

# Court upholds Serious Fraud Office procedures on seized privileged material

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In the recent case of *R (Colin McKenzie) v Director of the Serious Fraud Office ("SFO")*, the Court has held that the SFO's procedures for reviewing potentially privileged documents seized in the investigation of suspected crime are lawful.

## Background

In June 2015, the Claimant ("Mr McKenzie") was arrested at Heathrow Airport on suspicion of conspiracy to commit an offence under the Bribery Act 2010. At the time of the arrest the police seized various electronic devices, later securing further devices by way of statutory request. The SFO notified Mr McKenzie's solicitors in August 2015 that it believed some of the devices may contain some material subject to legal professional privilege ("LPP"). Mr McKenzie's solicitors subsequently informed the SFO that LPP material was stored on all of the seized devices.

The SFO's policy for dealing with LPP material is contained in its Operational Handbook. In summary, the Handbook provides that digital material that potentially contains LPP material will be loaded onto a review system that cannot be accessed by the team conducting the criminal investigation. Using search terms supplied by the owner of the material, in-house staff at the SFO identify the potentially privileged documents before sending them for review by an independent LPP lawyer. Following the review, any LPP material will be extracted and only non-LPP material will then be made available to the investigation team.

Mr McKenzie argued that it was unlawful for the SFO to use in-house technical staff to initiate the electronic search of seized devices for the purpose of isolating potential LPP material for subsequent review by independent counsel. Mr McKenzie argued that the process for isolating files that may contain LPP material into an electronic folder for review by an independent lawyer must itself be carried out by individuals who are independent of the SFO. By using in-house staff, it was argued, the SFO unnecessarily exposes the person to whom LPP attaches to a risk that LPP material may come to the knowledge of the investigating team. Mr McKenzie applied for permission to apply for judicial review of the SFO's procedures.

## Decision

The Judge dismissed the application. The Judge did not accept the argument that the Handbook was inconsistent with guidance issued by the Attorney General in the form of Guidelines on Disclosure and, in particular, an annex to the Guidelines entitled "Supplementary Guidelines on Digitally Stored Material (2011)". The Guidelines and its Annex did not require prosecuting authorities to use lawyers independent of that authority for the initial search identifying potentially LPP material. In any event, the Guidelines do not purport to be a statement of law.

The court further held that the case of *Prince Jefri of Bolkiah v KPMG* did not assist Mr McKenzie. In the *Bolkiah* case, the House of Lords established the rules relating to LPP, which apply when a solicitor accepts instructions to act against his former client. In these circumstances, the solicitor is required to satisfy the court that there is no real risk of disclosure of LPP material.

The court in this case refused to apply the same onerous "no real risk" test to the SFO's procedures. It was inappropriate to equate a public body exercising statutory powers in connection with suspected crime with a solicitor who proposes to act against a former client. A seizing authority has a duty to operate procedures that can reasonably be expected to be successful in isolating potential LPP material from material in its possession without members of the investigating team, having sight of the privileged documents. The SFO Handbook satisfied this lesser duty.

## Conclusion

It was common ground that LPP is an important right "jealously guarded by the common law." However, the court was not prepared to impose on the SFO or any prosecuting authority the same onerous duty as was placed on solicitors in respect of former clients. The SFO's policies for dealing with LPP material were held to be lawful.

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