



Attorney  
General's  
Office

**DRAFT REVISED CODE OF PRACTICE  
ISSUED UNDER SECTION 377A OF THE  
PROCEEDS OF CRIME ACT 2002**

**INVESTIGATIVE POWERS OF PROSECUTORS**

October 2017



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Presented to Parliament pursuant to section  
377A(4) of the Proceeds of Crime Act 2002

**October 2017**



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# Code of Practice issued under section 377A of the Proceeds of Crime Act 2002

**Officers must be aware of their mandatory obligations under the legislation and act in accordance with these duties. This is an absolute requirement regardless of any interpretation of this Code or any other document or guidance.**

## Abbreviations used in this Code

AFI	Accredited Financial Investigator
Attorney General	the Attorney General for England and Wales and the Advocate General for Northern Ireland
CJPA	the Criminal Justice and Police Act 2001
DPP	the Director of Public Prosecutions for England and Wales
DPPSNI	the Director of Public Prosecutions for Northern Ireland
DSFO	the Director of the Serious Fraud Office
HMRC	Her Majesty's Revenue and Customs
NCA	National Crime Agency
PACE	the Police and Criminal Evidence Act 1984
POCA	the Proceeds of Crime Act 2002
Relevant Directors	the DPP, the DSFO and the DPPSNI
SFO	Serious Fraud Office

POCA has been amended since it was enacted. This Code is necessary due to the commencement of provisions under the Criminal Finances Act 2017 which amend POCA.

**The provisions of the Criminal Finances Act 2017 which have led to amendments of this Code will initially be commenced in respect of England and Wales only. These provisions will be commenced in respect of Northern Ireland at a later date. This Code will be amended once those provisions are commenced.**

## Introduction

1. This Code is issued by the Attorney General for England and Wales and the Advocate General for Northern Ireland (hereinafter "the Attorney General") under section 377A of POCA which requires the Attorney General to make a Code of Practice as to the exercise by the relevant Directors and SFO officers of powers they have under Chapter 2 of Part 8 of POCA<sup>1</sup>.
2. The purpose of this Code is to provide guidance as to how in England and Wales:
  - the DSFO and SFO officers are to use their Part 8 investigatory powers in a confiscation investigation, civil recovery investigation, detained cash or property investigation, money laundering investigation, and frozen funds investigation;
  - the DPP is to use their Part 8 investigatory powers in a civil recovery investigation;

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<sup>1</sup> References to statutory provisions in this Code are to provisions of POCA unless otherwise stated.

- the DPP, DSFO and SFO officers are to use their powers to obtain a disclosure order under section 357, unexplained wealth order under section 362A, and interim freezing order under section 362J; and
- the DPP, DSFO and SFO officers are to request assistance under section 375A in relation to evidence which is overseas in connection with a civil recovery investigation, detained cash or property investigation, and frozen funds investigation.

Its purpose is also to provide guidance as to how in Northern Ireland:

- the DPPSNI and DSFO are to use their Part 8 investigatory powers in a civil recovery investigation;
  - the DPPSNI and DSFO are to use their powers to obtain a disclosure order under section 357; and
  - the DPPSNI and DSFO are to request assistance in connection with a civil recovery investigation.
3. This Code replaces earlier Codes issued under section 377A and applies to all actions undertaken in England, Wales and Northern Ireland as part of an investigation under Part 8 on or after 31 January 2018 notwithstanding that the investigation may have begun before that time.
  4. This Code should not be regarded as a complete or authoritative statement of the law. Only the courts can give an authoritative interpretation of the legislation, and the contents of this Code may be affected by subsequent judicial decisions and changes to the relevant legislation.
  5. This Code includes a section on general provisions relating to all orders and warrants (paragraphs 17 to 60) followed by detailed sections on each of the following topics:
    - production orders (paragraphs 61 to 81);
    - search and seizure warrants (paragraphs 82 to 137);
    - customer information orders (paragraphs 138 to 147);
    - account monitoring orders (paragraphs 148 to 158);
    - unexplained wealth orders (paragraphs 159 to 194);
    - disclosure orders (paragraphs 195 to 303); and
    - obtaining evidence from abroad (paragraphs 304 to 311).
  6. There are separate Codes of Practice for investigators issued by the Secretary of State under section 377 and the Department of Justice in Northern Ireland under section 377ZA in respect of the Part 8 investigation powers when they are exercised by the Director General of the NCA and members of his staff, constables, officers of HMRC, immigration officers, and civilian AFIs accredited by the NCA. This Code mirrors the Codes issued by the Secretary of State and the Department of Justice in all significant respects.



## Persons to whom this Code applies

7. This Code provides guidance to:
  - the DSFO and SFO officers in their role as “appropriate officers” in a confiscation investigation, civil recovery investigation, detained cash or property investigation, money laundering investigation, and frozen funds investigation in England and Wales, and the DSFO in the same role in a civil recovery investigation in Northern Ireland;
  - the DPP and DPPSNI in their role as “appropriate officers” in a civil recovery investigation in England and Wales and Northern Ireland respectively;
  - the DPP and the DSFO in their role as “enforcement authorities” in relation to an application for an unexplained wealth order in England and Wales only;
  - the relevant Directors in their role as “relevant authorities” in relation to applications for a disclosure order in England, Wales and Northern Ireland as applicable (and SFO officers in England and Wales only); and
  - the DPP, DSFO and SFO officers when making requests for assistance under section 375A in relation to evidence which the relevant Director thinks is overseas in connection with a civil recovery investigation, a detained property investigation, or a frozen funds investigation in England and Wales, and the DPPSNI and DSFO when making requests in connection with a civil recovery investigation in Northern Ireland.
8. Under section 454A a “SFO officer” is defined as “a member of staff of the SFO”. This definition applies only in England and Wales. Section 454A will be commenced in respect of Northern Ireland at a later date.
9. Under section 2C anything which a relevant Director is authorised or required to do under, or in relation to, Part 8 of POCA may also be done by a member of the relevant Director’s staff or a person providing services under arrangements made by that Director, if the member of staff or person providing services is authorised by that Director (whether generally or specifically) for that purpose. Therefore, this Code also applies to the exercise of functions by a member of a relevant Director’s staff, or to a person providing services under arrangements made by a relevant Director, if the member of staff or the person providing services is authorised as described to perform those functions.
10. Investigations under Part 8 are conducted by “appropriate officers” defined under section 378 by the type of investigation being conducted.
11. The DSFO and SFO officers are “appropriate officers” in relation to a confiscation investigation, civil recovery investigation, detained cash and property investigation, money laundering investigation, and frozen funds investigation in England and Wales only. The DPP is an “appropriate officer” in relation to a civil recovery investigation only in England and Wales. The DPPNI and the DSFO are “appropriate officers” in relation to a civil recovery investigation only in Northern Ireland. Other persons who are also “appropriate officers” in relation to these investigations and exploitation proceeds investigations are covered by the Secretary of State’s Code or the Department of Justice’s Code rather than this Code.

12. The powers which may be used in Part 8 investigations are production orders, search and seizure warrants, customer information orders, account monitoring orders, disclosure orders, and unexplained wealth orders. Production orders, customer information orders and account monitoring orders are applied for and executed by an “appropriate officer”. Search and seizure warrants are applied for by an “appropriate officer” and executed by an “appropriate person” as defined in section 352(5) which includes a member of staff of the relevant Director. Disclosure orders are applied for by the “relevant authority” as defined in section 357(7) and executed by an appropriate officer. Unexplained wealth orders are applied for by an “enforcement authority” as defined in section 362A(7). Unlike the other powers of investigation, unexplained wealth orders can be made before a Part 8 investigation is begun.
13. Where a person fails to comply with any provision of this Code, he is not by reason only of that failure liable to any criminal or civil proceedings, but the code is admissible as evidence in such proceedings. A court may take account of any failure to comply with its provisions in determining any questions in the proceedings.
14. The Code must form part of any published instructions or guidance for the persons to whom the Code applies and affected members of the public. The persons to whom the Code applies must make arrangements for the Code (whether in a hard copy form or electronically) to be available to both their staff and members of the public on request.
15. If a person to whom the Code applies is also exercising an additional and separate function or power, for example, making an application under Part 2 for a restraint order in relation to seized property, the appropriate officer should have regard to any connected code.
16. Those to whom the Code applies should be aware of the legislation and the detail of the particular provisions under which they operate. They must seek legal advice and/or guidance where necessary in advance of using the powers. This includes the relevant provisions in the Criminal Procedure Rules and Civil Procedure Rules as appropriate.

## **General provisions relating to all the orders and warrants**

### **Action to be taken before an application is made**

17. The right to respect for private and family life and the protection of property under the European Convention of Human Rights is safeguarded by the Human Rights Act 1998. The powers of investigation may involve significant interference with privacy and property of those whose premises are searched; on whom personal information is obtained; or whose personal information, material or documents are seen and/or seized. Therefore, the powers need to be fully and clearly justified before they are used. The use of the powers which impact upon individuals’ rights must be proportionate to the outcome being sought. In particular, those exercising the powers must consider at every stage whether the necessary objectives can be achieved by less intrusive means – this may be by approaching the potential respondent to ascertain whether they will provide the required information without the need for a court order or to give them prior notice that an application is to be made. The giving of prior notice of an application may mean that a respondent is ready to comply and allows them the opportunity to make representations about the detail of the order or notice due to the nature of the investigation or what they will be required to produce. In all cases, those exercising the powers must exercise them fairly, courteously, responsibly, respectfully, without discrimination and in accordance with any statutory duties on them. Under section 149 of the Equality Act 2010, when the relevant

Director, their authorised staff or a specified person are carrying out their functions, they also have a duty to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity between people who share a relevant “protected characteristic” and those who do not share it, and to take steps to foster good relations between those persons<sup>2</sup>.

18. With particular reference to search and seizure warrants, if there is reason to believe an action carried out pursuant to the powers covered by this Code might have an adverse effect on relations between law enforcement and the community, the “appropriate officer” should consult the local police/community liaison officer and/or any other relevant persons:
  - before any action is taken; or
  - in particularly urgent cases, as soon as practicable after action has been taken.
19. The appropriate officer (in the case of an application for a warrant) or appropriate person (in the case of the execution of a warrant) should also consider whether this consultation could jeopardise an ongoing (sensitive) wider operation or investigation. In such circumstances, consultation may not be necessary but it is generally best practice.
20. The expectation is that the provisions of this Code will apply to all searches carried out under it.
21. The appropriate officer or person should take special care and have particular regard to an individual’s vulnerabilities in responding to an order made in connection with the investigation or a search and seizure warrant.
22. A refusal to allow a search of premises or a vehicle may in some instances constitute an offence, including (but not limited to) the wilful obstruction of an appropriate officer in the exercise of a power<sup>3</sup>. This would be a criminal matter and is not an issue for, or subject to, this Code. Appropriate officers should be aware of other legislation and codes applicable in these circumstances.
23. Applications in relation to confiscation investigations, money laundering investigations, detained cash or property investigations, and frozen funds investigations, must be made in England and Wales to a judge entitled to exercise the jurisdiction of the Crown Court, and, in relation to confiscation investigations, money laundering investigations, and detained cash investigations in Northern Ireland to a Crown Court judge.
24. Applications in relation to civil recovery investigations must be made to a judge of the High Court. Before a judge can grant any of the Part 8 orders or warrants, they will

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<sup>2</sup> In Northern Ireland, under section 75 of the Northern Ireland Act 1998, when the DPPSNI, his authorised staff or a specified person are carrying out their functions they have a duty to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without and between persons with dependants and persons without. They must also have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

<sup>3</sup> See section 89 of the Police Act 1996 (in relation to constables), section 66 of the Police (Northern Ireland) Act 1998, section 453A of POCA (in relation to AFIs) and section 31 of the Commissioners for Revenue and Customs Act 2005 (in relation to officers of HMRC).

have to be satisfied that the statutory requirements are met. For each order or warrant to be granted, there is a statutory requirement<sup>4</sup> that there must be reasonable grounds for suspecting that:

- in relation to a confiscation investigation, the person who is the subject of the investigation has benefited from their criminal conduct;
- in relation to a detained cash or property investigation:
  - (a) into the derivation of the cash or property, the cash or property, or a part of it, which the application for the order specifies as being subject to the investigation is recoverable property; or
  - (b) into the intended use of the cash or property, the cash or property, or a part of it, which the application specifies as being subject to the investigation is intended by any person to be used in unlawful conduct.
- in relation to a money laundering investigation, the person the application for the order specifies as being subject to the investigation has committed a money laundering offence;
- in relation to a frozen funds investigation:
  - (a) into the derivation of money held in an account in a frozen account, the property, or a part of it, which the application for the order specifies as being subject to the investigation is recoverable property; or
  - (b) into the derivation of money held in an account in a frozen account, the property, or a part of it, which the application specifies as being subject to the investigation is intended by any person to be used in unlawful conduct; and
- in relation to a civil recovery investigation:
  - (a) the person who is the subject of the investigation holds recoverable property or associated property, or has at any time held recoverable property or associated property, or
  - (b) (except in the case of a customer information order) the property which is the subject of the investigation is recoverable property or associated property<sup>5</sup>.

25. Appropriate officers should be aware of the definition and scope of the different types of investigations under Part 8, and in this regard should have particular reference to sections 341 and 341A. They must be satisfied that the statutory requirements are fulfilled in relation to the type of investigation. They should also be aware of the limits to some of the individual powers in relation to the different investigations. It is of particular

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<sup>4</sup> Except in relation to an application for a search and seizure warrant where a production order has been granted but not complied with, but the statutory requirement will have applied in relation to the granting of the production order (see section 352(6)(a)).

<sup>5</sup> Because of the nature of the order, in the case of a customer information order, point (b) is not applicable, and in the case of an application for an account monitoring order, only point (a) is applicable.

note that disclosure orders are not available in detained cash investigations<sup>6</sup>, or (only in England and Wales) in detained property and frozen funds investigations. Production orders are available in money laundering investigations in England and Wales but not in Northern Ireland. Only production orders and search and seizure warrants are available in detained cash investigations.

