

ARE YOU REALLY DAWN RAID READY?

– A FEW POINTERS



www.amicuslegalconsultants.com

ARE YOU REALLY DAWN RAID READY?

– A FEW POINTERS

Dawn raids are an increasingly common feature of the regulatory landscape. A failure to manage a search and seizure exercise effectively can have far-reaching consequences for the organisation, its employees, and its reputation. Equally, for law firms, the nature of the guidance and advice to a corporate client is critical before, during as well as after a dawn raid.

This document has been put together to provide practical information on the key steps to be taken, from the moment officers first arrive at the premises to post-raid strategy.

The guidance notes have also been designed to act as a prompt to enable your team to measure, assess and develop its current dawn raid response planning.

WHAT IS A DAWN RAID?

The term ‘dawn raid’ has created a mystique around what is, essentially, a search and seizure exercise carried out, usually, at the start of a company’s day. Its main purpose is to identify and seize material relevant to an investigation and to ensure that such material is not lost or destroyed. This short paper is to help both corporates and legal practitioners understand their respective roles and that of the investigators conducting the dawn raid.

Dawn raids are used by law enforcement agencies and other authorities (for example, anti-corruption bodies or competition authorities) who are empowered to conduct investigations nationally, or following a mutual legal assistance (MLA) request from a foreign state.

More often than not, a company or its subsidiaries may have a presence in a number of countries, and it is usual for investigative bodies to co-ordinate their searches across a number of jurisdictions such that the dawn raids take place simultaneously (simultaneous dawn raids). Of course, the powers of search & seizure vary, and lawyers representing the company (both in house and external) will be alive to this. Co-ordination is, therefore, crucial to avoid confusion and conflicting advice!

If allegations of corruption, bribery and financial crimes are being investigated, they are usually, by their nature, transnational crimes that will require investigators and prosecutors to gather evidence across borders. Any dawn raid might, therefore, be in response to a request from overseas investigators. A request for search and seizure, as a coercive power, will almost certainly come via a formal letter of request or as part of a joint investigation. The framework and procedures within which formal assistance (referred to as “mutual legal assistance”) is obtained can be bewildering for investigators, prosecutors and lawyers alike. Gaining an understanding of MLA provides a vital tool in the armoury of any lawyer advising a client faced with a dawn raid.

NOTE: The information contained in this guide is intended to be of a general nature and is not a substitute for detailed legal advice, nor is it to be relied upon by any recipient. As such, Amicus Legal Consultants do not accept any liability whatsoever arising from any of its contents.

WHAT IS SEARCH & SEIZURE?

Search and seizure is a powerful, but intrusive, weapon for investigators. It necessarily involves interference with property and privacy and is justifiable only if it is lawful, necessary & proportionate. To enter and search any premises, therefore, requires legal justification and must be authorised.

But note that the Competition & Markets Authority (CMA) may conduct an inspection (as opposed to a search) on premises. The Competition Act 1998 gives the CMA inspectors power to enter business premises, with or without a warrant, in order to obtain information. However, a warrant will be required if the inspectors intend to search the premises.

WHO CAN AUTHORISE?

In most countries, a search warrant is issued by a judicial authority; although, in some, a prosecutor may authorise a search. Practitioners need to be aware that, as between jurisdictions, there are different thresholds for a search warrant.

WHO CAN APPLY FOR A SEARCH WARRANT?

Search and seizure has traditionally been the remit of law enforcement. However, this power has been expanded to regulatory agencies (in UK and elsewhere) to address the complex and transnational nature of financial wrongdoing, including crimes such as bribery, fraud, cartel offences, competition violations (restrictive agreements, abuse of dominance).

WHAT SHOULD THE COMPANY DO UNTIL THE ARRIVAL OF ITS LEGAL TEAM?

The following is a list of actions corporates should look to put in place on arrival of the search team. Most, but not all, have in place practice & procedures on what do in the event they are subject to a dawn raid. However, even where there are such processes, these may not necessarily be understood, or indeed appreciated, by members of staff. Every company should look to test its own internal processes to ensure that they are clear and workable.

- › If the company has a designated contact point, contact that person. If the company does not have a designated contact point, an appropriate senior should be contacted.
- › A team to 'manage' the requests for documents, files, memos, etc. should be put together, and should include a senior company representative responsible for overall co-ordination.
- › Make sure the team includes:
 - a competent note-taker (ideally with shorthand for verbatim recording),
 - the in-house lawyer (if there is one), and
 - company IT specialist (if there is one).

