation to the stage where the prosecutor can apply the law to the facts.

Co-operation will be a relevant consideration in the SFO's charging decisions to the extent set out in the **Guidance on Corporate Prosecutions** and the **Deferred Prosecution Agreements Code of Practice**. According to the **Guidance on Corporate Prosecutions**, it is a public interest factor tending against prosecution when management has adopted a "genuinely proactive approach" upon learning of the offending. Co-operation can be an important part of such a genuinely proactive approach (**DPA Code 2.8.2(i)**).

Co-operation means providing assistance to the SFO that goes above and beyond what the law requires. It includes: identifying suspected wrong-doing and criminal conduct together with the people responsible, regardless of their seniority or position in the organisation; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format.

Genuine co-operation is inconsistent with: protecting specific individuals or unjustifiably blaming others; putting subjects on notice and creating a danger of tampering with evidence or testimony; silence about selected issues; and tactical delay or information overloads.

It is important that organisations seeking to co-operate understand that co-operation – even full, robust co-operation – does not guarantee any particular outcome. The very nature of co-operation means that no checklist exists that can cover every case. Each case will turn on its own facts. In discussing co-operation with an organisation, the SFO will make clear that the nature and extent of the organisation's co-operation is one of many factors that the SFO will take into consideration when determining an appropriate resolution to its investigation. The SFO will retain full and independent control of its investigation process.

¹ "Organisations" includes corporate entities such as limited companies, limited liability partnerships, etc.

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Many legal advisers will understand the type of conduct that constitutes true co-operation. This will be reflected in the nature and tone of the interaction between a genuinely co-operative organisation, its legal advisers and the SFO. Nonetheless, some indicators of good practice are listed below, as are examples of steps which the SFO may ask an organisation to take. This is not a complete list; some items will be inapplicable (or undesirable) in certain cases and it is not intended to, nor does it, create legally enforceable rights, expectations or liabilities:

Preserving and providing material

1. Good general practices

- i. Preserve both digital and hard copy relevant material using a method that prevents the risk of document destruction or damage.
- ii. As and when material, especially digital material, is obtained, ensure digital integrity is preserved.
- iii. Obtain and provide material promptly when requested, to respond to SFO requests and meet agreed timelines.
- iv. Provide a list of relevant document custodians and the locations (whether digital or physical) of the documents.
- v. Provide material in a useful, structured way, for example:
 - a. Compilations of selected documents (including hard copy records, digital communications, records showing flow of cash) as requested by the SFO;
 - b. Particularly relevant materials sorted, for example, by individual or specific issue;
 - c. Relevant material gathered during an internal investigation;
 - d. Basic background information about the organisation, including organograms; lists, job titles, and contact and personal information of relevant persons; and what categories of data exist (e.g. emails, audio, chats).
- vi. Provide material on a rolling basis in an agreed manner.
- vii. Inform the SFO without delay of suspicions of, and reasons for, data loss, deletion or destruction.
- viii. Identify relevant material that is in the possession of third parties. The SFO may ask the organisation to facilitate the production of third-party material.
- ix. Provide relevant material that is held abroad where it is in the possession or under the control of the organisation.
- x. Promptly provide a schedule of documents withheld on the basis of privilege, including the basis for asserting privilege.

If an organisation decides to assert legal privilege over relevant material (such as first accounts, internal investigation

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interviews or other documents), the SFO may challenge that assertion where it considers it necessary or appropriate to do so.

- x. xi. Assist in identifying material that might reasonably be considered capable of assisting any accused or potential accused or undermining the case for the prosecution.