### **Reasonable grounds for suspicion**

26. Whether there are reasonable grounds for suspicion will depend on the circumstances in each case. There should be some objective basis for that suspicion based on facts, information and/or intelligence. The appropriate officer should take into account such factors as how the individual, premises or vehicle were identified, previous intelligence regarding the person(s), vehicle(s) or premises, previous law enforcement involvement with the person(s), vehicle(s) or premises, and suspected links with criminal activities, whether in the UK or overseas.
27. All appropriate officers and appropriate persons should recognise that investigations are more likely to be effective and legitimate and more likely to secure public confidence when their reasonable grounds for suspicion are based on a range of objective factors. The overall use of these powers is more likely to be effective when up-to-date and accurate intelligence or information is communicated to officers and they are well informed about local crime patterns. Local senior officers have a duty to ensure that those under their command who exercise search powers have access to such information, and the officers exercising the powers have a duty to acquaint themselves with that information. Appropriate officers should therefore be able to explain the basis for their suspicion by reference to intelligence or information about, or some specific behaviour by, the person concerned.
28. Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, religion or age cannot be used alone or in combination with another personal factor as the reason for establishing suspicion. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people being more likely to be involved in criminal activity. Reasonable suspicion should normally be linked to accurate and current intelligence or information. It can sometimes exist without specific information or intelligence and on the basis of some level of generalisation stemming from the behaviour of a person. However, reasonable suspicion cannot be founded retrospectively. Therefore, appropriate officers should be able to explain the basis for their suspicion by reference to intelligence or information about, or specific behaviour by, the person concerned.
29. In respect of each order or warrant to be granted, there is a statutory requirement that there must be reasonable grounds for believing that the material or information is likely to be of substantial value (whether or not by itself) to the investigation. The appropriate officer must be satisfied that the material or information will progress the investigation.
30. There is also a statutory requirement that there must be reasonable grounds for believing that it is in the public interest that the material or information is obtained or accessed by the appropriate officer. The appropriate officer must make sure that the public interest in obtaining the order outweighs the disadvantages to the person against whom the order is being made. For example, an application for an account monitoring order against a bank should not normally be sought unless the appropriate

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<sup>6</sup> See section 357(2).

officer considers that this may lead to the identification of monies greater than the anticipated cost to the bank in complying with the order<sup>7</sup>, or that the appropriate officer suspects that the information will be of substantial benefit with regards to the serious nature of the investigation. The appropriate officer must satisfy themselves that all of these statutory requirements are satisfied before making the application.

### **Action to be taken in making an application**

31. Applications for unexplained wealth orders must be made by an enforcement authority rather than an appropriate officer. It is not necessary for an investigation to be underway in order to apply for an unexplained wealth order and some of the general precisions in the following paragraphs do not apply.
32. All the applications for the powers of investigation may be made to a judge in chambers without notifying the respondent. In deciding whether the application should be without notice, the appropriate officer must consider the benefit of not notifying the respondent of the contemplated order or warrant. An obvious and probably most common reason would be so as not to alert the person connected to an investigation that such is ongoing. Providing notification of the proceedings might enable the person to move material or information and thereby frustrate the investigation. However, where an order is directed at a financial institution (who would be the respondent), the institution should normally be notified of the intention of making an application for an investigation order and given the opportunity to be represented at the application hearing.
33. An application in respect of a confiscation investigation, detained cash investigation or money laundering investigation, or a detained property and frozen funds investigation in England and Wales only should be made to a judge of the Crown Court in accordance with any relevant Criminal Procedure Rule and Practice Direction. An application in respect of a civil recovery investigation should be made to a judge of the High Court in accordance with any relevant Civil Procedure Rule and Practice Direction.
34. Appropriate officers should familiarise themselves as to the requirements in POCA, but the following should be included in an application for an order or warrant:
  - the name of the person who is under investigation or (if possible) who holds or owns property which is under investigation and confirmation that any information sought is for the purposes of the investigation. If the application is for an order against a different person to the main focus of the investigation, he or she must also be named or specified in the application and there must be an explanation of the person's connection to the investigation. In respect of applications for a disclosure order, it may not be possible to name each potential recipient of a notice and so they should be named as far as practicable in the evidence in support of the application;
  - the grounds on which the application is made; and
  - confirmation that none of the material or information sought is or consists of items subject to legal privilege or excluded material (with the exception of a lawyer's client's name and address requested under a disclosure order<sup>8</sup>). This

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<sup>7</sup> The appropriate officer is under no obligation to divulge the anticipated cost he or she has decided.

<sup>8</sup> See section 361(1).

does not apply to customer information orders and account monitoring orders as the type of information requested will not be that which could be subject to legal privilege or could be excluded material.

35. The information and evidence produced in support of an application should show that there are reasonable grounds for suspicion directly relating to the relevant matter under investigation. Appropriate officers should seek to limit the scope of what they request in an application to matters directly relevant to their investigation. Appropriate officers should be aware that their application and any information and evidence produced in its support will be subject to scrutiny by the judge.
36. Where information appears to justify an application, the appropriate officer should take reasonable steps to check the information is accurate, recent, and not provided maliciously or irresponsibly. An application may not be made on the basis of information from an anonymous source if corroboration has not been sought.
37. Where there is any sensitive information and there are concerns that disclosure would create a real risk of serious prejudice to an important public interest, legal advice should be sought about the need for disclosure of that information. There may be the possibility of a public interest immunity application to the court so that the sensitive information need not be disclosed. The appropriate officer should be in a position to deal with any questions the judge may have about the accuracy of information provided or any other related matters.
38. The person applying must be ready to satisfy the judge that they are an appropriate officer (see section 378) permitted to apply for the order or warrant, for example by means of a certificate signed by the relevant Director.
39. Appropriate officers should seek reasons (if not already given) from the judge for the grounds on which a decision is made, whether or not an application for an order or warrant is approved or rejected.

#### **Action to be taken in serving an order or warrant**

40. In all cases, the investigatory powers should be exercised fairly, courteously, responsibly and with respect for the persons and property of those concerned and without discrimination.
41. In deciding the method of service of the order or notice, the appropriate officer (in the case of a disclosure order or a customer information order), should take into account all the circumstances of the investigation, including the possible need to prove that service was effected, and the person or body on whom the order or notice is served. Search and seizure warrants are executed by an "appropriate person"<sup>9</sup> who should also have regard to these matters when executing the warrant.
42. When serving the order or notice under the order, or executing the warrant, a covering letter must be provided which includes the following information (unless it is already included in the order or the notice):
  - the name of the person who is the subject of the order, warrant or notice or the name by which he or she is known;
  - a warning in plain language that failure without reasonable excuse to comply with

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<sup>9</sup> See section 352(5).

the requirement may be an offence and could result in prosecution, or could lead to contempt of court proceedings;

- a statement that, where there has been a failure to comply with an unexplained wealth order, a presumption that the property to which the order relates is recoverable will arise and can be used in future civil recovery proceedings;
- in the case of a disclosure order, a statement setting out the effect of section 359(1) and (3), and in the case of a customer information order, a statement setting out the effect of section 366(1) and (3); namely, that a warning be given in plain language that failure without reasonable excuse to comply with the requirement, or knowingly or recklessly providing a false or misleading statement for the purpose of purported compliance, may be an offence and could result in prosecution;
- a statement that the warning given does not constitute a criminal caution, nor has the consequences of one;
- a general description of the investigation in connection with which the requirement is made (it is not necessary to specify the name of the person or property subject to the investigation on the order, although this information should be given to the judge as part of the application process);
- that the subject of the order, warrant or notice should seek legal advice or ask the appropriate officer about any doubts or concerns they may have, or for guidance on complying with the order, warrant or notice;
- a statement to the effect that disclosure of information about the investigation or falsifying, concealing, destroying or otherwise disposing of, or causing or permitting the falsification, concealment, destruction or disposal of documents which are relevant to the investigation may be an offence under section 342 (offences of prejudicing investigation) punishable by up to 5 years' imprisonment; and
- the right to apply for a variation or discharge of the order or notice (not applicable in search and seizure warrants).

The person should also be informed that if anyone contacts them about the investigation they should report this to the appropriate officer or the appropriate person.

43. When serving a notice under a disclosure order or a customer information order, the appropriate officer must inform the respondent of his or her right to refuse to comply with any requirement imposed on them unless the appropriate officer has, if required to do so, produced evidence of his authority to issue the notice<sup>10</sup>. The evidence of the authority could include the order itself.
44. Where it appears to the appropriate officer or appropriate person that the recipient of an order, warrant or notice has genuine difficulty in reading or understanding English, he or she should attempt to serve a copy on a person known to the recipient who, in the opinion of the appropriate officer or person, is able to explain or translate what is happening. If this is not practicable the appropriate officer or appropriate person

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<sup>10</sup> See sections 357(6) and 363(7).



should serve the order or warrant and attempt to ensure that the person understands what has occurred (e.g. by serving a multi-lingual explanation or engaging an interpreter or translator).

45. Sections 359(1) and 366(1) provide that an offence is committed if, without reasonable excuse, a person or financial institution fails to comply with a requirement imposed by a disclosure or customer information order. Sections 359(3), 362E(1) and 366(3) provide that it is an offence to knowingly or recklessly make a false or misleading statement in purported compliance with a disclosure order, unexplained wealth order (in England or Wales only), or customer information order. The other orders are treated as orders of the court against the named person and therefore attract contempt proceedings if they are not complied with.
46. What in law amounts to a reasonable excuse will depend on the facts of each particular case and will be a matter for decision by a court. But the fact that a person has already been questioned in connection with the same or a connected investigation, that the question relates to activities outside the jurisdiction or that a truthful answer to a question would tend to incriminate the interviewee or some other person is unlikely, in itself, to amount to a reasonable excuse.
47. Section 449A enables members of staff of the relevant Director to be identified by means of a pseudonym when authorised to carry out functions under POCA. An application may be made or an order or warrant may be served using a pseudonym. A certificate signed by the relevant Director is sufficient to identify a person as a member of staff of that Director and the member of staff may not be asked any question for the purposes of any proceedings or application under POCA which is likely to reveal his or her true identity. Section 449A does not extend to persons providing services under arrangements made by the relevant Director, or to persons exercising functions as a result of being specified in an order made by the Secretary of State.
48. No document may be removed or accessed and no information sought which is subject to legal professional privilege (with the one limited exception in respect of a disclosure order). A respondent has the right to withhold material and information sought which is subject to legal professional privilege. The definition of legal privilege evolves through case law, and legal advice should be sought where required on the scope of legal privilege. The current case law broadly defines two categories of legal privilege. The first is legal advice privilege which attaches to communications passing between lawyer and client created for the purpose of giving and receiving legal advice. The second is litigation privilege which attaches to communications and documents which come into existence for the sole or dominant purpose of either giving or obtaining legal advice with regard to contemplated litigation or collecting evidence for use in litigation. However, such communications made in the furtherance of a criminal purpose are not privileged.
49. Where legal professional privilege is asserted in respect of material or items, the appropriate officer may consider whether it is appropriate to use the “seize and sift” powers under Part 2 of CIPA, or refer the matter to independent counsel, if present with the agreement of the occupier.

50. None of the powers of investigation permit access to excluded material. Excluded material has the same definition as in section 11 of PACE or in relation to Northern Ireland, article 13 of PACE (NI) Order 1989 and includes journalistic material and medical records<sup>11</sup>.
51. Aside from the legal privilege and excluded material provision, requirements for information made under the powers of investigation take precedence in spite of any restriction on the disclosure of information, however imposed<sup>12</sup>. Therefore, they take precedence over any contractual duties of confidentiality and the common law duty of confidence.

### **Action to be taken on receiving an application for an extension of a time limit**

52. It is for the appropriate officer to set the time limit for replies to requirements made under disclosure orders and customer information orders, and this should be reasonable with regards to the circumstances of the case. Where the subject of one of these orders asks for more time to comply with a requirement made under one of these orders, the appropriate officer should carefully consider the request. When a decision has been made, the appropriate officer should normally set this out and the reasons for it in a letter to the subject of the order. The circumstances in which it would be suitable for appropriate officers to consider an extension will vary from case to case but may include the need to obtain legal or other professional advice, difficulty in obtaining requested information and/or documents and unavailability. The letter conveying the appropriate officer's decision should normally be served in the same way as the original notice under the order.
53. Where a solicitor acting on behalf of the subject of the order makes the application for an extension of time, the letter should be served on the solicitor and may also be served on the subject.
54. Time limits for compliance with a production order and an account monitoring order are set out on the face of the order – see sections 345(5) and 370(6) and (7). Therefore, they cannot be extended unless the subject of the order applies to the court for a variation of the order. If the appropriate officer receives a request for an extension of the time limit to comply with a production order or an account monitoring order, he or she should direct the subject of the order to the court. An appropriate officer should request a reasonable time limit when making their application for a production order or an account monitoring order in the first place. The appropriate officer should liaise, where possible, with the subject of the order when seeking a time period for compliance in order to minimise applications to the court for extensions of time.

### **Record of Proceedings**

55. The appropriate officer or appropriate person should keep or cause to be kept a written record of the exercise of the powers conferred by the provisions of Part 8.
56. The written record must, in relation to each requirement, include:
  - a copy of the order or warrant and copies of notices given under an order;

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<sup>11</sup> Section 379.

<sup>12</sup> Sections 348(4), 361(6), 368 and 374.

- a copy of the application for the order or warrant;
- the date on which the order, warrant or notice was served together with any proof of service or the date on which the warrant was executed;
- the date of receipt of, and reason for any request for, an extension of the time allowed to comply with the order or notice;
- the decision in respect of any such request and the date on which it was notified to the subject of the order or notice or their solicitor;
- the date and place that the information or documents were received in response to the order; and
- a copy of any receipts provided in accordance with the provisions of this Code.

### **Retention of documents and information**

57. If documents, material or information are provided which were not required to be provided under the terms of the order or notice, no account must be taken of that document or information in the investigation and it should be returned to the person who provided it.
58. Appropriate officers and appropriate persons should follow established local procedures on the retention and return of documents, material and information. Intelligence that arises during the appropriate officer's investigation may be passed to the NCA, police, HMRC and/or other departments and agencies (provided the appropriate officer is satisfied that there is a legal basis in place either in statute or common law for the passing of information between those bodies for that purpose).

### **Variation and discharge applications**

59. Where an appropriate officer applies to the court to vary or discharge an order or warrant made under Chapter 2 of Part 8, they should, as far as is practicable, follow the same procedure as for the original application.
60. There is no requirement for the same appropriate officer to make the variation or discharge application but if it is a different officer, that officer should be in a position to explain the genuine change of circumstances. The respondent should be notified of an application to vary or discharge an order and be given the opportunity to be represented at the hearing.

### **Production Orders**

61. Persons to whom this part of the Code applies should familiarise themselves with the introduction section which sets out general instructions relating to all the orders and warrants.

### **Definition**

62. A production order is an order which may be served on any person or institution, for example a financial institution, requiring the production of, or allowing access to, material within the time specified in the order. This might include documents such as bank statements (see section 345(4)).