NOTE: The information contained in this guide is intended to be of a general nature and is not a substitute for detailed legal advice, nor is it to be relied upon by any recipient. As such, Amicus Legal Consultants do not accept any liability whatsoever arising from any of its contents.

- › The search team must serve a copy of the warrant on the company representative, and identify themselves. Make a note of their names and fax a copy of the warrant to the company's lawyers straightaway.
- › Inform the search team that you are contacting the company's lawyers and ask them if they are prepared to wait for lawyers to arrive. This will depend entirely on the urgency of the matter as much as the attitude of the search team. The investigators may be prepared to wait for a short period; they might not be willing to wait at all.
- › If the search team is not willing to wait for your lawyers to attend, do not obstruct the search, but inform the senior representative of the search team that, in starting the search, they are failing to accede to a reasonable request. Request that the search team makes a written note of the objection, and make a note for your own records.
- › If the search team is unwilling to wait, ask them to explain to you how they intend to conduct the search; in other words, what they will be doing and how they intend to do it. Make a note of the explanation.
- › Check that any documents asked for, or examined, fall within the scope of the warrant. If it does not, bring this to the attention of the search team's lawyer (a lawyer is usually present in SFO dawn raids) or its senior representatives. Make a note of your observation and the response received.
- › Immediately instruct staff not to delete any e-mails/material held electronically (whether on the company system or a laptop) or dispose of any documents until advised. Explain to staff that a search is taking place.
- › Throughout the search, ensure that a detailed note of what is said and done, including details of any document inspected, copied or seized.
- › Take notes on everything that happens in the course of the search, including files examined, extent of the search, and questions asked.
- › Save for assisting with the location of files or documents, do not answer any substantive questions from those searching until your lawyer/legal team arrives. Explain courteously your position on this and ask that any questions wait until the lawyer is in attendance. It is important to know that whilst those searching are entitled to ask questions that relate to the location or nature of a document, the execution of a search warrant cannot be used as a justification to conduct an interview. Be alive, therefore, to attempts to question any company staff about the company, its reporting structures etc.
- › Remember to contact your press office and communications team.
- › Instruct staff not to discuss any matter with those conducting the search. The senior member of the company team should be nominated as spokesperson, together with the lead lawyer representing the company (when in attendance).
- › Arrange for a member of staff to be available to copy documents. Three copies should be taken: one for the search team, one for your legal representatives and one for the company.
- › A room should be made available to those searching in which to examine documents; however, they may decide to do so in situ. A company representative/lawyer should be present during that process.

NOTE: The information contained in this guide is intended to be of a general nature and is not a substitute for detailed legal advice, nor is it to be relied upon by any recipient. As such, Amicus Legal Consultants do not accept any liability whatsoever arising from any of its contents.

WHAT SHOULD THE LAWYER DO WHEN CONTACTED TO ATTEND A DAWN RAID?

When a company is the subject of a search warrant, it will often instruct external lawyers in addition to its own in-house legal team. When instructed, the lawyer(s) must be in a position to act swiftly and decisively: The immediacy of a dawn raid requires a rapid and certain response in the best interests of the client.

On receiving a call to represent a client at a dawn raid, it is unlikely that an external lawyer will be in a position to be present at the client's premises right away. Should this occur, the lawyer must:

- › Try and speak to the investigator in charge of the search team and ask him/her to wait until the lawyer(s) arrives before commencing the search. That request should be courteous, but firm.
- › Speak to the client and suggest that a room (in which no documents or files are kept) is made available for the search team, and ask them to wait there until the legal team arrives.

WHAT SHOULD A LAWYER DO ON ARRIVAL?

ON ARRIVAL, THE FOLLOWING STEPS MAY BE USEFUL TO BEAR IN MIND:

- › Ask for proof of identity.
- › Request sight of the warrant and ask what the subject matter and purpose of the search is. Check with the client if a copy of the warrant has been served on a representative of the company.
- › Carefully scrutinise the ambit of the warrant and that the particulars are correct on its face.
- › Check the date of issue of the warrant, that it is signed and certified as a true copy, the location specified, who may enter the premises, and what material is covered.
- › Any concerns as to the validity of the warrant should be brought to the investigator's attention and recorded in writing.
- › Ask for sight of the Information that formed the basis of the application for the warrant. Almost certainly, the lawyer will not get sight of it at this stage (it will fall to be considered for disclosure if criminal proceedings are instigated, if not made available at an earlier stage), but it is worth asking. It can be helpfully indicated that a copy with sensitive information redacted would suffice at this stage.
- › Remember the powers available to the search team are entirely dependent on the legal basis for the grant of the warrant: Police & Criminal Evidence Act 1984 (police), Criminal Justice Act 1987 (for the SFO) or Competition Act 1998 (Competition & Market Authority, formerly OFT) inspectors.

