

SFO issues guidance on section 2 interviews

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Corporate Crime analysis: New guidance issued by the Serious Fraud Office (SFO) seeks to establish a criteria whereby it might exercise some control over which lawyers might be instructed in investigation interviews. Rebecca Dix, barrister and senior associate of Bivonas Law LLP, assesses the guidance on how the use of certain lawyers and firms might compromise the interview process, weighing that danger against the need for the SFO to interpret the guidance with sensitivity and case-by-case subjectivity.

What is the background to the SFO guidance issued earlier this week on section 2 notice interviews?

In the judgment of *R (Lord) v SFO* [2015] EWHC 865 (Admin) (the unsuccessful judicial review of the SFO's decision to refuse the attendance of the interviewee's choice of solicitor) reference was made to the fact that the SFO's Operational Guidance on this issue was under review.

The previous guidance had been published in January 2012 and shortly after the *Lord* decision it was removed from the SFO website.

The claimants in the *Lord* case sought to challenge the decision of the SFO to deny the interviewee from having the solicitor of his choice attend the interview. That solicitor also represented the company, GSK, which was at that time under investigation. Lord Justice Davis held that the SFO policy was lawful and that the SFO was permitted to exclude the attendance of a particular lawyer if that lawyer's attendance might prejudice the investigation.

The starting point of the 2012 policy was that a solicitor would be permitted to attend a section 2 interview subject to the SFO believing that his presence would neither jeopardise the investigation nor cause delay and provided that the lawyer understood his role, which was not akin to a PACE 1984 interview conducted under caution.

The SFO has now published its updated policy that comprised of three guidance papers as opposed to the few paragraphs in the 2012 guidance.

What are the key provisions of the new guidance from a practitioner's perspective?

The new guidance now requires active engagement with the lawyer before the interview is conducted, requiring advance notice and representations setting out why a lawyer should be present. Further, it requires undertakings from the law firm prohibiting disclosure post-interview until the conclusion of the investigation or prosecution.

What is specifically required in any written representations by the solicitor takes up almost a page of the guidance.

Within seven days prior to the date of the interview or three days after the date of the SFO letter (whichever is later) the lawyer is required to set out the following:

'a) the name of the particular lawyer and the reasons why their presence in the interview will assist the purpose of the interview and/or investigation, or that they will provide essential assistance to the interviewee by way of legal advice or pastoral support.

b) written undertakings in the name of your firm that:

- (name of firm) does not represent any individual or legal person who is a suspect in the investigation;
- all pre-disclosure documents and documents provided during the interview ('relevant documents') retained by (name of firm) will be kept confidential to (name of firm) and (name of client/Section 2 interviewee);
- no relevant documents will be provided to or discussed with anyone other than (name of client), without the written authority of the SFO;
- relevant documents will not be copied;
- all relevant documents will be kept securely in (name of firm) offices at all times until they are returned to the

SFO;

- all relevant documents will be returned to the SFO after the Section 2 interview;
- whilst a note may be taken of the Section 2 interview (name of firm) will not transcribe or otherwise record the interview; and
- (name of firm) will not disclose the content of the interview to, or discuss it with, anyone other than (name of client / Section 2 interviewee), without the written authority of the SFO.

On the agreed basis that:

- (name of firm) will be bound by these undertakings until notified by the SFO of the conclusion of the investigation or prosecution.
- (name of firm) will ensure that systems are deployed to ensure the compliance, monitoring and enforcement of the undertakings
- the undertakings are made in accordance with the meaning of solicitors undertakings as set out in SRA Code of Conduct 2011 or such future amendment of the SRA Code of Conduct.

c) Written acknowledgement of the parameters of the role of the lawyer in the interview, and that any breach of the parameters is likely to lead to the exclusion of the lawyer, without notice.'

The SFO are very clearly setting out ground rules for both the interviewee and lawyer and while the head of the division holds the authority to exclude the attendance of a lawyer before the interview it is only the case controller who holds the power to exclude a lawyer after the interview has begun, for example where there has been a breach of the lawyer's role.

What changes does this new guidance herald from the situation before?

The new regime provides that the SFO will only admit a lawyer for the interview on its own terms.

It is also sending the message that interviewees and lawyers are not to prejudice the investigation by discussing the contents of the interview with anyone else. This means that before the solicitors can discuss the interview with anyone else they must first obtain the SFO's consent.

What practical and ethical issues is the new guidance likely to present to solicitors representing clients at section 2 notice interviews?

It is unclear why the SFO has sought to go so far as to require written undertakings from law firms before they can attend interviews, dictating the practice and conduct of a firm that is already regulated by the Solicitors Regulation Authority. It is not clear how in fact the SFO will police this new policy or enforce any breaches of the undertakings.

It is difficult to understand how a law firm can commit to such an undertaking to the SFO if they are not furnished with sufficient information about the investigation. To be effective it requires open channels of communication between lawyers and the SFO to seek to understand what is required.

The SFO is required to apply its guidance on a case by case basis. It will be interesting to see how this new guidance will be applied in practice and while section 2 of the Criminal Justice Act 1987 remains without amendment it is likely that the SFO will be open to challenge where it appears that the guidance is not being applied justly. *Lord*, we can presume, may not be the last challenge to the SFO policy.

Interviewed by Julian Sayerer.

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