### **Persons who can apply for a production order**

63. An application must be made by an appropriate officer.

### **Statutory requirements**

64. An application for a production order must be made to a court and must state that<sup>13</sup>:

- a person specified in the application is subject to a confiscation investigation, money laundering investigation, detained property investigation or frozen funds investigation in England or Wales only, or civil recovery investigation, or that property specified in the application is subject to a civil recovery investigation or a detained cash investigation;
- the order is sought for the purposes of such an investigation, and concerns material (or material of a description) specified in the application and that a person specified in the application appears to be in possession or control of the material;
- in the case of a confiscation investigation, there are reasonable grounds for suspecting:
  - that the person specified in the application has benefited from his criminal conduct; or
  - the purpose of the investigation is to identify the extent or whereabouts of property available for satisfying a confiscation order made in respect of him;
- in the case of a civil recovery investigation, there are reasonable grounds for suspecting:
  - that the person specified in the application holds recoverable property or associated property,
  - that the person specified in the application has, at any time, held property that was recoverable property or associated property at the time; or
  - the property specified in the application as being subject to the investigation is recoverable property or associated property;
- in the case of a detained cash investigation or frozen funds investigation (but not in Northern Ireland) into the derivation of cash or money held in a bank or building society account, there are reasonable grounds for suspecting that the property specified in the application as being subject to the investigation, or a part of it, is recoverable property;
- in the case of a detained cash investigation or frozen funds investigation into the intended use of cash or money held in a bank or building society account, there are reasonable grounds for suspecting that the property specified in the application as being subject to the investigation, or a part of it, is intended by any person to be used in unlawful conduct;

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<sup>13</sup> See sections 345 and 346.

- in the case of a detained property investigation (but not in Northern Ireland) into the derivation of the property, there are reasonable grounds for suspecting that the property specified in the application as being subject to the investigation, or a part of it, is recoverable property;
- in the case of a detained property investigation (but not in Northern Ireland) into the intended use of the property, there are reasonable grounds for suspecting that the property specified in the application, or a part of it, is intended by any person to be used in unlawful conduct;
- in the case of a money laundering investigation, there are reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence;
- there are reasonable grounds for believing that the person specified in the application as appearing to be in possession or control of the relevant material is in possession or control of it;
- there are reasonable grounds for believing:
  - that the material is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought; and
  - it is in the public interest for the material to be produced, having regard to the benefit likely to accrue to the investigation if the material is obtained, and the circumstances under which the person specified in the application as appearing to be in possession or control of the material holds it.

65. The person named in the order should then either produce the material, or provide access to it, within a period of time, as directed by the order. Section 345(5) provides 7 days as the normal period, unless in the particular circumstances the judge making the order considers it appropriate to set a different period.

#### **Particular action to be taken before an application for a production order**

66. The appropriate officer should ascertain, as specifically as is possible in the circumstances, the nature of the material concerned and, where relevant, its location.

67. The appropriate officer should also make enquiries to establish what, if anything, is known about the likely owner(s), occupier(s) or person(s) in control of the premises where the material is believed to be located and the nature of the premises themselves; and to obtain any other information relevant to the application. This may not be necessary if the premises are owned, occupied or controlled by professional bodies or financial institutions.

68. The appropriate officer should consider whether the application should seek production of the material or access to it. In most circumstances the appropriate officer should seek production, so material can be retained. There are occasions however where, for example, he or she may simply want sight of information contained in larger material (e.g. an entry in a register).

69. The 7 day time limit for the production of material applies unless it appears to the judge that a shorter or longer period would be appropriate. Reasons which the

appropriate officer might advance to the judge for changing the 7 day period are that the investigation may be prejudiced unless there is a shorter time limit, or that it would not be reasonably practicable for the subject of the production order to comply with the 7 day time limit due to the nature or amount of documentation required.

70. There will be cases when the best practice is to contact the subject of the production order (e.g. a financial institution) before the application is made to discuss a reasonable time limit.

**Particular action to be taken executing a production order**

71. When a production order is served on a person, business or institution under section 345(4)(a), the order or the covering letter must additionally state:

- that the order was made under section 345(4)(a);
- the material or class of material required to satisfy the production order; and
- the period of time within which such documents must be produced.

72. Where an order is made under section 345(4)(b) (for access to material), the order or covering letter must additionally state:

- that the order was made under section 345(4)(b);
- the material or class of material required to satisfy the production order; and
- the appropriate officer's right of access to such material within the period stated in the order.

73. Section 350 deals with service of a production order on a government department. Where a production order is served on a government department, it must be served as if the proceedings were other civil proceedings in relation to the department. This means that appropriate officers should look at the list of government departments published by the Cabinet Office and the Office of the First Minister and deputy First Minister in Northern Ireland<sup>14</sup> under section 17 of the Crown Proceedings Act 1947 in order to find the correct address for service. A list is set out in annex 2 of Practice Direction 66<sup>15</sup> and in Northern Ireland, the Judicial Review Practice Note 1/2008 as revised on 10 October 2013<sup>16</sup>. A production order served on a government department may require any officer of the department (whether named in the order or not) who may for the time being be in possession or control of the material to comply with it. If the order does so require, then the person on whom it is served must take all reasonable steps to bring it to the attention of the officer concerned, and any other officer of the department who is in receipt of the order must also take all reasonable steps to bring it to the attention of the officer concerned. If the order is not brought to

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<sup>14</sup> See further the Crown Proceedings (NI) Order 1981.

<sup>15</sup> See [www.justice.gov.uk/courts/procedure-rules/civil/contents/form\\_section\\_images/practice\\_directions/pd66\\_pdf\\_eps/pd66-list-of-authorised-government-departments.PDF](http://www.justice.gov.uk/courts/procedure-rules/civil/contents/form_section_images/practice_directions/pd66_pdf_eps/pd66-list-of-authorised-government-departments.PDF)

<sup>16</sup> See [www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Practice%20Directions/Documents/PN%201-2008/j\\_j\\_PN%201-2008%20-%20revised%2010%20October%202013.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Practice%20Directions/Documents/PN%201-2008/j_j_PN%201-2008%20-%20revised%2010%20October%202013.htm)

the attention of the officer concerned within the period stated in the order, the person on whom it is served must report the reasons for the failure to a judge of the court which made the order.

**Particular provisions relating to the handling and retention of documents produced or accessed in response to a production order**

74. A production order should be served on the person named in the order. If the order is made against a company or other legal persons and there are no directions for service, the appropriate officer should direct the order to a person in authority and with responsibility for the material.
75. When executing a production order, an appropriate officer should ask for the material specified in the production order to be produced.
76. An appropriate officer may remove any material covered by the production order, except where the production order is made under section 345(4)(b) and only allows access to, rather than removal of, the material.
77. An appropriate officer may photograph or copy or have photographed or copied any material that has been removed or accessed. If a copy of the material is sufficient, it should be copied on site and the original returned. If this is not practicable and the order was for production rather than providing access, the material can be taken away and copied and the original returned as soon as possible.
78. Where an appropriate officer requires material that is contained in a computer (for example a computer printout), to be accessed or produced, it is to be made available in a visible and legible form in accordance with section 349. The appropriate officer should ensure that care is taken when the person produces the material so that the material on the computer is not, for example, deleted or corrupted.
79. In cases where an appropriate officer serves a production order in person they should complete, unless it is impracticable to do so, a list of the articles or documents removed or accessed and give a copy of it and (if appropriate, usually where an order to grant entry is made) a receipt to the owner or occupier and the subject of the order, if present, before leaving the premises. In any event, the appropriate officer should make or have made a record of the articles removed and or accessed in compliance with a production order. A copy of any such record should be given to the subject of the order and the owner or occupier within 7 days of the removal of or access to the material.

**Order to grant entry**

80. An appropriate officer should consider at the application stage if he or she considers the right to enter premises under section 347 is necessary in order to satisfy a production order to provide access to material on any premises. It might be used, for example, to enable an appropriate officer to be granted entry to a building in circumstances where a production order had been made in respect of material in a particular company's office in that building.
81. An order granting entry differs from a search and seizure warrant in that the order to grant entry is to require any person who appears to the appropriate officer to be entitled to grant entry to the premises to allow him to enter the premises to obtain access to the material. It does not include the power to search the premises.

## **Search and Seizure Warrants**

82. Persons to whom this part of the Code applies should familiarise themselves with the introduction section which sets out general instructions relating to all the orders and warrants.

### **Definition**

83. A search and seizure warrant is a warrant authorising an appropriate person (and any other person authorised by the warrant to accompany the appropriate person in relation to a confiscation investigation, detained cash investigation, and in England and Wales only, a detained property investigation or frozen funds investigation) to:
- (a) enter and search the premises specified in the application for the warrant, and
  - (b) seize and retain any material found there which is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the application is made.

### **Persons who can apply for a search and seizure warrant**

84. An application must be made by an appropriate officer. The person who is carrying out the investigation will normally make the application to the court. The search and seizure warrant must be executed by an “appropriate person”<sup>17</sup>. It may be the case that the same officer is both an “appropriate officer” and an “appropriate person” and so can undertake both roles.
85. As part of the application in a confiscation investigation, detained cash or property investigation, money laundering investigation, or frozen funds investigation, the appropriate officer can in request that the warrant authorises other persons to accompany the appropriate person when executing the warrant<sup>18</sup>.

### **Statutory requirements**

86. A search and seizure warrant may be granted under section 352 if either of the requirements for the issuing of the warrant is fulfilled<sup>19</sup>. The requirements are that a production order has already been made and has not been complied with and there are reasonable grounds for believing that the required material is on the premises specified in the application for the warrant, or that section 353 (requirements where production order not available) is satisfied.
87. Section 353 provides two sets of conditions for granting a search and seizure warrant where a production order is not available:
1. there are reasonable grounds to suspect that:
    - in the case of a confiscation investigation, the person specified in the application for the warrant has benefited from his criminal conduct: or

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<sup>17</sup> See section 352(5)(b) as to who is an appropriate person for a civil recovery investigation (but where a production order is not available see section 353(10)(b)).

<sup>18</sup> See section 355.

<sup>19</sup> See section 352(1) and (6).



- in the case of a civil recovery investigation, the person specified in the application for the warrant either holds recoverable property or associated property, has at any time held such property, or the property specified in the application is such property; or
- in the case of a detained cash or property investigation:
  - o into the derivation of cash or property, the cash or property, or part of it, specified in the application for the warrant is recoverable property, or
  - o into the intended use of cash or property, the cash or property, or part of it, specified in the application for the warrant is intended by any person to be used in unlawful conduct;
- in the case of a money laundering investigation, the person specified in the application for the warrant has committed a money laundering offence; or
- in the case of a frozen funds investigation,
  - o into the derivation of money held in a frozen account, the property, or part of it, specified in the application for the warrant is recoverable property, or
  - o into the intended use of money held in a frozen account, the property, or part of it, specified in the application for the warrant is intended by any person to be used in unlawful conduct; and

2. there are reasonable grounds for believing either:

- under section 353(3) that (a) any material on the premises specified in the application for the warrant is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the warrant is sought, (b) it is in the public interest for the material to be obtained, having regard to the benefit likely to accrue to the investigation if the material is obtained, (c) it would not be appropriate to make a production order for one of the reasons in section 353(4); or
- under section 353(5) that (a) there are reasonable grounds for believing that there is material on the premises specified in the application for the warrant and that the material falls within sections 353(6), (7), (7A), (7B), (7C), (7D), (7E), (7F) or (8).

88. The first set of conditions might be satisfied, for example, if the person who owns the material, or who controls access to the premises on which the material is held, is abroad and it is not possible to communicate with them. The second set of conditions might be satisfied, for example, where it is not possible to describe the material (for the purposes of a production order) and access will not be gained without a warrant (to the home address of a suspect).

89. "Premises" has the same meaning as in section 23 of PACE<sup>20</sup> and article 25 of PACE (NI) and includes any place and, in particular, includes any vehicle, vessel, aircraft or hovercraft, any offshore installation, any renewable energy installation<sup>21</sup>, any tent or moveable structure.
90. The search and seizure warrant does not include a power to stop a person, make an arrest or to search a person. The legislation and this Code only apply to searches of premises. This Code does not apply to searches conducted with consent without a search and seizure warrant.

#### **Particular action to be taken before an application for a search and seizure warrant**

91. The appropriate officer should at all times bear in mind that a search and seizure warrant is the most invasive of the powers of investigation.
92. The appropriate officer should consider why he needs a search and seizure warrant rather than a production order with an order to grant entry.
93. The appropriate officer should ascertain as specifically as is possible in the circumstances the nature of the material to be specified in the application and its location.
94. The appropriate officer should make reasonable enquiries to establish what, if anything, is known about the likely owner or occupier, or person in control, of the premises and the nature of the premises themselves; whether they have been previously searched and if so how recently; and obtain any other information relevant to the application.
95. The appropriate officer should consider whether any other persons are needed to accompany the appropriate person to execute the warrant (e.g., computer experts if material on computers is to be accessed). If they are needed, those persons will need to be named in the application as persons to be authorised by the warrant to accompany the appropriate person at the time of the execution of the warrant.

#### **Particular action in making an application for a search and seizure warrant**

96. An application for a search and seizure warrant must state:
  - that a person specified in the application is subject to a confiscation investigation or money laundering investigation; or that the property specified in the application is subject to a civil recovery investigation, or detained cash investigation, or in England and Wales only a detained property investigation or frozen funds investigation;
  - the name (if any) and address of the premises to be searched and the object of the search;
  - the material which is sought, or that there are reasonable grounds for believing that there is material falling within section 353(6), (7), (7A), (7B), (8) or (8A) on the premises;

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<sup>20</sup> See section 379.

<sup>21</sup> A renewable energy installation is not explicitly included in the PACE (NI) definition of premises.

- which of the requirements under section 352(6) apply to the application, whether a production order made in relation to material has not been complied with and there are reasonable grounds for believing that the material is on the premises specified in the application for the warrant, or that section 353 is satisfied;
- if relying upon satisfying section 353:
  - o how subsection (2)(b) of that section applies; and
  - o which of the conditions in either subsection (3) or (5) apply to the application; and
- the name of the appropriate officer or the appropriate person, subject to the provisions in POCA relating to pseudonyms of members of staff of a relevant Director; and
- the names of any persons which are requested to be able to accompany the appropriate person at the time of execution of the warrant, with the justification for those persons being so authorised by the warrant.

The application should also state that it has been authorised by a senior member of staff, where this is the case, although this is not a prerequisite.

97. If an application for a search and seizure warrant is refused, no further application may be made for a warrant to search those premises in the investigation unless supported by additional grounds which subsequently come to light.

**Particular action to be taken executing a search and seizure warrant**

98. If the appropriate officer who made the application is a different person from the appropriate person authorised to execute the warrant, the appropriate officer should explain the background and decision to apply for the warrant to the appropriate person. The appropriate person will then have the relevant information which will help when executing the warrant.
99. Authorised persons may only attend execution of the warrant if they are accompanying the appropriate person.