NOTE: The information contained in this guide is intended to be of a general nature and is not a substitute for detailed legal advice, nor is it to be relied upon by any recipient. As such, Amicus Legal Consultants do not accept any liability whatsoever arising from any of its contents.

A SEARCH WARRANT SHOULD:

- › describe in general terms the nature of the investigation;
- › describe the documents consistently with the descriptions given in the Information;
- › make it plain that the documents sought relate to the investigation; it is not sufficient that they relate to attached schedules of connected persons or entities; (Kent Pharmaceuticals [2003] EWHC 3002 Admin);
- › be limited by reference to relevant dates, i.e. the period covered by the investigation;
- › be capable of being understood by those carrying out the search and by those whose premises are being searched, without reference to any other document; (Energy Financing Team Ltd and others v Director of SFO [2005] EWHC 1626 (Admin); [2006] 1 WLR 1316);
- › authorise all persons accompanying the executing constable who have not been authorised by the Director of the SFO;
- › include the exclusion in relation to legal professional privilege (LPP) material.

WHO EXECUTES THE SEARCH WARRANT?

The warrants will usually list the name of the investigator(s) authorised to enter and search the premises. For SFO investigations, it is usual practice to have an in-house SFO lawyer or counsel present during the search, primarily to deal with any potential LPP issues. The lawyer, however, will play a limited role in the search.

CAN AN INVESTIGATOR SEIZE ANYTHING ON THE PREMISES?

This will largely be governed by the relevant law, save to say that the removal of documents attracting LPP is prohibited. However, s.50 Criminal Justice and Police Act 2001 enables an investigator to remove material from premises for examination elsewhere when:

- (i) it is not reasonably practicable for the investigator, at the point of search, to finally determine whether the property is or contains something he is entitled to seize; or
- (ii) it is not reasonably practicable, at that point, to divide the property into seizable and non-seizable elements.

In such instances, the searching investigator may seize relevant items which might contain LPP material. Given the complexity of LPP, the SFO issued guidelines in April 2010 on its approach and handling of LPP issues during a search.

¹ The extended power is in respect of PACE 1984 and those statutory authorities set out in Schedule 1.

WHAT LAWYERS SHOULD OR SHOULD NOT DO ON BEHALF OF A CLIENT DURING AND AFTER THE DAWN RAID?

DURING THE SEARCH

- › If a dispute arises as to the relevance of a document, or as to whether it is caught by the terms of the warrant, and if the dispute cannot be resolved, ensure that the dispute and the lawyer's objection are noted by those searching.
- › Be alive to directions from the searching team that go beyond what is lawful: for instance, directions to staff members that they may not leave the building. Anyone on the premises may leave the premises at any point (unless arrested).
- › If a person on the premises is suspected of carrying relevant material, the officer in charge of the search must be informed. A person who has not been arrested but is searched by a police constable during a search must be searched in accordance with Code A of PACE (and given a record of the search).
- › If, for instance, the SFO or CMA find an item that is evidence of criminality outside of its remit (e.g. evidence of other unrelated criminality), then that item will need to be referred to the police. The SFO/CMA should not touch or remove such an item.
- › In the event of any potentially incriminating document or item being found and any question asked of a member of staff in relation to that document or item, ensure that the words of the caution are given. If they are not, ensure that the omission is recorded.
- › Ensure that a premises search book/log is being completed and records not just individual documents and items, but also the location where the item was found (i.e. which room, desk or drawer).
- › The lawyer should ensure that a detailed note is kept. Remember that the searching team may want to search more than one location at the time; therefore, either a team of note-takers is required, or the searching team need to be persuaded that only one location at a time should be examined (impracticable in a search of any size).
- › Do not allow an attempt by any member of the search team to conduct an interview with a member of staff.
- › Ensure that the search team has a procedure or protocol that can be agreed in relation to the examination of electronic material in situ. In particular, ensure that an electronic marker or equivalent is used so that only relevant material is examined.
- › Ensure that LPP is asserted if it appears that a document is potentially privileged, and that any such document is appropriately bagged and sealed pending a determination. The handling of legal professional privilege (LPP) material during a search is a challenging, and sometimes complex, area. In particular, the nature and extent of LPP varies from jurisdiction to jurisdiction. Indeed, even the categories of lawyer seen as having a 'lawyer-client relationship' will differ; for instance, in Italy the advice of an in-house company lawyer does not attract LPP as the relationship is not deemed to be one of lawyer-client, but rather that of an employee. Given the challenges in addressing LPP during the course of a search, the SFO issued a Guidance Note in April 2010, which sets out its procedure on handling LPP material .

