



GLOBAL INVESTIGATIONS AND ENFORCEMENT | MAY 2022

HOW TO RESPOND TO A NOTICE COMPELLING THE PROVISION OF DOCUMENTS AND/OR INFORMATION

How to respond to a notice requiring the production of documents

Who has these powers?

A number of law enforcement and government agencies including the Serious Fraud Office (SFO), the Financial Conduct Authority (FCA), the Competition and Markets Authority (CMA), the Insolvency Service, the Information Commissioner's Office (ICO) have statutory powers which allow them to compel the production of documents and information from individuals and companies. Some powers can be exercised without the need for a Court Order.

What should I do if I receive a notice?

You and/or your company are entitled to take legal advice and should do so. We are specialists and familiar in dealing with compulsion notices and liaising with enforcement agencies on behalf of clients to deal with them. We routinely advise clients on the response to compulsion notices and have successfully challenged enforcement agencies claimed power to compel documents and information in the courts.

What can notices require?

Recipients can be compelled to provide documents and in certain cases required to answer questions. For example, a notice issued by the SFO under section 2 of the Criminal Justice Act 1987 and/or by the FCA under Sections 171-175 of the Financial Services and Markets Act, allow the FCA and SFO to compel recipients to answer questions. Such Notices are normally used to obtain information from potential witnesses where they may have refused or be unable, due to confidentiality obligations, to provide it voluntarily. In some circumstances they may also be served on suspects. While the Notice overrides the suspects usual right to silence answers to questions under compulsion cannot be used against the person who gave them in a prosecution arising from the investigation unless it is introduced into evidence or a question asked about it on behalf of that person. They can however be prosecuted in separate proceedings for making a false statement.

Do I have to comply?

Failure to comply with a lawful notice can lead to prosecution resulting in imprisonment and/or fines.

It is also an offence for a person to destroy, conceal, falsify or otherwise dispose of relevant documents.

The SFO and the FCA have successfully prosecuted for failure to comply with compulsion notices. There may be a legal basis for not complying with a compulsion notice but legal advice should always be taken to confirm the position. Both the FCA and the SFO regimes contemplate the defence of "reasonable excuse".

Law enforcement agencies can act beyond their powers. The authors recently successfully challenged the SFO's powers in the Supreme Court where the SFO attempted to compel a US fortune 500 company to produce documents held outside the UK.

How are they served?

Notices are often served via email but may also be sent by post or fax. In some circumstances they may be served in person.

Who can they be issued to?

Notices compelling the production of documents can be issued to the target of an investigation and to any other person/entity that is believed may have information relating to the matters under investigation.

What information is contained in a Section 2 Notice?

Notices should state the person(s) and/or entities under investigation and should include details of the specific documents or categories of documents which it requires production of.

"Documents" have a broad definition and can include information stored on computers, mobile phones and other electronic storage devices.

Other than stating that it is investigating suspected offences there are unlikely to be any further details of the specific nature of the conduct under investigation. That said it may be possible to ascertain some information about the suspected wrongdoing from the specific documents or categories of documents specified in the Notice. If an agency is compelling an interview, then we customarily seek pre interview disclosure and recommend that individuals obtain legal advice from their own, not the company lawyer.

Duties of confidentiality and legal privilege

Notices override any obligations of confidentiality or data protection owed to third parties. It should be noted that notices cannot compel any documents which are subject to legal professional privilege and all documents responsive to any compulsion notice should be reviewed by lawyers to ensure that they are not legally privileged. If attending an interview we recommend a lawyer is present to ensure that interviewers do not seek information which is legally privileged.

Timeframe for compliance

Generally speaking, a notice for the production of documents will require that the documents are produced by a specific date and time. It is often possible to negotiate an extension to the stated deadline if it is not possible to collate all of the material responsive to the Notice in the specified timeframe.

Section 2 "Here & Now" Notices

In some circumstances agencies may deem it necessary to issue a "Here and Now" notice requiring the immediate production of documents or information.

Where a Here and Now Notice is used it should be noted that they do not give a right of entry or a right to search.

What to do if you receive a notice

- Seek legal advice
- Check that the addressee details are correct, including the name of any entity.
- Ascertain whether the documents specified in the Notice exist and if so where they are located. In the case of a Notice served on a multi-national corporate this will include ascertaining which entity within the corporate structure owns or has control over the documents and whether that entity is located within the UK or outside of the jurisdiction.
- Note the deadline for responding to the Notice. In the event that it is unrealistic to collate all of the material in the given timeframe it is usually possible to negotiate an extension.
- Check whether any of the documents requested are likely to be subject to legal professional privilege. This area can be complicated, and it is likely that the recipient will need to take legal advice in the event that the question of LPP arises.
- In the case of corporate recipients who are the target of the investigation, determine whether the Notice gives rise to any reporting obligations, for example under any banking covenants or rules on market announcements.
- Seek legal advice if you are uncertain about the scope or application of the Notice.

HFW – Here to help

We have extensive experience of advising clients who have received section 2 Notices, up to and including challenging the validity of a Notice in the Supreme Court¹

¹ Insert KBR v SFO case citation

For more information, please contact the author(s) of this alert



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