**Time limit for conducting searches**

100. Under section 356 searches carried out under a warrant must be conducted within:
- 3 calendar months of it being granted in a confiscation investigation, money laundering investigation or detained cash investigation; or
  - 1 calendar month of it being granted for civil recovery; and
  - the warrant should be returned to the issuing court not more than four months after the date that it was granted.
101. Where the extent or complexity of a search means that it is likely to take a long time to complete, the appropriate person may wish to consider whether the additional powers of seizure under Part 2 of CJPA may appropriately be used.

### **Entry other than with consent**

102. Before entering the premises, the appropriate person must first attempt to communicate with the owner or occupier, or any other person entitled to grant access to the premises, by explaining the authority under which entry is sought to the premises, showing the warrant and asking the owner, occupier or person entitled to grant access to allow entry, unless:
- the premises to be searched are known to be unoccupied;
  - the owner or occupier and any other person entitled to grant access are known to be absent; or
  - There are reasonable grounds for believing that to alert the owner, occupier or any other person entitled to grant access by attempting to communicate with them would frustrate the object of the search or endanger the person concerned or other people.
103. Before a search begins, the appropriate person must identify him or herself (subject to the provision in section 449A relating to pseudonyms of members of staff of the relevant Director) and show an official form of identification, state the purpose of the search and the grounds for undertaking it. The appropriate person does not need to comply with this provision if the circumstances detailed below apply.

### **Notice of powers and rights**

104. The appropriate person must, unless it is impracticable to do so, provide the owner or occupier of, or other person entitled to grant access to the premises with a copy of the warrant and in addition to the matters specified above a notice<sup>22</sup>:
- summarising the extent of the powers of search and seizure conferred in POCA; and
  - stating that a copy of this code is available to be consulted and giving a contact point at which it can be obtained.
105. If the owner, occupier or person entitled to grant access is present, copies of the notice mentioned above, and of the warrant must, if practicable, be given to the owner, occupier or person entitled to grant access before the search begins, unless the appropriate person reasonably believes that to do so would frustrate the object of the search or endanger those conducting the search or other people. If the owner, occupier or person entitled to grant access is not present, copies of the notice and of the warrant must be left in a prominent place on the premises or appropriate part of the premises and endorsed with the name of the appropriate person (or the pseudonym authorised under section 449A) and the date and time of the search. The warrant itself must be endorsed to show that this has been done.

### **Conduct of searches**

106. Searches should be conducted at a reasonable time of day, for example in the case of domestic premises outside normal sleeping hours and in the case of business

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<sup>22</sup> If this information is on the warrant then there is no need for it to be also detailed and served on a separate notice.

premises during normal business hours, unless this might frustrate the purpose of the search. If a search will take place at an unreasonable hour, the appropriate person should record their reasons for doing so in writing.

107. Premises should be searched only to the extent necessary to achieve the object of the search, having regard to the size and nature of whatever is sought. No search may continue once the appropriate person is satisfied that whatever is being sought is not on the premises. This does not prevent the issue of further search warrants in respect of the same premises if additional grounds come to light. Examples would be when, as a result of new information, it is believed that articles previously not found or additional articles are on the premises.
108. Searches should be conducted with due consideration for the property and privacy of the owner or occupier of the premises searched, and with no more disturbance than necessary. The owner, occupier or person entitled to grant access must be asked whether he or she wishes a friend, neighbour or other person to witness the search. That person must be allowed to do so unless the appropriate person has reasonable grounds for believing that the presence of the person asked for would seriously hinder the investigation, or endanger persons present. A search need not be unreasonably delayed for this purpose. A record of the action taken under this paragraph, including the grounds for refusing a request from the owner, occupier or person entitled to grant access, must be made on the premises search record (see below). This requirement also relates to business and commercial properties if practicable, as well as private addresses.
109. A person is not required to be cautioned prior to being asked questions that are solely necessary for the purpose of furthering the proper and effective conduct of a search. Examples would include questions to discover the identity of the owner, occupier or person entitled to grant access to specified premises, to find a key to open a locked drawer or cupboard, or to otherwise seek co-operation during the search.

#### **Leaving premises**

110. The appropriate person should, before leaving the premises, be satisfied that they are secure either by arranging for the owner or occupier or person entitled to grant access or their agent to be present or by any other appropriate means.

#### **Seizure of material**

111. An appropriate person may seize:
  - material covered by the warrant (being either material specifically mentioned or where there were reasonable grounds for believing that there was material falling within section 353(7) on the premises);
  - anything covered by the powers in Part 2 of CJPA which allow an appropriate person to seize property from premises where it is not reasonably practicable to determine on the premises whether he is entitled to seize it and retain it for sifting or examination in secure conditions elsewhere; and
  - anything that the appropriate person has the power to seize not covered by the warrant which is discovered during the course of the search (for example seizure of cash under section 294). However, this is incidental to the search powers and a warrant should not be applied for to search for material other than that specified in the application. Regard should be had to the codes relevant to the exercise of the other powers.

112. A search must not continue after it appears that there is no more material covered by the warrant on the premises, even if the appropriate person suspects that there are other items which they may want to seize.
113. Appropriate persons should be aware of section 59 of CJPA which allows persons with a relevant interest in material which has been seized to make an application to a judicial authority<sup>23</sup> for the return of the material. Appropriate persons should also be aware of the subsequent duty to secure seized property in sections 59 to 61 of CJPA.
114. An appropriate person may photograph, image or copy, or have photographed, imaged or copied, any material that has been seized under the warrant. In a confiscation investigation, detained cash investigation, or a money laundering investigation, an appropriate person will have regard to their obligation not to retain original material when a photograph or copy would be sufficient. Appropriate officers and appropriate persons should be aware of the safeguards applied by the relevant order made under section 355 in confiscation investigation, detained cash or property investigation, money laundering investigation, or frozen funds investigation<sup>24</sup>. Detained property investigations and frozen funds investigations are not available in Northern Ireland.
115. Under section 356, an appropriate person may take copies of any seized material. Material seized under a warrant may be retained for so long as it is necessary to retain it (as opposed to copies of it) in connection with the investigation for the purposes of which the warrant was issued. But if an appropriate officer has reasonable grounds for believing that:
- (a) the material may need to be produced for the purposes of any legal proceedings, and
  - (b) it might otherwise be unavailable for those purposes, it may be retained until the proceedings are concluded<sup>25</sup>.
116. Where an appropriate person considers that information which is held in a computer and is accessible from the premises specified in the warrant is relevant to the investigation, they may require the information to be produced from the computer in a form which can be taken away (for example, a computer printout or a removable computer disk).<sup>26</sup> Care should be taken to ensure that the person producing the material in this form does not delete or corrupt evidence from the computer, either deliberately or accidentally.

#### **Particular record of proceedings in executing a search and seizure warrant**

117. Where premises have been searched under a warrant issued under Chapter 2 of Part 8, the appropriate person should make or have made a record of the search, at the time of the search, unless there are exceptional circumstances that would make this

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<sup>23</sup> See section 64 of CJPA for the meaning of “appropriate judicial authority”: in relation to the exercise of the power of seizure under section 352(4) POCA, whether exercised alone or in conjunction with section 50 of CJPA, it means the High Court.

<sup>24</sup> In relation to England and Wales, the current order is the Proceeds of Crime Act 2002 (Application of Police and Criminal Evidence Act 1984) (England and Wales) Order 2015.

<sup>25</sup> See section 356(10).

<sup>26</sup> See section 356(5).

impracticable. If a written record is not made at the time then the appropriate person should do so as soon as is reasonably practicable thereafter and also set out the reasons for the delay in making the record. There may be situations when it is not practicable to obtain all of the information necessary to complete a record, but the appropriate person should make every reasonable effort to do so, and if necessary, complete a partial record. The record should include:

- the address of the premises searched (and if relevant and possible the part of those premises searched);
  - Where a vehicle is searched, the location of that vehicle;
  - the date, time and duration of the search;
  - the warrant under which the search was made (a copy of the warrant should be appended to the record or kept in a place identified in the record);
  - the name of the appropriate person, subject to the provisions in POCA relating to pseudonyms of members of staff of a relevant Director;
  - the names and dates of birth of any people on the premises if they are known<sup>27</sup>;
  - the names and details of any witnesses;
  - any grounds for refusing the owner's, occupier's or the person who is entitled to grant access's request to have someone present during the search;
  - either a list of any material seized or a note of where such a list is kept and, if not covered by a warrant, the grounds for their seizure;
  - details of any damage to property or injury to person caused during the search, and the circumstances in which it was caused;
  - confirmation that the premises were left secured and by what means; and
  - any other relevant information.
118. Unless it is impracticable or would jeopardise a wider ongoing operation or investigation, a copy of the record should be given immediately to the person in charge of the premises searched. If a record is not made at the time, the person should be informed how they can apply for a copy of the record once it is made.
119. When an officer makes a record of the search electronically and is unable to produce a copy of the form at the time of the search, the officer should explain how the person can obtain a full copy of the record of the search and give the person a receipt which contains:
- a unique reference number and guidance on how to obtain a full copy of the report;

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<sup>27</sup> When considering whether to request and make a record of someone's personal details, the appropriate person should be aware of the need for proportionality to avoid any unjustifiable interference with a person's right to private and family life under article 8 of the ECHR.

- the name of the officer who carried out the search (subject to the provisions of POCA relating to pseudonyms); and
- the power used to search.

120. The search and seizure warrant must be endorsed by the appropriate person to show:

- whether any material was seized;
- the date and time at which it was executed;
- subject to the provisions relating to pseudonyms of members of the staff of the relevant Director, the name of the appropriate person who executed it; and
- whether a copy of the warrant, together with a copy of the Notice of Powers and Rights, was handed to the owner, occupier or person entitled to grant access; or whether it was endorsed and left on the premises together with the copy notice and, if so, where.

### **Search register**

121. The record of the search should be maintained in a suitable form (i.e. the record should be easily accessible, retrievable and subject to reasonable rules for storage, in particular in relation to the length of time before the record is destroyed).

122. In order to promote public confidence in the use of the powers, bodies using these powers should make the records available (anonymised as required) to be scrutinised by representatives of the community and to explain the use of the powers at a local level in response to a reasonable request.

### **Specific procedures for seize and sift powers**

123. Part 2 of CJPA provides persons who are lawfully on any premises and exercising powers of search and seizure with further limited powers to seize material from premises so that they can sift through it or otherwise examine it elsewhere. These powers may be exercised for the reasons stated in section 50 of CJPA; appropriate persons should refer to and have regard to this provision. All appropriate persons conducting searches under POCA are permitted to use these powers. Appropriate persons should be careful that they only exercise these powers where it is essential to do so and that they do not remove any more material than is absolutely necessary. The removal of large volumes of material, much of which may not ultimately be retainable, may have serious implications for the owners, particularly where they are involved in business. Appropriate persons should always give careful consideration to whether removing copies or images of relevant material or data would be a satisfactory alternative to removing the originals. Where originals are taken, appropriate persons should always be prepared to facilitate the provision of copies or images for the owners where that is reasonably practicable.

124. Property seized under section 50 CJPA must be kept securely and separately from any other material seized under other powers (section 53(2) and (5) of CJPA). Section 51 of CJPA is not relevant as the search and seizure powers under Chapter 2 of Part 8 of POCA do not extend to seizing material from a person. An initial examination under section 53 of CJPA to determine what material may be retained in accordance with POCA must be carried out as soon as reasonably practicable, allowing the



person from whom the material was seized, or a person with an interest in the material, an opportunity of being present or represented. The appropriate person should ensure that he or she has the facilities for the sift to be conducted in suitable surroundings and that persons from whom the material was seized or who have an interest in the material or their representative can be present.

125. All reasonable steps should be taken to accommodate an interested person's request to be present, provided the request is reasonable and subject to the need to prevent harm to, interference with, or unreasonable delay to the investigatory process. If an examination proceeds in the absence of an interested person who asked to attend or their representative, the appropriate person who exercised the search and seizure warrant must give that person a written notice of why the examination was carried out in those circumstances. If it is necessary for security reasons or to maintain confidentiality, appropriate persons may exclude interested persons from decryption or other processes which facilitate the examination but do not form part of it.
126. It is the responsibility of the appropriate person to ensure that, where appropriate, property is returned in accordance with sections 53 to 55 of CJPA. Material which is not retainable (i.e. because it is legally privileged material, excluded material or falls outside the terms of the warrant) must be separated from the rest of the seized property and returned as soon as reasonably practicable after the examination of all the seized property has been completed. Delay is only warranted if very clear and compelling reasons exist; for example, the unavailability of the person to whom the material is to be returned or the need to agree a convenient time to return a very large volume of material. Legally privileged or excluded material which cannot be retained must be returned as soon as reasonably practicable and without waiting for the whole examination to be completed. As set out in section 58 of CJPA, material must be returned to the person from whom it was seized, except where it is clear that some other person has a right to it.
127. Where an appropriate person involved in the investigation has reasonable grounds to believe that a person with a relevant interest in property seized under section 50 of CJPA intends to make an application under section 59 for the return of any legally privileged or excluded material, the appropriate officer must be informed and the material seized must be kept secure in accordance with section 61. Appropriate persons should consider reaching agreement with owners and/or other interested parties on the procedures for examining a specific set of property without necessarily seeking judicial authority. Agreement can sometimes be simpler, speedier and more cost effective for all concerned.
128. The responsibility for ensuring property is properly secured rests ultimately with the appropriate person and the appropriate officer, even if there is a separate person delegated with this specific task. Securing involves making sure that the property is not examined, copied or put to any other use except with the consent of the applicant or in accordance with the directions of the appropriate judicial authority. Any such consent or directions must be recorded in writing and signed by both the applicant or judicial authority and the appropriate person. The mechanics of securing property vary according to the circumstances: "bagging up" (placing material in sealed bags or containers and strictly controlling subsequent access) is the appropriate procedure in many cases.
129. Where an appropriate person exercises a power of seizure conferred by section 50 of the CJPA, that appropriate person must at the earliest opportunity and unless it is impracticable to do so, provide the occupier of the premises or the person from whom the property was seized with a written notice:

- specifying what has been seized in reliance on the powers conferred by that section;
  - specifying the grounds on which those powers have been exercised;
  - setting out the effect of sections 59 to 61 of CJPA which cover the grounds on which a person with a relevant interest in seized property may apply to the appropriate judicial authority for its return and the duty to secure property in certain circumstances where such an application is made;
  - specifying the name and address of the person to whom notice of an application to the appropriate judicial authority in respect of any of the seized property must be given; and
  - specifying the name and address of the person to whom an application may be made to be allowed to attend the initial examination of the property.
130. If the owner or occupier is not present but there is some other person there who is in charge of the premises, the notice must be given to that person. If there is no one on the premises to whom the notice may appropriately be given, it must either be left in a prominent place on the premises or attached to the exterior of the premises so that it will easily be found.

