
Divisional Court Confirms Lawfulness of SFO Procedures for Isolating Privileged Material

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On 27 January, the Divisional Court in *R (McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin) confirmed the lawfulness of the SFO's procedures for dealing with material potentially subject to legal professional privilege ("**LPP**") embedded in electronic devices which have been seized using statutory powers or produced in response to a notice.

The claimant, Mr Colin McKenzie, was arrested in 2015 on suspicion of conspiracy to commit a Bribery Act offence. Various electronic devices were seized in connection with the investigation including Mr McKenzie's iPhone. The SFO were later informed by the claimant's solicitors that the phone might contain material subject to LPP. In order to filter out and isolate this material, the SFO requested—in accordance with the procedures set out in its Operational Handbook—that the claimant's solicitors agree with the SFO a list of targeted search terms, which would be applied by the SFO's in-house technical specialists. The responsive material would then be extracted, and sent to external independent counsel for privilege review. The claimant's solicitors challenged the lawfulness of this procedure on the grounds that the SFO's in-house team would not be sufficiently independent to carry out the initial application of search terms, leaving the SFO open to the risk of inadvertently viewing legally privileged material.

The judgment of the Divisional Court does not dismiss the importance of preserving LPP in the context of an SFO investigation. However, requiring independent counsel to be engaged at an even earlier stage to agree search terms would impose "*too onerous a legal obligation*" on any investigating authority. In relation to the specific procedures adopted by the SFO in its Operational Handbook, Burnett LJ confirmed that he was "*satisfied that the system in place does not give rise to a real risk that LPP material might be read by investigators before the independent lawyer has done his job.*"

This positive affirmation arrived at a convenient time for the SFO, who were still smarting from their loss in the trial of the six brokers accused of conspiring with Tom Hayes to manipulate Libor. It is therefore unsurprising that the SFO has made much of this "*landmark*" victory. However, rather than being a great triumph for the SFO, the verdict is perhaps more a reflection of the lack of a viable alternative to the *status quo*: a ruling against the SFO in this instance would have required a

procedural overhaul involving impractical, costly and inefficient outsourcing at the initial stages of an investigation. The procedure currently in use by the SFO is, in the opinion of most practitioners, already fit for purpose.