

## SFO Director Attacks Privilege Ahead of Corporate Guidance on Cooperation

APRIL 25, 2019

The Director of the UK Serious Fraud Office (SFO), Lisa Osofsky, has promised to provide companies with concrete guidance on cooperation with the SFO. Based on her recent comments, this guidance is likely to encourage companies to waive any claim to Legal Professional Privilege, eroding a right that Ms Osofsky herself describes as “fundamental in our legal system” but which has become something of a *bête noire* for her in the early days of her directorship.<sup>1</sup>

In a speech at the Royal United Services Institute on 3 April 2019, Ms Osofsky pledged that she would “soon be issuing guidance for corporates and their legal advisers to provide them with added transparency about what they might expect if they decide to self-report fraud or corruption”.<sup>2</sup>

Providing some insight into what that guidance may contain, Ms Osofsky made clear her belief that companies owe a duty to law enforcement agencies to share information and to self-report suspected misconduct, saying they “should be willing, indeed eager” to share their “great experience, advanced analytical tools and vast quantities of data”.

Any duty of cooperation owed to law enforcement can at times exist in tension with the right of companies to conduct internal investigations prior to self-reporting and to rely on Legal Professional Privilege in determining what to disclose to law enforcement during and after such investigations. Ms Osofsky recognises these potentially competing objectives and the “prerogative” of companies to hire external advisors to investigate suspicions of criminality, but she is clear on how companies should resolve such dilemmas where these objectives are incompatible. According to Ms Osofsky, the “ultimate objective” of any internal investigation should be “cooperating with law enforcement” and this objective would be frustrated by throwing “the blanket of Legal Professional Privilege over all the material they have gathered”.

Having assured her audience that she “fully support[s] and value[s] the right of privilege”, which she recognised as a “fundamental right in our legal system”, Ms Osofsky tellingly added: “but companies can waive that privilege if they wish to cooperate with the Serious Fraud Office”. According to Ms Osofsky, “waiving privilege over that initial investigative material will be a strong indicator of cooperation and an important factor... when considering whether to invite a company to enter into DPA negotiations.” This uncompromising position does not appear to leave much latitude

to companies that wish to self-report and to assert their privilege rights. It is worth noting that the joint Code of Practice on DPAs issued by the SFO and Crown Prosecution Service in February 2014 does not mention waiver of privilege when providing examples of what constitutes cooperation.<sup>3</sup>

Ms Osofsky said that her position on privilege was supported by Sir Brian Leveson, whom she quoted as saying in *SFO v ENRC* that a court “will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO.”<sup>4</sup> This quote implies that willingness to waive privilege would be considered as one factor among many, but does not go so far as Ms Osofsky, whose implication is that the failure to waive privilege would be fatal any DPA negotiations.

Ms Osofsky’s selection of the above quote in *ENRC* also obfuscates what Lord Leveson wrote in the preceding paragraph of the judgment: “[i]t is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority.”<sup>5</sup>

That Ms Osofsky invoked the judgment in *ENRC* provides some insight into the motivation behind her position on privilege. The Court of Appeal ruling in *ENRC*, issued a week after Ms Osofsky took up her Directorship in September 2018, partially overturned a High Court judgment that had appeared severely to restrict the definition of Legal Professional Privilege. This ruling allowed companies to breathe a little more easily in their ability to invoke the privilege over documents produced during internal investigations. Ms Osofsky’s uncompromising position appears to suggest that regardless of whether documents could be protected by privilege, companies seeking a DPA would be unwise to invoke their “fundamental” right to this protection.

Greater certainty for companies regarding how to demonstrate cooperation with the SFO will be welcomed, but guidance that is overly restrictive of privilege rights could be counterproductive inasmuch as it might disincentivise companies from conducting internal investigations and reporting their results to the SFO.

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<sup>1</sup> See for example: <https://www.wilmerhale.com/en/insights/blogs/WilmerHale-W-I-R-E-UK/20181207-lessons-from-across-the-ocean-sfo-directors-speech-in-washington-provides-insight-into-the-future-of-uk-investigations>

<sup>2</sup> ‘*Fighting Fraud and Corruption in a Shrinking World*’, Lisa Osofsky, 3 April 2019, available at: <https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/>

<sup>3</sup> ‘*Deferred Prosecution Agreements - Code of Practice Crime and Courts Act 2013*’, issued jointly by the Serious Fraud Office and Crown Prosecution Service on 14 February 2014.

<sup>4</sup> *Serious Fraud Office v ENRC* [2018] EWCA Civ 2006, para 117

<sup>5</sup> *SFO v ENRC*, para 116.

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