### **Retention**

131. Anything which has been seized under either POCA or CJPA may be retained only for as long as is necessary in connection with the investigation for the purposes of which the warrant was issued.
132. Property should not be retained if a photograph or copy would be sufficient - appropriate officers and appropriate persons should be aware of the safeguards applied by section 355 and 356 of POCA and section 63 of CJPA.

### **Rights of owners**

133. If property is retained under POCA or CJPA, the owner or occupier of the premises on which it was seized or the person who had custody or control of it immediately prior to its seizure should on request be provided with a list or description of the property within a reasonable time.
134. That person or their representative should be allowed supervised access to the property to examine it or have it photographed or copied, or must be provided with a photograph or copy, in either case within a reasonable time of any request and at their own expense, unless the appropriate officer has reasonable grounds for believing that this would prejudice the investigation or any proceedings or lead to the commission of an offence. A record of the grounds should be made in any case where access is denied.

### **Access to search warrant application documents**

135. If any person affected by a search and seizure warrant seeks access to the documents supporting the application for the search and seizure warrant, the appropriate officer or the appropriate person is expected to consider the request within 14 days. Access may

be refused, for example, on the basis that allowing access to some or all of the documents would:

- prejudice the prevention or detection of crime;
- prejudice the apprehension or prosecution of offenders; or
- be contrary to any public interest in maintaining the confidentiality of that information.

136. Persons to whom this part of the Code applies should familiarise themselves with the introduction section which sets out general instructions relating to all the orders and warrants.

137. In order to promote public confidence in the use of the powers, bodies using these powers should make the records available (anonymised as required) to be scrutinised by representatives of the community and to explain the use of the powers at a local level in response to a reasonable request.

## **Customer Information Orders**

138. Persons to whom this part of the Code applies should familiarise themselves with the introduction section which sets out general instructions relating to all the orders and warrants.

### **Definition**

139. A customer information order compels a financial institution covered by the application to provide any “customer information” it has relating to the person specified in the application on receipt of a written notice from an appropriate officer asking for that information. “Customer information” is defined at section 364. A “financial institution” means a person carrying on a business in the regulated sector<sup>28</sup>. The “regulated sector” is defined in schedule 9 to POCA. A customer information order is not available in a detained cash or property investigation, or a frozen funds investigation.

### **Persons who can apply for a customer information order**

140. Under section 363, an application can be made by an appropriate officer who must have the authorisation of a senior appropriate officer before making the application to the court (unless that officer is a senior appropriate officer).

### **Statutory requirements**

141. The application must state:

- a person specified in the application is subject to a civil recovery investigation;
- that the order is sought for the purposes of that investigation;
- the financial institutions, or a description of financial institutions, from which the customer information is to be obtained. A description of financial institutions may

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<sup>28</sup> See section 416(4).

include all financial institutions but would usually be specifically targeted, such as those financial institutions within a geographical area;

- in the case of a confiscation investigation:
  - there are reasonable grounds for suspecting that the person specified in the application has benefited from their criminal conduct; or,
  - the purpose of the investigation is to identify the extent or whereabouts of property available for satisfying a confiscation order made in respect of them;
- in the case of a civil recovery investigation, the reasonable grounds for suspecting that the person specified in the application:
  - holds recoverable property or associated property; or
  - has, at any time, held property that was recoverable property or associated property at the time;
- in the case of a money laundering investigation, the reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence;
- in the case of any investigation, the reasonable grounds for believing
  - that customer information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought; and
  - it is in the public interest for the customer information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.

**Particular action to be taken before an application for a customer information order is made**

142. The appropriate officer must carefully consider his existing evidence and information so as to limit the number or scope of financial institutions. This may include researching NCA's intelligence system and the Police National Computer. They must consider what benefit the customer information they may obtain may have, either in itself or as the lead to other avenues of investigation. They must also consider whether the information they wish to gain could not be acquired as effectively and efficiently from material which could be obtained by way of a production order. The appropriate officer should consider the cost both to their employer and the financial institutions in complying with the order.
143. The appropriate officer should particularly consider the proportionality of requesting the customer information, against the believed benefit to the investigation. They must also consider the broader issues of law enforcement such as the benefit to the community of removing the suspected proceeds from circulation.

### **Particular action to be taken when serving notices under a customer information order**

144. Section 363(5) requires a financial institution to provide any customer information which it has relating to the person specified in the application if it is given notice in writing by an appropriate officer. Section 363(6) gives the appropriate officer power to require the financial institution to provide the information in a particular manner, and at, or by, a particular time. The appropriate officer is expected to impose a reasonable time limit depending on the nature of the institution and the information which is requested. There will be cases where the best practice is to contact the financial institution before the notice is served to discuss a reasonable time limit.
145. A notice given under a customer information order must include the following:
- the name of the financial institution;
  - the name of the person(s) (or other identifying factor) about whom customer information is sought;
  - the financial institution's right to refuse to comply with any requirement made of it unless the appropriate officer has, if asked to do so, produced evidence of their authority;
  - the period of time within which the customer information must be provided;
  - the manner in which such information must be provided;
  - the place at or to which the information is to be provided;
  - where the appropriate officer believes that the customer information includes information in relation to accounts held in any other name which it appears to the appropriate officer that the specified person may have used, that other name;
  - where the appropriate officer thinks that the customer information includes information in relation to accounts held in the name of any company or limited liability partnership, which the specified person has or in which it appears to the appropriate officer that the specified person has or had an interest, the name and all known addresses of that company or limited liability partnership;
  - all addresses known by the appropriate officer to have been used by the specified person possibly relating to accounts that may have been or are held by the financial institution;
  - the date of birth or approximate age of that person if an individual, or any known identification information in respect of a company or limited liability partnership;
  - such other information as the appropriate officer considers would assist the respondent in complying with the requirement; and
  - the financial institution's right not to have information furnished used in evidence against it in criminal proceedings other than in the circumstances specified in section 367(2).

### **Particular record of proceedings under a customer information order**

146. The appropriate officer should keep a copy of the customer information order and all the notices issued to financial institutions under a customer information order. He or she must also keep a record of all the information supplied in response to the notices.
147. The appropriate officer should consider the customer information he or she has obtained and consider whether a production order or account monitoring order would be the next step to obtain further information and material to support the investigation.

### **Account Monitoring Orders**

148. Persons to whom this part of the Code applies must familiarise themselves with the introduction section which sets out general instructions relating to all the orders and warrants.

#### **Definition**

149. An account monitoring order is an order that requires a specified financial institution to provide account information on a specified account for a specified period, up to 90 days in the manner and at or by the times specified in the order. "Account information" is information relating to an account held at a financial institution. This would most commonly be transaction details. A "financial institution" means a person carrying on a business in the regulated sector. The "regulated sector" is defined in schedule 9 to POCA. There is no bar to an appropriate officer making a repeat application for an account monitoring order immediately after an account monitoring order has expired. An account monitoring order is not available in a detained cash or property investigation or a frozen funds investigation.

#### **Persons who can apply for an account monitoring order**

150. Under section 370, an application may be made by an appropriate officer.

#### **Statutory requirements**

151. The application must state that:
  - a person specified in the application is subject to a confiscation investigation, civil recovery investigation, or money laundering investigation;
  - the order is sought for the purposes of that investigation;
  - the order is sought against the financial institution specified in the application in relation to account information that the appropriate officer wishes to obtain;
  - the order is sought in relation to account information<sup>29</sup> about the specified person;
  - in the case of a confiscation investigation:

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<sup>29</sup> Account information is information relating to an account or accounts held at the financial institution specified in the application by the person so specified (whether solely or jointly with another): section 370(4).

- o there are reasonable grounds for suspecting that the person specified in the application has benefited from their criminal conduct; or
- o the purpose of the investigation is to identify the extent or whereabouts of property available for satisfying a confiscation order made in respect of them;
- in the case of a civil recovery investigation, the reasonable grounds for suspecting that the person specified in the application holds recoverable property or associated property;
- in the case of a money laundering investigation, the reasonable grounds for suspecting that the person specified in the application has committed a money laundering offence;
- for any investigation, the reasonable grounds for believing that account information which may be provided in compliance with the order is likely
  - o to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought; and
  - o that it is in the public interest for the account information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.

152. The application for an account monitoring order may specify information relating to all accounts held by the person specified in the application for the order at the financial institution so specified, a particular description, or particular descriptions, of accounts so held, or a particular account, or particular accounts, so held. The order will set out the manner and deadline by which the financial institution must produce account information and the period for which the order should last (but this may not exceed a 90 day period).

**Particular action to be taken before an application for an account monitoring order**

153. The appropriate officer has to consider the benefit of obtaining information from an account to his investigation, and whether this information could be as easily obtained by using a production order.
154. The appropriate officer should also consider what account information he or she should request. If, for example, the appropriate officer requires information on certain transactions, they should consider whether they could meaningfully limit the information they require to amounts over a certain threshold or identity of the source of the deposit or transaction destination.
155. The provision of account information will be for so long as the court has set out in the order (although no longer than 90 days, beginning with the day on which the order is made) and be provided at or by the time or times stated in the order. A reasonable time limit to suggest to the judge might be that the information should be provided within 24 hours on all transactions unless it appears that it would not be reasonably practicable for the subject of the account monitoring order to comply with this time limit. It is best practice to contact the subject of the account monitoring order (i.e. the relevant financial institution) before the application is made to discuss types of transaction and the reporting process.

156. Appropriate officers should consider the time period they wish the account monitoring order to cover. The appropriate officer should not treat the 90 day maximum as the standard time limit. They should carefully consider and justify to the judge the requirement for the time period requested.

#### **Particular action to be taken executing an account monitoring order**

157. When an account monitoring order is served on a financial institution, the covering letter, in addition to the general matters specified above should include the following (unless it is already included in the order):

- the name of the financial institution;
- the identity of the person(s) who hold the account to be monitored, including as much identity information as is known by the appropriate officer;
- the accounts in relation to which the information is required, whether this is a specific account or a general description of accounts;
- the account information required (in as specific detail as possible, for example, a general description of the nature of the transactions);
- the period for which the account monitoring order will have effect;
- the period of time within which such information must be provided to the appropriate officer (e.g. within 24 hours of a particular transaction taking place);
- the manner in which such information must be provided;
- such other information as the appropriate officer considers would assist the respondent in complying with the requirements of the account monitoring order; and
- the financial institution's right not to have information furnished used in evidence against it in criminal proceedings other than in the circumstances specified in section 372(2).

#### **Particular record of proceedings under an account monitoring order**

158. The appropriate officer should keep a record of all the account information supplied in response to the order and a copy of the actual order and notices.

### **Unexplained wealth orders**

159. This section of the Code provides for the use of unexplained wealth orders in England and Wales ("UWOs") and contains guidance on specific provisions relation to their use by the relevant DPP and DSFO. UWOs are not currently available in Northern Ireland.

#### **Definition**

160. A UWO is an investigation tool under Part 8 of POCA intended to assist in building evidence. It is specifically designed to support the building of a case for civil recovery



under Part 5 of POCA but can also be used for other reasons both criminal and civil (provided there is a legal basis for using such information).

161. A UWO provides an enforcement authority with the ability to require an individual or company to provide specific documents or information in order to establish whether the asset(s) in question have been legitimately obtained. As such, it provides an alternative means of obtaining information and allowing for the consideration of action against persons and their property about whom little information is available.

### **Persons who can apply for a UWO**

162. An application for a UWO may be made with or without notice to the High Court by an enforcement authority. The relevant Directors are each enforcement authorities.
163. An application for a UWO is made by the relevant enforcement authority rather than an appropriate officer of that authority. The authority concerned should give consideration to implementing a suitable assurance and authorisation process that ensures appropriate applications will be made. The authority should also ensure that properly trained and qualified members of their staff are making applications in their name.
164. Enforcement authorities considering the use of a UWO should have regard to the cost-capping provisions contained within the practice direction of the Civil Procedure Rules. The rules allow for cost-capping in appropriate cases. Costs should not be the sole factor in deciding whether or not to apply for a UWO.

### **Statutory requirements**

165. An application for a UWO must be made to the High Court. The application must specify or describe the property in respect of which the UWO is sought, and specify the person whom the enforcement authority thinks holds the property (“the respondent”)<sup>30</sup>.
166. The application should state that:
- the respondent holds the specified property and that the aggregate value of that property is greater than £50,000;
  - the reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property;
  - the respondent is:
    - o a non-EEA politically exposed person<sup>31</sup>; or

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<sup>30</sup> See section 362A(2). Section 362A specifies what an order must contain as well as the requirement to comply with an order within a certain timeframe.

<sup>31</sup> Section 362B(7) defines a “politically exposed person” as an individual who is or has been entrusted with prominent public functions by an international organisation or by a State other than the UK or another EEA State, and includes a family member, known close associate, or person otherwise connected such a person. Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 applies for the purposes of determining whether a person is politically exposed.

- o there are reasonable grounds for suspecting that they or a person connected with them<sup>32</sup> is or has been involved in serious crime<sup>33</sup> (whether in a part of the United Kingdom or elsewhere) and provide details as to the basis of that suspicion.

#### **Particular action to be taken before making an application**

167. The enforcement authority should carefully consider the value of evidence that may be obtained through a UWO. A UWO provides a tool to obtain information and documentation in relation to property that appears to be disproportionate to the known income of an individual or company. A fundamental aim of the power, therefore, is to access evidence that would otherwise not be available. Although not an absolute requirement, the applicant should consider whether alternative tools of investigation could be used in obtaining any relevant documents and information.
168. Whether there are reasonable grounds for suspecting that there is insufficient lawfully obtained income to explain the wealth (i.e. holding of the property) will depend on the circumstances in each case, and should be carefully considered. Applications should be able to explain the basis for their suspicion by reference to disclosable intelligence or information about or some specific behavior by the individual or company concerned (including open source material from overseas where there may be public registers relating to property and public servants' income).
169. Applicants should take reasonable steps to liaise with other agencies in order to:
- establish whether they already own material that explains a person's wealth; and
  - ensure appropriate action thereby avoiding duplicating enquiries that may already be underway.
170. In considering whether to apply for a UWO, the enforcement authority should have made reasonable attempts to:
- establish the identity of the beneficial owner, for example, in cases where a property is held in trust;
  - identify either:
    - o the politically exposed person; or
    - o the type of serious crime in which the respondent or person associated with them is suspected of being involved.
171. In drafting the proposed terms of the UWO in the application, care should be taken to list strict requests for information. The applicant should consider what precise information they require and categorise this in a structured fashion. This will assist in avoiding receiving responses that comply with the UWO but are vague or minimal.

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<sup>32</sup> Section 1122 of the Corporation Tax Act 2010 applies for the purpose of determining whether a person is connected to another person.

<sup>33</sup> A person is involved in serious crime in a part of the United Kingdom or elsewhere if they would be so involved for the purposes of Part 1 of the Serious Crime Act 2007.

