

## The calm before the storm: are you prepared for a dawn raid?



**BY KELLY THOMSON**  
associate,  
WilmerHale

THE START OF A DAWN RAID IS OFTEN the first time a company or individual learns that they are the subject of an investigation. Knowing what to do during the first minutes of a dawn raid is vital. Ensuring that a company's receptionist, employees and senior management all know what role they have to play in effectively managing the arrival of investigators at the company's front door and the subsequent search is essential. Attempting to formulate such a plan of action once the raid has begun is not practical and therefore the key to handling a dawn raid is preparation and detailed planning.

Dawn raids can be carried out by a number of criminal and regulatory agencies including, but not limited to, the Financial Conduct Authority (FCA)<sup>1</sup>, the Serious Fraud Office (SFO)<sup>2</sup>, HM Revenue & Customs (HMRC)<sup>3</sup>, the European Commission assisted by the UK authorities<sup>4</sup> and the Office of Fair Trading (OFT)<sup>5</sup>. While dawn raids are not the only investigative option open to these agencies, they are an effective tool to be used to obtain evidence by searching property and seizing documents when it is feared an individual or company may destroy or hide evidence.

By the middle of 2012 it was widely reported that the use of dawn raids by the SFO was waning. It appeared that the SFO were behaving cautiously in the aftermath of the headline-grabbing dawn raids on the Mayfair properties owned by the Tchenguiz brothers in March 2011 and the subsequent successful outcome of the judicial review mounted by the brothers, which resulted in the SFO being ordered to pay significant legal costs. The SFO denied the drop in numbers had anything to do with the mishandling of this investigation and instead asserted that not all of their investigations required the assistance of a dawn raid. This decline in SFO raids should be seen within the context of the fluctuating use of dawn raids by the FCA, HMRC and competition regulators. It is uncertain what 2013 will bring, but it is arguable that once the dust settles on the Tchenguiz matter the risk of future dawn raids from the SFO as well as other agencies will be ever present.

Given the impact on business and the reputational damage that can ensue, not only from any press reporting on the raid, but also any allegation of corporate

wrongdoing, it is imperative for in-house legal teams to work closely with their company to prepare them for a dawn raid.

### THE FIRST HOUR

The surprise nature of a dawn raid means that it is important that companies are prepared and provide information to relevant members of staff on how dawn raids are carried out, as well as assisting employees who may be directly involved in the raid to understand their individual roles. In addition, in-house lawyers play an important role in helping to manage the situation by acting as a liaison between the investigators and the company and ensuring that the investigators are acting within their powers.

It is vital that everyone within the company knows what to do at each stage of the raid. For example, it is likely that the first person the investigators will come into contact with will be sitting at the front desk or reception and they will need to know what to do and who to call if investigators arrive at 6am on a Monday morning.

To that end it is often helpful to have a clear documented plan that may be followed, which provides comfort to those members of staff on the front line as well as providing the company with an element of control over a disruptive process.

In terms of an initial plan the following is suggested.

#### Front desk/reception

- Act in a polite and calm manner towards the investigators.
- Take the names of the investigators.
- Show the investigators into an empty room away from the reception area and work spaces and inform them you will be calling a senior member of management.
- Make copies of the investigators mandate. In the case of an SFO, FCA or HMRC raid, the mandate will be a warrant. It will be called an authorisation or warrant for the OFT or an authorisation or decision for the Commission.
- Contact senior management, working your way down a list of prepared

names, which include in-house lawyers and external lawyers. In addition the investigators may ask for named individuals and these people should be contacted as soon as possible.

- Be careful not to inadvertently inform anyone, especially anyone outside the company, about the raid.

## Senior management and in-house legal

- Assign a person to act as a point of contact with the investigators.
- Determine how many investigators are at the company's location.
- Determine whether there are investigators at other company locations and if so, allocate teams of lawyers and staff to each location.
- If your in-house legal team is not available immediately, ask senior management to request a reasonable delay at the start of the search to allow time for in-house legal to arrive. The investigators from the different agencies are under no obligation to allow time for this and may start their search regardless.
- If the investigators will not wait for in-house legal to arrive, it is important for senior management to check the documentation brought by the investigators. This can be done over the phone with a member of in-house legal.
- Examine the authorisation or warrant carefully to ensure it accurately reflects the name and address of the company or person(s) subject to the raid, the names of each individual investigator, the date of issue and expiry date of the investigation. SFO and FCA warrants will specify the precise scope of the information required.
- Make it clear to all staff members who are aware of the investigation not to discuss the investigation with other members of staff or anyone outside of the company, including the press.
- Recommend members of the in-house legal team or external legal team to

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shadow and monitor each investigator. A member of IT should be nominated to monitor any investigator conducting a search of electronic data.

- Consider a temporary block on all external e-mails.

## DURING THE SEARCH

### Seizing hard copy documents or electronic data

Employees should be informed immediately that under no circumstances should electronic or hard copy documents be hidden or destroyed. This means all e-mails should be retained, no hard copy documents should be shredded or thrown away and no materials should be removed from the premises. Any destruction of a document that a person knows or suspects would be relevant to the investigation is likely to lead to criminal sanctions<sup>6</sup>.

Generally investigators have the right to take copies of documents and certain agencies also have the right to take original documents<sup>7</sup>. In order to maintain business continuity, it is important to ascertain whether the investigators intend on seizing company computers or whether they require the more reasonable option of imaging the hard drive.