2. Digital evidence and devices

- i. Provide digital material in a format the SFO requests that is, in a format ready for ingestion by and viewing on the SFO's document review platforms. The SFO may ask an organisation to provide schedules of relevant documents that it is producing and details of search terms, "seed sets" or other search methodologies applied to extract the documents.
- ii. Create and maintain an audit trail of the acquisition and handling of digital material and devices, and identify a person to provide a witness statement covering continuity.
- iii. Be alert to ageing technology or bespoke systems, and preserve means of reading digital files over the life of the investigation and any prosecution and appeal.
- iv. Alert the SFO to relevant digital material that the organisation cannot access – for example, relevant private email accounts, messaging apps or social media that have come to light in an internal investigation.
- v. Preserve and provide passwords, recovery keys, decryption keys and the like in respect of digital devices.

3. Hard-copy or physical evidence

Create and maintain an audit trail of the acquisition and handling of hard copy and physical material, and identify a person to provide a witness statement covering continuity.

4. Financial records and analysis

- i. Provide records that show relevant money flows.
- ii. Provide relevant organisational financial documents in a structured way, including bank records, invoices, money transfers, contracts, accounting records and other similar documents.
- iii. Alert the SFO to relevant financial material that the organisation cannot access – for example, bank accounts into which monies flowed from the organisation.

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- iv. Make accountants and/or other relevant personnel (internal and/or external) available to produce and speak to financial records and explain what they are and what they show about money flows.
- v. Create and maintain an audit trail of the acquisition and handling of financial material, and identify a person to produce the exhibits and cover continuity.
- vi. Provide financial information and calculations relevant to profit, disgorgement, financial penalty calculation and ability to pay.

5. Industry and background information

- i. Provide industry knowledge, context and common practices.
- ii. Identify potential defences that are particular to the market or industry at issue.
- iii. Provide information on other actors in the relevant market.
- iv. Notify the SFO of any other government agencies (domestic or foreign, law enforcement or regulatory) by whom the organisation has been contacted or to whom it has reported.

6. Individuals

- i. To avoid prejudice to the investigation, consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps.
- ii. Identify potential witnesses including third parties.
- iii. Refrain from tainting a potential witness's recollection, for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen.
- iv. Make employees and (where possible) agents available for SFO interviews, including arranging for them to return to the UK if necessary.
- v. Provide the last-known contact details of ex-employees, agents and consultants if requested.

Witness Accounts and Waiving Privilege

In conducting internal investigations, some organisations will have obtained accounts from individuals. Since 2014, the **Deferred Prosecution Agreements Code of Practice** has provided (at paragraph 2.8.2(i):

“Co-operation: Considerable weight may be given to a genuinely proactive approach Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for

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interview when requested. It will further include providing a report in respect of any internal investigation including source documents”.

Organisations seeking credit for co-operation by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview and identify a witness competent to speak to the contents of each interview.

When an organisation elects not to waive privilege, the SFO nonetheless has obligations to prospective individual defendants with respect to disclosable materials.²

The existence of a valid privilege claim must be properly established.³

During the investigation, if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged.

If privilege is not waived and a trial proceeds, where appropriate, the SFO will apply for a witness summons under section 2 Criminal Procedure (Attendance of Witnesses) Act 1965.⁴

An organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the **DPA Code** (above) but will not be penalised by the SFO.⁵

Other

There may be circumstances, even when an organisation is co-operating, when it will be necessary or appropriate for the SFO to use powers of compulsion to obtain relevant material.

Compliance with compulsory process, in itself, does not indicate co-operation. Conversely, use of compulsion does not necessarily indicate that the SFO regards the organisation as non-co-operative.

² As to privileged witness accounts, the House of Lords held that the importance of legal privilege outweighs a defendant's request for prior witness statements: *R v Derby Magistrates Court ex parte B* [1996] 1 AC 487.

³ See *R (on the application of AL) v SFO* [2018] EWHC 856 (Admin).

⁴ See the advice in *R (on the application of AL) v SFO* [2018] EWHC 856 (Admin) (the XYZ case).

⁵ The Court of Appeal has not ruled out a court's consideration of the effect of an organisation's non-waiver over witness accounts as it determines whether a proposed DPA is in the interests of justice: *SFO v ENRC* [2018] EWCA Civ 2006 at [117].