## **Service of documents**

172. If the enforcement authority or court is serving documents overseas, they should do so in accordance with the usual Civil Procedure Rules for service outside the jurisdiction.

## **Requirements for making an application**

173. In addition to fulfilling the statutory requirements for making a UWO, the applicant must specify the property in respect of which the UWO is sought. It is immaterial whether or not other persons in addition to the respondent also hold the property or whether the property was obtained by the respondent before or after the UWO provisions came into force. The information provided to the court should be sufficient to frame the requirements of the UWO, as the UWO places an obligation on the respondent to explain the source of the specified asset(s) within a time period set by the court.

## **Points to note**

174. In coming to a decision as to whether there are reasonable grounds to suspect that the respondent's lawfully obtained income would have been sufficient to obtain the property, the court will:
- have regard to any mortgage, charge, or other kind of security that is reasonable to assume was or may have been available to the respondent for the purposes of obtaining the property;
  - assume that the respondent obtained the property for a price equivalent to its market value;
  - consider income to be "lawfully obtained" if it is obtained lawfully under the laws of the country from where the income arises;
  - interpret "known" sources of the respondent's income to mean the sources of income that are reasonably ascertainable from available information at the time of making an application, which will include open source material including from other jurisdictions; and
  - consider the other lawful financial benefits available to the respondent aside from income, such as capital gains, because, although it is not an express requirement, it is reasonable to expect the court to assess the full financial circumstances when considering an application.

## **Providing of information and production of documents**

### Where a respondent fails to comply with a UWO

175. A respondent must comply with the requirements imposed by a UWO within whatever period the court may specify. This period is known as the "response period". Different response periods may be specified in relation to different requirements by the UWO.
176. If the respondent fails to comply with the requirements imposed by the UWO within the relevant response period, the property concerned is presumed to be "recoverable property"<sup>34</sup>. In this case, the enforcement authority can consider whether to take

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<sup>34</sup> Recoverable property is property obtained through unlawful conduct.

further action against the property. This may include recovering the property using the civil recovery powers provided by Part 5 of POCA. If civil recovery proceedings are commenced, the respondent can provide evidence to rebut the presumption that their property is recoverable in those proceedings.

177. A respondent will be treated as having failed to comply with a UWO if, without reasonable excuse, he fails to comply with all of the requirements imposed by the UWO within the response period. It is important to note that where a response is provided to a particular requirement in the UWO, but that response is considered to be unsatisfactory, this does not necessarily mean that the respondent has failed to comply with the UWO. If the individual has genuinely and fully engaged with the process and attempted to provide a response to each requirement of the order, and has not sought to withhold information or otherwise mislead the agency, then this would amount to “purported compliance” under section 362D<sup>35</sup>.

#### Where a respondent complies or purports to comply with a UWO

178. If the respondent complies or purports to comply with the requirements imposed by a UWO within the response period and there is no interim freezing order, the enforcement authority may (at that time) determine what (if any) enforcement or investigatory proceedings ought to be taken in respect of the property. If it is determined initially that no further proceedings are necessary, this does not prevent such proceedings being taken subsequently.
179. It is also to be noted that knowingly or recklessly making a statement that is false or misleading is a criminal offence under section 362E of POCA.
180. The term “purported compliance” applies in cases where a person has provided a response to each of the requirements of a UWO but the recipient is not wholly satisfied with the response. The term is required to ensure clarity in the circumstances in which the presumption that the property is recoverable will arise. In cases of non-compliance, this presumption will arise automatically
181. The provision is also intended to protect the respondent in instances where there has been a genuine attempt to comply with the requirements of the order. It is not, however, intended to excuse a poor or limited response and the respondent is expected to provide full and genuine information. A failure to do so could still amount to non-compliance with the order. It should also be noted that a relevant Director would be entitled to rely on any information provided in any further action against the respondent or his property. Therefore, it is incumbent on the applicant to ensure that the terms of the UWO are specific and clear in order to minimise the likelihood of an unsatisfactory response being provided.
182. However, if an interim freezing order is in effect, the enforcement authority must make this determination within 60 days starting with the day of compliance or purported compliance<sup>36</sup>.

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<sup>35</sup> For example, where an individual provides nothing more than the bare minimum of information necessary to address each requirement of the UWO, and, as a result, the authority is not satisfied by his explanation as to the derivation of the property. In such circumstances, the rebuttable presumption that the property is recoverable does not arise but the enforcement agency may elect to take further civil recovery against the property in light of the evidence (or lack of evidence) provided by the respondent.

<sup>36</sup> See section 362D(3). Where the requirements are complied with at different times this means the last date upon which action to comply with the UWO is taken.

183. Subject to certain exceptions, a statement made by a person in response to a requirement imposed by a UWO will not be used in evidence against them in criminal proceedings. The exceptions are:
- in case of proceedings under Part 2 or Part 4 of POCA;
  - on a prosecution for an offence under section 362E;
  - on a prosecution for an offence under section 5 of the Perjury Act 1911 or Article 10 of the Perjury (Northern Ireland) Order 1979 (S.I. 1979/1714 (N.I. 19)) (false statements); or
  - on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement made in response to a requirement imposed by a UWO.
184. If the enforcement authority considers that investigatory or enforcement proceedings could be appropriately taken by another agency, they need to be satisfied that there is a legal basis for sharing the information/evidence. It is also important to note that they are only passing the information/evidence to the other agency for them to take their own independent operational decision to pursue appropriate investigations or proceedings. The enforcement authority is not tasking the other agency.
185. The enforcement authority may take copies of any documents produced by the respondent in response to the requirements of a UWO. Such documents (which may be originals) may be retained for as long as it is necessary to retain them in connection with an investigation of the type specified in section 341<sup>37</sup>. Documents may also be retained if the enforcement authority has reasonable grounds to believe that they may need to be produced for the purposes of any legal proceedings (and would otherwise be unavailable). In such circumstances, they may be retained until the proceedings are concluded.
186. The UWO provisions do not provide an express exclusion in respect of legally privileged material. This should rarely arise as it is unlikely that material and information sought by a UWO will include information that is privileged. The court will consider this issue, when relevant, both in considering the application and in proceedings that use information gathered in response to a UWO.

### **Interim freezing orders**

#### Definition

187. An interim freezing order is an order that allows for the freezing of property identified as a result of a UWO. It is intended to prevent such property being dissipated while it is subject to the UWO. As with a UWO, an interim freezing order is not currently available in Northern Ireland.

#### Persons who can apply for an interim freezing order

188. An application for an interim freezing order can only be made by the enforcement authority that applied for the UWO to which the freezing order relates.

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<sup>37</sup> Section 341 makes provision for civil recovery investigations, money laundering investigations, confiscation investigations, and detained cash investigations.

Particular action to be taken in making an application

189. An application for an interim freezing order may be made to the High Court as part of a UWO hearing and it should be made at the same time as a UWO. The UWO and interim freezing order may be combined in one document.
190. An interim freezing order cannot be made in advance of a UWO nor can it be applied for as an alternative to freezing orders under other provisions.
191. The enforcement authority should consider whether to apply for an interim freezing order on the individual facts of the case which could include the following factors:
- the likelihood that the property will be dissipated based on the available evidence or the nature of the case;
  - the value of the property;
  - other interests in the property which may include the complexity of the ownership arrangements of the property;
  - the location of the respondent, particularly if they are normally overseas;
  - the ability to monitor the property by other means, for example, by way of the Land Registry;
  - in relation to residential property, whether there is no likelihood of the property being disposed of in the time period of the UWO; and
  - a realisation that a case will be expected to progress more quickly if relevant property is frozen.
192. It is important to note that the only test for the court when considering an application for an interim freezing order is whether making the order is necessary to avoid the risk of frustrating any civil recovery that might subsequently be made.
193. In applying for an interim freezing order, the enforcement authority should also consider the possible need for a receiver to be appointed. A receiver may not be necessary if the property does not require active management or if this can be achieved in another manner.
194. The enforcement authority or any person affected by an interim freezing order can apply for the order to be varied or discharged at any time. The power to vary an interim freezing order includes power to exclude property from the order and to make exclusions from the prohibition on dealing with the property to which the order applies. An exclusion may (amongst other things) make provision to allow for a person to meet their reasonable living or legal expenses or to carry on any trade, business, profession or occupation.

## **Disclosure Orders**

195. Persons to whom this part of the Code applies should familiarise themselves with the introduction section which sets out general instructions relating to all the orders and warrants.

### **Definition**

196. A disclosure order under section 357 is an order authorising an appropriate officer to give notice in writing to any person requiring him or her to answer questions, to provide information or to produce documents with respect to any matter relevant to the investigation in relation to which the order is sought. A disclosure order is not available in a detained cash or property investigation, frozen funds investigation, or, in Northern Ireland only, money laundering investigation.

197. Once a disclosure order has been made, the appropriate officer may use the powers set out in section 357(4) throughout the investigation. Thus, unlike the other orders which have to be applied for separately on each occasion, a disclosure order gives continuing powers for the purposes of the investigation. The appropriate officer should serve a notice on any person they wish to question or to ask to provide information or documents.

198. Under section 357(6), where a person is given a notice under a disclosure order, that person is not bound to comply with any requirement imposed by the notice unless evidence of the authority to give the notice is provided. A copy of the disclosure order should, therefore, be given to the person on each occasion a notice is served upon them.

### **Persons who can apply for a disclosure order**

199. The DSFO and SFO officers can apply for a disclosure order in a civil recovery investigation, confiscation investigation and money laundering investigation in England and Wales. The DPP can apply for a disclosure order in a civil recovery investigation in England and Wales. The DPPSNI and the DSFO can apply for a disclosure order in a civil recovery investigation in Northern Ireland.

### **Statutory requirements**

200. An application must state:

- a person specified in the application is the subject of a civil recovery, confiscation or money laundering investigation; and
- the order is sought for the purposes of that investigation.

201. It must also state:

- it is considered that there are reasonable grounds for suspecting:
  - o in the case of a civil recovery investigation, the person specified in the application holds recoverable property or associated property, or has at any time held property that was recoverable property or associated property at the time, or the property specified in the application for the order is recoverable or associated property;

- o in the case of a confiscation investigation, the person specified in the application for the order has benefited from criminal conduct;
- o in the case of a money laundering investigation in England and Wales, the person specified in the application for the order has committed a money laundering offence; and
- there are reasonable grounds for believing:
  - o the person the application specifies as appearing to be in possession or control of the information so specified is in possession or control of it;
  - o the information is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought; and
  - o it is in the public interest for the information to be produced or for access to it to be given, having regard to the benefit likely to accrue to the investigation if the information is obtained, and to the circumstances under which the person the application specifies as appearing to be in possession or control of the information holds it.

**Particular action to be taken in making an application**

202. An application for a disclosure order should also state:

- in the case of a civil recovery investigation, the identity of the person or the details of the property under investigation;
- in the case of a confiscation investigation or a money laundering investigation (exception in Northern Ireland), the identity of the person under investigation;
- that the order sought is for the purposes of that investigation;
- whether the appropriate officer is likely to require answers to questions and/or information and/or documents;
- if applicable and practicable, the name of the person or persons against whom the power may be used;
- the grounds on which the application is made (including details of the investigation); and
- why a disclosure order is required in preference to the other powers of investigation.

203. The applicant should carefully consider what benefit the disclosure order may bring to the investigation, either in itself or as the lead to other avenues of investigation, and whether the information could not be acquired as effectively and efficiently from material which could be obtained by other orders.



204. Where a respondent is required to provide information, the notice should be accompanied by a letter explaining that the information should be produced in the form of a witness statement together with a standard statement of truth. The letter should also explain that the respondent will be committing a criminal offence if they fail without reasonable excuse to answer questions.

### **Interview**

205. The disclosure order also contains a power to ask questions. The preferred course of asking questions is to conduct a formalised interview in accordance with the procedure set out below.

### **Invitation to interview**

206. The appropriate officer should send the interviewee a notice served under the disclosure order which should set out:

- the right of the appropriate officer to carry out the interview under section 357(4)(a);
- the purpose of the interview, which may be as detailed as the appropriate officer thinks necessary;
- the interviewee's right not to have statements made by them used in evidence in criminal proceedings against them other than in the circumstances specified in section 360(2);
- the interviewee's right to be accompanied at any interview by a solicitor and/or a qualified accountant;
- the interviewee's right, if they are a juvenile<sup>38</sup>, or are mentally vulnerable, have a mental disorder<sup>39</sup> or a learning disability, to be accompanied at any interview by an appropriate adult;
- details of the place at which the interview is to take place;
- where attendance is not required at once, the time and date of the interview;
- that failure to comply with a disclosure order without reasonable excuse is an offence under section 359; and

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<sup>38</sup> If anyone appears to be under the age of 18 then he or she must be treated as a juvenile for the purposes of this Code in the absence of clear evidence to show that he or she is older.

<sup>39</sup> 'Mentally vulnerable' applies to anyone who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies. 'Mental disorder' is defined in the Mental Health Act 1983, section 1(2) as 'any disorder or disability of mind'. For Northern Ireland, see article 3 (1) of the Mental Health (NI) Order 1986.

Where the person conducting the interview has any doubt about the mental state or capacity of an interviewee, that person should be treated as mentally vulnerable and an appropriate adult should be called.

- that providing a false or misleading statement in response to an order, whether deliberately or recklessly also amounts to an offence.

### **Legal and Financial advice**

207. In this Code, a “solicitor” means a solicitor who holds a current practising certificate, and in England and Wales only: a trainee solicitor, a duty solicitor representative or an accredited representative included on the register of representatives maintained by the Legal Aid Agency. A “qualified accountant” means a person who is a member or fellow of the Institute of Chartered Accountants in England and Wales, or the Institute of Chartered Accountants of Scotland, or the Institute of Chartered Accountants in Ireland, or the Association of Chartered Certified Accountants or who would, for the purposes of the audit of company accounts be regarded by virtue of section 1221 of the Companies Act 2006 as holding an approved overseas qualification.
208. In urgent cases, a person who is not suspected of any unlawful conduct may be prepared to answer questions without the presence of a solicitor and/or qualified accountant. If a person to be interviewed requests access to legal or financial advice before complying with a requirement to be interviewed in a notice served under a disclosure order, the appropriate officer must normally consent and set a reasonable time limit for obtaining such advice. In the exceptional cases set out below, the appropriate officer can refuse such a request depending on the circumstances of the case and the information or material which is being requested.
209. A person who requests legal and/or financial advice may not be interviewed or continue to be interviewed until they have received such advice unless:
- (a) the person conducting the interview has reasonable grounds for believing that:
    - (i) the consequent delay would be likely to lead to interference with or harm to evidence connected with the investigation; or
    - (ii) the delay would alert another person whom the person conducting the interview thinks might have information relevant to the investigation and alerting that person would prejudice the investigation;
  - (b) a solicitor and/or qualified accountant has been contacted and has agreed to attend but the appropriate officer considers that awaiting their arrival would cause unreasonable delay to the process of investigation;
  - (c) the solicitor and/or qualified accountant whom the person has nominated:
    - (i) cannot be contacted; or
    - (ii) has previously indicated that they do not wish to be contacted; or
    - (iii) having been contacted, has declined to attend and the person being interviewed declines to consult another solicitor and/or qualified accountant; or,
  - (d) the person who wanted legal and/or financial advice changes his or her mind.
  - (e) there is an urgent need to avoid serious adverse consequences for the life, liberty or physical integrity of a person;

- (f) there is an urgent need to prevent the destruction, alteration, interference or harm to evidence connected with the investigation; or
- (g) the particularly identified solicitor and/or qualified accountant is suspected of being involved in criminality. In these circumstances, the person should be allowed to choose another solicitor and/or qualified accountant to represent them.