### Privilege

Privilege is a complex area and it is helpful for a member of the company's legal team to be present to assist in determining whether a document is privileged or not. In England and Wales law, legal advice privilege and litigation privilege will generally apply to written communications with in-house lawyers made for the purpose either of giving legal advice or of pending or anticipated litigation. Under EU law, privilege applies to confidential written communications between a company and external lawyers qualified in the European Economic Area, but does not cover advice given by in-house lawyers.

Where the investigator wants to image the entire hard drive of a computer and it is unclear whether there is privileged documentation involved, it is good practice to put the investigators on notice that the hard drive may contain privileged material and a formal determination should be made at a later date.

The team of in-house or external lawyers or other staff who have been nominated to monitor or shadow the investigators should be briefed on their responsibilities regarding privileged documents. Lawyers monitoring investigators should be told to try to ensure that no privileged documents or documents falling outside the scope of the investigation are read, copied or kept by the investigators. Privilege and scope is often a matter of judgement and those monitoring the investigators should be told that if there is a dispute regarding whether a document is privileged or relevant, it should be placed in a sealed envelope and a determination by an independent third party as to whether it is privileged or not can be made at a later date.

### Lawyers/staff monitoring investigators

- Do not leave the side of the investigator you are monitoring.
- Make a copy of each document copied or kept by the investigators, including the nature of the document, date and author.
- Make a list of offices and files accessed by the investigator.
- Keep a note of each question asked and answered.
- Ensure no privileged documents or documents falling outside the scope of the investigation are read, copied or kept.

### Answering questions

Although investigators generally have the right to ask employees questions<sup>8</sup>, such

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questions should be limited to the scope of the investigation, and should generally not stray from issues relating to the search or assisting in locating documents. A dawn raid is not an opportunity for the investigators to interview or interrogate employees.

#### Employees

- Act in a calm and polite way towards the investigators but also do not volunteer any more additional information than necessary.
- Allow investigators admission into your office and access to your electronic and hard copy work files.
- Immediately refrain from deleting e-mails, removing documents from the work place or shredding hard copy documents.
- If asked any questions, request the assistance of in-house legal.
- Cease from sending e-mails to or speaking with anyone other than in-house legal, senior management, or expressly authorised individuals about the investigation.
- Do not create any additional documents relating to the investigation.

#### IMMEDIATELY AFTER THE RAID

##### Reviewing the investigation

It is good practice to begin reviewing what the investigators have taken as soon as the raid has concluded. This is why it is important for those monitoring

the investigators during the raid to take detailed notes of every document, file or folder copied and taken by the investigators. The sooner the review can begin, the sooner the legal team can determine the potential issues that may arise and a strategy for handling the next steps in the investigation.

#### Reputation management

The potential reputational damage that can follow a dawn raid, as well as any allegation of corporate wrongdoing, is high. It is important for the company to have a coherent PR strategy in place to combat this. There is no one-size-fits-all approach. While a company may decide they do not want to engage with the press, it may be out of their control if it is a high-profile raid and the press become aware of it. It is advisable that a statement

is prepared swiftly, either in response to a press enquiry, or to pre-empt any press speculation.

#### CONCLUSION

The mishandling of a dawn raid can be damaging to any company. Privileged documents may inadvertently be handed over to the investigators, employees may be subject to beyond-scope questioning and an incomplete list of documents taken during the search can lead to the company missing out on key information regarding the focus of the investigation.

Having a prepared dawn raid response plan in place which is individually tailored for staff members will assist greatly in ensuring everyone in the company knows what they have to do during a raid, which in turn helps minimise the loss of control that initially follows a dawn raid. A step-by-step guide detailing how employees should behave during a dawn raid, the rights and responsibilities of the investigators and the roles of each individual is a useful tool should a company receive an unexpected early morning knock on the door by investigators. Preparation is crucial.

*By Kelly Thomson, associate, WilmerHale.  
E-mail: [kelly.thomson@wilmerhale.com](mailto:kelly.thomson@wilmerhale.com).*

#### NOTES

- 1) s176 Financial Services and Markets Act 2000.
- 2) s8 and Schedule 1 Police and Criminal Evidence Act 1984.
- 3) s8 and Schedule 1 Police and Criminal Evidence Act 1984.
- 4) Article 20 Council Regulation (EC) 1/2003 and s62 Competition Act 1998.
- 5) s28 Competition Act 1998 and s194 Enterprise Act 2002.
- 6) s177 Financial Services and markets Act 2000; s43 Competition Act 1998; s201 Enterprise Act 2002.
- 7) FCA, s176 Financial Services and Markets Act 2000; SFO and HMRC, s8 and Schedule 1 Police and Criminal Evidence Act 1984; Commission, Article 20 Council Regulation (EC) 1/2003 and s62 Competition Act 1998; OFT, s28 Competition Act 1998 and s194 Enterprise Act 2002.
- 8) FCA, s176 Financial Services and Markets Act 2000; SFO and HMRC, s8 and Schedule 1 Police and Criminal Evidence Act 1984; Commission, Article 20 Council Regulation (EC) 1/2003 and s62 Competition Act 1998; OFT, s28 Competition Act 1998 and s194 Enterprise Act 2002.