² http://www.sfo.gov.uk/media/99280/legal_professional_privilege_sfo_operational_handbook_topic.pdf

- › Throughout the search, have in mind the police/SFO/CMA obligations under the Human Rights Act 1998/ECHR. In particular, is the extent of the search necessary and proportionate given the nature of the investigation and the ambit of the search warrant?
- › A search must be conducted with due consideration for the property and privacy of the occupier with no more disturbance than is necessary. The search cannot continue once all the things specified in the information or warrant has been located.
- › A search should not continue once the officer is satisfied that whatever is being sought is not on the premises.
- › Possession may be taken of any documents appearing to be documents of the description specified in the Information.
- › Finally, the lawyer(s) must remember that there may be a need to manage the client and/or the client's staff actively. He/she should not fall prey to any manipulation by the client.

AFTER THE DAWN RAID

A COMPANY SHOULD:

- › Undertake immediate analysis to ascertain if challenge (e.g. judicial review) is required or representations should be made.
- › If not already in place, put together a team composed of one of the company's senior management and an in-house lawyer. They will be the liaison point with the external lawyers.
- › Obtain copies of, and review, the authorisation/warrant (and the 'information', if possible) and other documents (e.g. warrant).
- › Formulate internal and external communication strategy (including 'lines to take') communication strategy. Draft press release (pre-emptive) a written statement to be released if approached by the press, which states, inter alia that the company has been visited by the Commission, and that it is co-operating with the investigation.
- › Take advice on whether to hold a meeting with members of staff who had contact with the investigators in order to assess likely issues and nature of the investigation. Lawyers to be present.
- › Where possible, reassure members of staff (including any who are under suspicion, so long as it can be said that they have the full support of the company).
- › Review and seek advice on any documents/material identified relevant to the investigation. Carry out a prioritisation exercise in respect of this.
- › Write a report about the raid, including any questions and answers. Make a note of errors made (on either side).
- › Take legal and IT advice on collation of hard and soft copy documents and material.

³ The Guidance can be accessed at http://www.sfo.gov.uk/media/99280/legal_professional_privilege_sfo_operational_handbook_topic.pdf

NOTE: The information contained in this guide is intended to be of a general nature and is not a substitute for detailed legal advice, nor is it to be relied upon by any recipient. As such, Amicus Legal Consultants do not accept any liability whatsoever arising from any of its contents.

- › Ensure lawyer liaison with investigators in respect of the provision of copies of materials seized.
 - › Be prepared for other investigative actions, including further searches/inspections.
 - › Carry out all relevant risk assessments (including in respect of any other vulnerabilities).
 - › Consider whether any additional policies need to be introduced at this stage (including in respect of the production of further material that might attract a claim of LPP).
-

ABOUT AMICUS LEGAL CONSULTANTS

WHY USE AMICUS LEGAL CONSULTANTS RATHER THAN IN-HOUSE TRAINING?

Both Martin Polaine & Arvinder Sambei are former prosecutors with extensive experience in dealing with transnational crime cases (including corruption, bribery, counter-terrorism). This experience has given them an invaluable insight into transnational issues, such as search and seizure, extradition, mutual legal assistance, asset freezing and the different approaches taken by common law and civil law systems respectively.

In addition, they have designed and delivered practical training programmes for law enforcement agencies, prosecutors, defence lawyers and judges, in both common law and civil law jurisdictions, for more than 15 years.

The dawn raid training by Amicus is a practical training session which helps to provide an understanding of the 'dynamic' of a search and aims to provide a 'feel' for criminal investigations and help your lawyers make the right tactical 'calls'. The training is delivered either through a role play exercise or an immersive exercise (Solve: Immersive).

IF YOU WOULD LIKE FURTHER DETAILS ON DAWN RAID OR ANY OTHER TRAINING, PLEASE CONTACT AMICUS LEGAL CONSULTANTS ON:

**+44(0) 207 073 2640/2773 or
email info@amicuslegalconsultants.com**

NOTE: The information contained in this guide is intended to be of a general nature and is not a substitute for detailed legal advice, nor is it to be relied upon by any recipient. As such, Amicus Legal Consultants do not accept any liability whatsoever arising from any of its contents.

Amicus
LEGAL CONSULTANTS
www.amicuslegalconsultants.com

+44(0) 207 073 2640/2773 | info@amicuslegalconsultants.com