Such a decision to proceed with the interview should usually be with the authorisation of a senior appropriate officer and should be recorded in writing.

- 210. In a case falling within paragraph 209(a), once sufficient information has been obtained to avert the risk of interference or harm to evidence or of alerting another person so as to prejudice the investigation, questioning should cease until the interviewee has received legal or financial advice.
- 211. In a case falling within paragraph 209(d), the interview may be started or continued without further delay provided that the person has given his or her agreement in writing to being interviewed without receiving legal or financial advice and that the person conducting the interview has inquired into the person's reasons for the change of mind and has given authority for the interview to proceed. Confirmation of the person's agreement, his or her change of mind and his or her reasons (where given) should be recorded in the written interview record at the beginning or re-commencement of interview.
- 212. In England and Wales, if a solicitor wishes to send a non-accredited or probationary representative to provide advice on his behalf, then that person is also recognised as a "legal adviser" and must be admitted to the interview unless the appropriate officer considers that this will hinder the investigation.
- 213. In exercising his discretion as to whether to admit a legal adviser who is not a solicitor, the person conducting the interview should take into account in particular whether the identity and status of the non-accredited or probationary representative have been satisfactorily established; whether they are of suitable character to provide legal advice (a person with a criminal record is unlikely to be suitable unless the conviction was for a minor offence and is not recent); and any other matters in any written letter of authorisation provided by the solicitor on whose behalf the person is attending.
- 214. If the person conducting the interview refuses access to a non-accredited or probationary representative or a decision is taken that such a person should not be permitted to remain at an interview, they must forthwith notify a solicitor on whose behalf the non-accredited or probationary representative was to have acted or was acting, and give them an opportunity to make alternative arrangements. The interviewee must also be informed.

### **Persons who may be present at interviews**

- 215. Interviews should be conducted in private with at least two members of staff present at all times, one of whom should be an appropriate officer. Only persons whose presence is sanctioned by this Code should be present. It is up to the interviewee to arrange the presence of any solicitor and/or qualified accountant. When doing so they must ensure that the person he or she selects is available to attend. Where the provisions of this Code require the presence of an appropriate adult or an interpreter and no such person attends with the interviewee the person conducting the interview should, before commencing or restarting any interview, secure the attendance of such a person.

216. The person conducting the interview may be accompanied by a person to assist in handling documents and carrying out such other support tasks as will assist the person conducting the interview to perform his duties. Such a person has no power to require the interviewee to do anything and need not disclose their name or address provided a record of these is made by the person conducting the interview.

217. If the person conducting the interview has any suspicion, or is told in good faith, that a person is or appears (without clear evidence to the contrary):

- to be under 18 years of age;
- to have a mental disorder;
- to have a learning disability or be mentally handicapped (or, in Northern Ireland, to be otherwise mentally vulnerable); or
- mentally incapable of understanding the significance of questions put to them or their replies; then

that person must not be interviewed unless an appropriate adult is present.

218. In this Code the “appropriate adult” means:

(a) in the case of a juvenile:

- (i) his or her parent or guardian (or, if the juvenile is in care a member of staff of the care authority/agency or voluntary organisation. The term ‘in care’ is used in this Code to cover all cases in which a juvenile is ‘looked after’ by a local authority under the terms of the Children Act 1989 or the Children (NI) Order 1995);
- (ii) a social worker;
- (iii) failing either of the above, another responsible adult aged 18 or over who is not a member of staff of the Agency or any law enforcement or prosecuting body.

(b) in the case of a person who has a mental disorder, is mentally vulnerable or has a learning disability:

- (i) a relative, guardian or other person responsible for his or her care and custody;
- (ii) someone who has experience of working in the field of mental health and/or learning disability but who is not a member of staff of the appropriate officer’s employer or any law enforcement or prosecuting body (such as an approved mental health professional as defined by the Mental Health Act 1983 or the Mental Health (NI) Order 1986, a specialist social worker or a community psychiatric nurse); or
- (iii) failing either of the above, some other responsible adult aged 18 or over who is not a member of staff of the appropriate officer’s employer or any law enforcement or prosecuting body.

219. A person, including a parent or guardian, must not be an appropriate adult if they are suspected of involvement in the unlawful conduct to which the investigation relates, are involved in the investigation, are a victim or witness, or have received admissions from the juvenile prior to attending to act as the appropriate adult.
220. If the parent of a juvenile is estranged from the juvenile, they must not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to their presence.
221. In the case of people who suffer from a mental disorder, are mentally vulnerable or have a learning disability, it may be more satisfactory if the appropriate adult is someone experienced or trained in their care rather than a relative lacking such qualifications. But if the person prefers a relative or objects to a particular person their wishes should, if practicable, be respected.
222. When an appropriate adult is called to the interview, a person should always be given an opportunity to consult privately with a solicitor and/or a qualified accountant in the absence of the appropriate adult if they wish to do so. A solicitor or qualified accountant present in that capacity may not be the appropriate adult.

### **Role of persons who may be present at interviews**

#### Solicitor and Qualified Accountant

223. The main role of any solicitor or qualified accountant is to observe that the interview is conducted in a fair and proper manner. They may not answer questions on behalf of the interviewee but they may intervene:
  - to seek clarification of questions put during the interview;
  - to challenge a question put by the appropriate officer which he or she considers improper;
  - to challenge the manner in which a question is put;
  - if the interviewee may have a reasonable excuse for failure to comply with the disclosure order, to advise him or her whether or not to reply to a question; or
  - to give the interviewee advice.
224. Any request for legal or financial advice and the action taken on it should be recorded on the record and/or taped. If a person has asked for legal or financial advice and an interview is begun in the absence of a solicitor or qualified accountant (or the solicitor or qualified accountant has been required to leave an interview), a note should be made in the interview record.
225. The solicitor or qualified accountant may read any documents shown to, or produced by, the interviewee at the interview.

#### Appropriate Adult

226. Where the appropriate adult is present at an interview, he or she should be informed that they are not expected to act simply as an observer, and that the purposes of their

presence are, firstly, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly, and secondly, to facilitate communication with the person being interviewed.

#### Person to assist in case of physical disability

227. At all times, appropriate officers should have regard to and consider the needs of any person who appears to be blind, visually impaired, deaf, unable to read or speak or has difficulty orally because of a speech impediment and take action accordingly.
228. A person who is blind or seriously visually impaired may be accompanied by his guide dog. The person conducting the interview should ensure that the person who is blind or seriously visually impaired has his or her solicitor, relative, the appropriate adult or some other person likely to take an interest in him or her (and not involved in the investigation) available to help in the checking of any documentation. Where this Code requires written consent the person who is assisting may be asked to sign instead if the interviewee so wishes.
229. An interviewee who is seriously physically impaired may be accompanied by an able-bodied adult aged 18 or over to provide such physical assistance, as the interviewee requires. Such a person may take no part in the interview and has none of the rights of an appropriate adult.

#### Interpreters

230. A person should not be interviewed in the absence of a person capable of acting as interpreter:
  - if they have difficulty in understanding English and the person conducting the interview cannot speak the person's own language; or
  - if they are deaf or have difficulty with hearing or speaking,unless the interviewee agrees in writing that the interview may proceed without an interpreter.
231. An interpreter should also be present if a juvenile is interviewed and the appropriate adult appears to be deaf or there is doubt about his or her hearing or speaking ability, unless he or she agrees in writing that the interview should proceed without one.
232. The interpreter should be provided at the agency's expense. The person conducting the interview should ascertain, as far as is practicable, that the interpreter and interviewee understand each other and this should be noted on the interview record. An appropriate adult may not act as the interpreter.
233. Action taken to call an interpreter under this section and any agreement to be interviewed in the absence of an interpreter should be recorded in writing and ortaped.
234. Whenever possible, interpreters should be drawn from the National Register of Public Service Interpreters (NRPSI) or the Council for the Advancement of Communication with Deaf People (CACDP) or the Directory of British Sign Language/English Interpreters.

235. The appropriate officer should make sure that a foreign language interpreter makes a note of the interview at the time in the person's language for use in the event of the interpreter being called to give evidence, and certify its accuracy.
236. A sign language interpreter should also make a note of the interview and certify its accuracy.
237. The appropriate officer should permit sufficient time for an interpreter to note each question asked and answered. The person should be permitted to read the record or have it read to them and sign it as correct or indicate the respects in which they consider it inaccurate.

#### Foreign languages

238. In the case of a person making a statement to an appropriate officer other than in English:
- the interpreter should record the statement in the language that it is made;
  - the person should be invited to sign it; and
  - an official English translation should be made in due course.
239. The interviewer should make sure the interpreter is allowed to read the interview record and certify its accuracy in the event of the interpreter being called to give evidence.

#### **Excluding Persons from the Interview**

240. The person conducting the interview may exclude from the interview a person whose presence is authorised by the provisions of this Code if it appears to the appropriate officer that the person is mentally disordered.
241. The person conducting the interview may exclude from the interview a person whose presence is authorised<sup>40</sup> only if they have reason to believe that the person is personally involved in the matter under investigation or that the person has, by improper conduct, hindered the proper conduct of the interview. Before excluding any person the person conducting the interview should state their reason and note this on the interview record. What amounts to improper conduct will depend on the circumstances of each case. It would almost always be improper conduct for a person to prompt the interviewee, to provide the interviewee with written answers to the questions, to answer questions on behalf of the interviewee or to interrupt the interview for any reason other than to make a proper representation.
242. Exclusion of any person from an interview is a serious matter which may be subject to comment in court. The person conducting the interview should therefore be prepared to justify their decision.
243. If the person conducting the interview has excluded a person from the interview room, they should adjourn the interview. The interviewee should then be informed that they have the right to seek another person to act in the same role as the person who was

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<sup>40</sup> Persons whose presence is authorised are a solicitor, a qualified accountant, an appropriate adult, a person providing assistance and an interpreter.

excluded. If the interviewee wishes the interview to continue, then the interviewer should record this decision and continue with the interview.

244. If the person conducting the interview considers that a solicitor or qualified accountant is acting in such a way as to hinder the proper conduct of the interview, they should cease questioning the interviewee, and whilst the tape recorder is still operating, speak to the solicitor or qualified accountant. After speaking to the solicitor or qualified accountant, the person conducting the interview should decide whether or not the interview should continue in the presence of that solicitor or qualified accountant. If they decide that it should not, the interviewee should be given the opportunity to consult another solicitor or qualified accountant before the interview continues and that solicitor or qualified accountant should be given an opportunity to be present at the interview.
245. The removal of a solicitor or qualified accountant from an interview is a serious step and, if it occurs, the person conducting the interview must consider whether the incident should be reported to the Law Society, the Law Society of Northern Ireland, Legal Complaints Service, General Council of the Bar or the Institute of Legal Executives (as appropriate). In the case of a qualified accountant the person conducting the interview should consider whether the matter should be reported to their professional body, such as the Institute of Chartered Accountants in England and Wales and the Institute of Chartered Accountants in Northern Ireland.

#### **Conduct of interviews**

246. As far as practicable interviews should take place in interview rooms which are adequately heated, lit and ventilated. People being questioned or making statements should not be required to stand.
247. Breaks from interviewing should be made at recognised meal times. Short breaks for refreshment should also be provided at intervals of approximately two hours, subject to the interviewer's discretion to delay a break if there are reasonable grounds for believing that it would prejudice the outcome of the investigation.
248. Any decision to delay a break in an interview should be recorded, with reasons, and duration, in the interview record.
249. Where an interview is adjourned for any reason and is to be resumed at the same place later the same day it should be sufficient for the person conducting the interview to inform the interviewee of the time of resumption and no notice in writing requiring attendance at that time should be necessary. The details of the adjournment must be noted in the interview record.
250. Where an interview is adjourned for any reason and is to be resumed either at a different place or on a different day the person conducting the interview should serve another notice under the disclosure order on the interviewee requiring them to attend at that place on that day.

#### **The interviewer's obligations at the interview**

251. At the beginning of the interview and immediately following any break, the person conducting the interview should then caution the interviewee as follows:

“You are required by law to answer all the questions I put to you unless you have a reasonable excuse for not doing so. If you fail,



without reasonable excuse, to answer a question or if you knowingly or recklessly make a statement which is false you will be committing an offence for which you may be prosecuted. Do you understand?"

252. The person conducting the interview must also inform the interviewee that this is not a criminal caution and any responses will not be used to incriminate the interviewee.
253. The person conducting the interview should, if asked to do so, produce evidence of their authority to require the interviewee to answer questions under the disclosure order.
254. The person conducting the interview may ask such further questions as appear to them to be necessary to ascertain the entitlement of any person to be present.
255. The person conducting the interview should ask the interviewee whether they suffer from any condition which may impair their ability to understand what is taking place or if they are due to take any medication before the time at which the appropriate officer estimates that the interview will end. The interviewee should be free to take medication during a routine break in the interview. When a break is to be taken during the interview, the fact that a break is to be taken, the reason for it and the time should be recorded.
256. The person conducting the interview should remember that it may be necessary to show to the court that nothing occurred during a break or between interviews which influenced the person's recorded evidence. After a break or at the beginning of a subsequent interview, the person conducting the interview should consider summarising the reason for the break and that nothing happened and confirming this with the person.
257. The person conducting the interview should pursue all reasonable lines of enquiry, whether these assist or undermine the investigation. What is reasonable will depend on the particular circumstances. The person conducting the interview should keep this in mind when deciding what questions to ask in an interview.
258. The person conducting the interview should offer the interviewee the opportunity to ask any questions to clarify the purpose, structure and conduct of the interview.
259. The person conducting the interview should not try to obtain answers or elicit a statement by the use of oppression or by doing or saying anything which is likely in the circumstance to render unreliable any confession which might be made by the interviewee as a consequence.
260. Before concluding the interview, the person conducting the interview should ask the interviewee if they have any complaint to make about anything which has taken place at the interview.
261. If a question and answer record has been taken of the interview because it was not tape-recorded, the person conducting the interview should afford the interviewee the opportunity to read the record. If the interviewee is for any reason unable to read the note or if the interviewee declines to do so the person conducting the interview should read, or cause it to be read aloud. The person conducting the interview should invite the interviewee to comment on the note and will add to it any comments made. The interviewee should be invited to sign the note. The person conducting the interview should then record the time in the presence of the interviewee. If the interviewee is unable for any reason to sign the note they may authorise any person present at the

interview to sign it on their behalf. Where the interviewee refuses to sign the note, or to have it signed on their behalf, the person conducting the interview should record that fact and any reason given for the refusal on the note and have the note countersigned by a senior officer.

262. Whenever this Code requires a person to be given certain information, they do not have to be given it if they are incapable at the time of understanding what is said to them, or are violent or likely to become violent or are in urgent need of medical attention, but they should be given it as soon as practicable.

### **Recording interviews**

263. Interviews should normally be recorded by recording media. Recording media is any removable, physical audio recording medium (such as magnetic type, optical disc, or solid state memory) which can be played and copied – it includes audio tapes, recordable discs and video tapes. A record of certain matters arising from the interview should also be made contemporaneously. The matters to be recorded in the note are listed at the end of this section.
264. Recording of interviews should be carried out openly to instill confidence in its reliability as an impartial and accurate record of the interview.
265. One form of record will be the master record which should be sealed before it leaves the presence of the interviewee. A second form of record will be used as a working copy.

### **Interviews to be recorded in writing**

266. The person conducting the interview may authorise that the interview is not recorded where it is not reasonably practicable to do so. This could be due to failure of the equipment or lack of a suitable interview room or recorder if the person conducting the interview has reasonable grounds for considering that the interview should not be delayed until the failure has been rectified or a suitable room or recorder becomes available.
267. In such cases the interview should be recorded in writing. In all cases, the person conducting the interview should make a note in specific terms of the reasons for not recording.
268. The written record should be made and completed during the interview, unless this would not be practicable or would interfere with the conduct of the interview, and should constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it.
269. If a written record is not made during the interview it should be made as soon as practicable after its completion.
270. Written interview records should be timed and signed by the maker.
271. If a written record is not completed during the interview the reason should be recorded in the record of interview.
272. Unless it is impracticable, the interviewee should be given the opportunity to read the record of interview and to sign it as correct or to indicate how they consider it inaccurate. If the interviewee cannot read or refuses to read the record or sign it, the

person conducting the interview should read it to them and ask whether they would like to sign it as correct or make their mark or to indicate how they consider it inaccurate. The appropriate officer should certify on the interview record itself what has occurred.

273. If the interviewee is unable for any reason to sign the note they may authorise any person present at the interview to sign it on their behalf.
274. If the appropriate adult or the interviewee's solicitor is present during the interview, they should also be given an opportunity to read and sign the interview record or any written statement taken down during the interview.
275. A written record should be made of any comments made by the interviewee, including unsolicited comments, which are outside the context of an interview but which might be relevant. Any such record should be timed and signed by the maker. When practicable, the interviewee should be given the opportunity to read that record and to sign it as correct or to indicate how they consider it inaccurate.
276. If the interviewee cannot read or refuses to read the written record of comments or sign it, the appropriate officer should read it to them and ask whether they would like to sign it as correct or make their mark or to indicate how they consider it inaccurate. The person conducting the interview should certify on the written record itself what has occurred.
277. When an interviewee agrees to read the record and other comments and sign them as correct, they should be asked to endorse the record and comments with, for example, "I agree that this is a correct record of what was said" and add their signature or mark. If the person does not agree with the record or comments, the appropriate officer should record the details of any disagreement and ask the interviewee to read these details and sign them to the effect that they accurately reflect their disagreement. Any refusal to sign should be recorded.

### **Commencement of interviews**

278. When the interviewee is brought into the interview room the person conducting the interview should without delay, but in the sight of the interviewee, load or start the recorder with clean recording media and set it to record. The recording media should, if possible, be unwrapped or otherwise opened in the presence of the interviewee.
279. The person conducting the interview should tell the interviewee about the recording process and state on the record that the interview is being recorded using recording media (identifying what that media is) and that the person will be given a notice about what will happen to the copies of the recording.
280. The person conducting the interview should:
  - inform the interviewee that he or she is the appropriate officer or has delegated authority to conduct the interview (under section 2C);
  - give his or her name and that of any other persons present (subject to the provision on pseudonyms of members of staff of the relevant Director under section 449A);
  - inform the interviewee of the purpose for which any person accompanying the person conducting the interview is present;

- ask the interviewee to state his full name and address and date of birth;
- ask any person present with the interviewee to state their name, business address<sup>41</sup> and capacity in which he or she is present;
- state the date, time of commencement and place of the interview;
- state that the interviewee has the opportunity to request legal and/or financial advice;
- state and obtain the confirmation of the reasons under paragraph 207 onwards for there being no legal representation if this be the case;
- inform the interviewee of their right:
  - o to consult in private at any time with any solicitor, qualified accountant or appropriate adult present with them at any interview;
  - o to be questioned fairly;
  - o to be given an opportunity at the end of the interview to clarify anything they have said or to say anything further if they wish; and
  - o to be allowed a break in any interview which lasts for more than two hours;
- inform the interviewee that the interview is being recorded;
- stated that they will be given a notice about what will happen to the recording media; and
- attempt to estimate the likely length of the interview.

281. For the purpose of voice identification the appropriate officer should ask the interviewee and any other people present to identify themselves.

282. If the interviewee is deaf or is suspected of having impaired hearing, the appropriate officer or the person assisting should make a written note of the interview, at the same time as the recording.

283. If the interviewee indicates that they want to tell an appropriate officer about matters not directly connected with the case and that they are unwilling for these matters to be recorded, the person should be given the opportunity to tell the appropriate officer at the end of the interview.

### **Objections and complaints by the interviewee**

284. If the interviewee raises objections to the interview being recorded either at the outset or during the interview or during a break in the interview, the person conducting the interview should explain the fact that the interview is being recorded and that the

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<sup>41</sup> If persons present do not have a business address (e.g. a parent), they should provide a home address.

provisions of this Code require that the interviewee's objections should be recorded. When any objections have been recorded or the interviewee has refused to have their objections recorded, the person conducting the interview has the option of turning off the recorder. If the person conducting the interview decides to do so, they should say that they are turning off the recorder, give their reasons for doing so and then turn it off. The person conducting the interview should then make a written record of the interview. If, however, the person conducting the interview reasonably considers that they may proceed to put questions to the interviewee with the recorder still on, the person conducting the interview may do so.

### **Changing recording media**

285. When the recorder indicates that the recording media have only a short time left to run, the person conducting the interview must tell the interviewee that the recording media are coming to an end and round off that part of the interview. If the person conducting the interview wishes to continue the interview but does not already have a second set of recording media, they should obtain a set. The interviewee should not be left unattended in the interview room.
286. The person conducting the interview should remove the recording media from the recorder and insert the new recording media, which, if practicable, should be unwrapped or otherwise opened in the interviewee's presence. The recorder should then be set to record on the new recording media. Care should be taken, particularly when a number of sets of recording media have been used, to ensure that there is no confusion between them. This may be done by marking the recording media with an identification number immediately after they are removed from the recorder.

### **Taking a break during interview**

287. When a break is to be taken during the course of an interview and the interview room is to be vacated by the interviewee, the fact that a break is to be taken, the reason for it and the time should be recorded on the recording media. The recording media should then be removed from the recorder and the procedure for the conclusion of an interview as set out in paragraph 292 below be followed.
288. When a break is to be a short one and both the interviewee and the person conducting the interview are to remain in the interview room, the fact that a break is to be taken, the reasons for it and the time should be recorded on the recording media. The recorder may be turned off. There is, however, no need to remove the recording media and when the interview is recommenced the recording should be continued on the same recording media. The time at which the interview recommences should be recorded on the recording media.

### **Failure of recording equipment**

289. Where the interview is being recorded and the media or the recording equipment fails, the appropriate officer should stop the interview immediately. Where part of the interview is unaffected by the error and is still accessible on the media, that media should be copied and sealed in the interviewee's presence and the interview recommenced using new equipment or media as required. Where the content of the interview has been lost in its entirety the media should be sealed in the interviewee's presence and the interview begun again.
290. If there is a failure of equipment, which can be rectified quickly, for example by inserting new recording media, the appropriate procedures set out in this Code must

be followed. When the recording is resumed the person conducting the interview must explain what has happened and record the time the interview recommences. If, however, it will not be possible to continue recording on that particular recorder and no replacement recorder or recorder in another interview room is readily available, the interview may continue without being recorded on recording media.

### **Removing recording media from the recorder**

291. Where recording media are removed from the recorder in the course of an interview, they should be retained and the procedure as set out below followed.

### **Conclusion of interview**

292. The person conducting the interview should inform the interviewee that they have no further questions and offer the interviewee an opportunity to clarify anything they have said and to say anything further they wish. Any solicitor, qualified accountant or appropriate adult present at the interview along with the interviewee, should be given the opportunity to ask the interviewee any question the purpose of which is to clarify any ambiguity in an answer given by the interviewee or to give the interviewee an opportunity to answer any question which they have refused previously to answer.
293. At the conclusion of the interview, including the taking and reading back of any written statement, the time should be recorded and the recorder switched off. The master recording media should be sealed with a master label. The person conducting the interview should sign the label and ask the interviewee and any appropriate adult and other third party present during the interview to sign it also. If the interviewee or the appropriate adult refuses to sign the label, the person conducting the interview should sign it and note on the label that the interviewee has refused to do so.
294. The interviewee should be handed a notice which explains:
- how the recording will be used; and
  - the arrangements for access to it.

### **After the interview**

295. If court proceedings are commenced, a copy of the recording media should be supplied as soon as practicable to the interviewee. Where the interview is not subsequently used in proceedings, the recording media should nevertheless be kept securely in accordance with the provisions below.

### **Recording media security**

296. A second recording will be used as a working copy. The master recording is either the two recordings used in a twin deck/drive machine or the only recording in a single deck/drive machine. The working copy is either the second/third recording used in a twin/triple deck/drive machine or a copy of the master recording made by a single deck/drive machine.
297. The purpose of sealing the master recording in the interviewee's presence is to show that the integrity of the recording is preserved. If a single deck/drive machine is used the working copy of the master recording should be made in the interviewee's presence and without the master recording leaving their sight. The working copy should be used for making further copies if needed.

298. An appropriate officer has no authority to break the seal on a master recording media where proceedings may result. The appropriate officer should make arrangements for master recordings to be kept securely and their movements accounted for. If it is necessary to gain access to the master recording media, the appropriate officer must arrange for its seal to be broken in the presence of another member of staff of the appropriate officer's employer. The interviewee or his legal adviser must be informed of the intention to break the seal on the master recording media and given a reasonable opportunity to be present. If the interviewee or his legal representative is present, they should be invited to reseal and sign the master recording media. If either refuses or neither is present another member of staff of the appropriate officer's employer must do this.
299. When the master recording seal is broken, a record should be made of the procedure followed, including the date, time, place and persons present. Where the interview is not subsequently used in proceedings, the recording media should nevertheless be kept securely.
300. Where no court proceedings result, it is the responsibility of the appropriate officer to establish arrangements for the breaking of the seal on the master recording media, where this becomes necessary.

#### **Particular record of action taken under a disclosure order**

301. In addition to the general provisions on taking records, the appropriate officer should also keep copies of notices in writing issued under a disclosure order (see section 357(4)) together with full details of their issue and response.
302. The record of an interview should contain the following, as appropriate
- a copy of the invitation to interview letter;
  - the date and place and time of the interview;
  - the time the interview began and ended, the time of any breaks in the interview and, subject to the provisions relating to pseudonyms of members of staff of the relevant Director, the names of all those present;
  - any request made for financial or legal advice, and action taken on that request;
  - that the person conducting the interview told the interviewee everything he was required to tell him or her under this Code;
  - the name of person(s) excluded from the interview room, and the reason for that decision; and
  - the presence of an interpreter, and the reason for this.
303. In respect of interviews conducted under the authority of section 357(4)(a), the record of the interview should be held with a transcript of the interview. Documents produced at the interview should also be listed on a note of the action taken under disclosure order. Receipts should be given to the interviewee and this should also be recorded.

## Obtaining evidence from abroad

304. Section 375A makes provision for evidence to be obtained from overseas if a person or property is subject to a civil recovery investigation, detained cash or property investigation, or a frozen funds investigation. Detained property investigations and frozen funds investigations are not available in Northern Ireland. This process should be used to obtain “relevant evidence” as defined in section 357A(5).
305. A judge may request overseas assistance as a result of an application by an appropriate officer or a person subject to the investigation if the judge thinks there is relevant evidence in a country or territory outside the United Kingdom. Alternatively, the relevant Director (or, in England and Wales only, a SFO officer) may request overseas assistance, directly and without making an application to a judge, if they believe that there is relevant evidence in a country or territory outside the United Kingdom.
306. The appropriate officer should ensure that there is material supporting his or her belief that there is relevant evidence overseas.
307. “Relevant evidence” depends on the type of investigation for which evidence is being requested:
- in relation to a civil recovery investigation, evidence is relevant for the purposes of identifying recoverable property or associated property, and includes whether property is or has been recoverable property or associated property, who holds or has held property, what property a person holds or has held, or the nature, extent or whereabouts of property;
  - in relation to a detained cash or property investigation, evidence is relevant for the purposes of investigating the derivation of the cash or property, or part of it, or whether it, or part of it, is intended by any person to be used in unlawful conduct; and
  - in relation to a frozen funds investigation, evidence is relevant for the purposes of investigating the derivation of money held in a frozen account, or part of it, or whether it, or part of it, is intended by any person to be used in unlawful conduct.
308. Requests for assistance may be sent by a judge, or the relevant Director to the Government of the country or territory concerned, or any authority recognised by the Government of the country or territory concerned as being appropriate for receiving requests, or a court or tribunal which is specified within the request and which exercises jurisdiction in the place where the evidence is to be obtained.
309. Alternatively, a request may be sent to the Secretary of State who should forward the request to the court, tribunal, Government or authority in the country or territory concerned.
310. In the case of urgency, a request may be sent via the International Criminal Police Organisation (Interpol or Europol) or any person competent to receive it under any provisions adopted under the EU Treaties, for onward transmission to a court, tribunal, Government or authority in the country or territory concerned.



311. Section 375B(3) provides that evidence obtained by means of a request for assistance cannot be used for any purpose other than for the purposes of the investigation for which it was obtained or for the purposes of certain proceedings (or any proceedings arising out of such proceedings). However, the court, tribunal, government or authority that received the request and provided the evidence can consent to the use of the evidence for other purposes.

