

WHEN THE REGULATOR CALLS



ALL KINDS OF AUTHORITIES CAN COMPEL YOU TO GIVE THEM ACCESS TO YOUR INFORMATION. SO MAKE SURE YOU'RE PREPARED FOR THE DAWN RAID, SAYS SARAH GABRIEL OF PETERS & PETERS.

Many of you will have seen the headlines in the middle of July "EU raids mobile phone firms". We all now live in a regulated world. It is not just the police who can arrive unannounced. There are a whole variety of agencies that can ask you to provide information and documentation and which can appear bright and early one morning demanding immediate access to your records.

This is a brief overview of the type of powers available to a range of authorities. We will concentrate on the types of practical procedures you need to put in place to deal with such an eventuality. This will enable you to respond quickly and effectively to manage the potential adverse consequences to your business, should that knock on the door ever come.

DEPARTMENT OF TRADE & INDUSTRY. Inspectors appointed by the Department of Trade & Industry (DTI) have various compulsory powers to obtain information and documents. If they have good reason, they can gain access to any or all of a company's books and records at any time. They can take copies away with them and require officers and employees to provide explanations of them. If a company refuses to co-operate, or there is a fear that records will be destroyed, the inspectors can obtain a warrant from the Court authorising them to search premises and seize documents. The DTI also has the power to assist overseas regulatory authorities in connection with that authority's enquiries.

THE SERIOUS FRAUD OFFICE. The Serious Fraud Office is responsible for the investigation and prosecution of offences involving serious or complex fraud. It has extensive powers to serve written notices requiring not only suspects, but also anyone who they have reason to believe has relevant information, to answer questions and produce documents. They can also apply for a search warrant if they believe that a notice would be ineffective.

FINANCIAL SERVICES AUTHORITY. Under the Financial Services & Markets Act, passed in June 2000, which comes into force on 1 December 2001, the Financial Services Authority (FSA) will act as the sole regulator for the financial services industry. Not only will the

FSA be able to require information and documents to be provided by companies themselves, it will also be able to require reports from skilled persons, most obviously accountants, to be produced. The expense of this could be considerable.

The FSA will be able to appoint investigators to carry out either general or specific investigations. The investigators' powers will depend on the particular purpose for which they are appointed. At their widest they will be able to require anyone they believe may be able to give information which may be relevant to the investigation to attend to answer questions, provide documents or information and give all assistance in connection with the investigation that can reasonably be given. The investigator will also be able to apply for search warrants.

THE INLAND REVENUE AND CUSTOMS & EXCISE. Both bodies have very wide powers of investigation and are able to require the subject of their investigations and third parties to deliver up information and documentation. Both organisations, however, are

WHEN THE CALL COMES – KEY POINTS

KNOW WHO WILL TAKE CHARGE AND GET RECEPTION TO CONTACT HIM/HER ASAP

GET FORMAL ID AND A COPY OF THE WARRANT

GET APPROPRIATE LEGAL ADVICE QUICKLY

BE CAREFUL WHAT YOU SAY

MAKE NOTES OF CONVERSATIONS

STOP AUTOMATIC FILE DESTRUCTION PROCEDURES

IDENTIFY PRIVILEGED MATERIAL

PUT PR STRATEGY INTO OPERATION

unlikely to rely on serving notices to obtain information from suspects if they believe fraud is being committed. In those circumstances, they are much more likely to obtain a warrant, allowing them to enter premises and search and seize documents relevant to their investigation.

THE OFFICE OF FAIR TRADING. The regulator has wide powers to investigate if there are reasonable grounds for suspecting that the prohibitions against restricting competition and abusing dominant market position have been infringed. In such circumstances, production of specified documents or information from third parties including suppliers, customers and competitors can be required. Information to be provided extends to that which is not already in recorded form. You may, therefore, find yourself having to produce reports which you would not otherwise have created. The Director General can authorise entry of premises without a warrant if sufficient notice is given, but the OFT can also obtain warrants. The Director General may also obtain warrants to assist in European Commission investigations.

The above list of authorities is not meant to be exhaustive, but merely to illustrate that there are a whole range of regulators which could seek to obtain documents and information from your business. As the recent headlines made clear, it is not just fly-by-night companies engaging in scams which are vulnerable to such procedures: household names and large plcs are also at risk.

PRACTICAL CONSIDERATIONS. Dealing with any form of notice or order that gives you time to comply is easy, as you always have an opportunity to take advice. Make sure that you do, though, as compliance is rarely straightforward and commonsense is not always enough. Take, for example, a written Opinion you have received from Counsel on a technical tax issue. If a notice is served by the Inland Revenue seeking delivery up of documents relating to that issue, you have to hand over the Opinion, even though it is legally privileged. However, if the Revenue executed a warrant at your premises, they would not be entitled to take that same document.

Dealing with the execution of a warrant is more difficult. Thinking about the possibility in advance and having a structured procedure in place is invaluable should such an unwanted intrusion ever occur.

Your receptionists will be first in the line of fire. They must know who to call and have home contact details and mobile telephone numbers at hand, as it is likely that any warrant will be executed first thing in the morning.

They should also know to ask those attending to move out of the public reception area and into a meeting room to avoid alarming customers and employees.

Someone must take charge quickly. Formal identification should be sought and noted, and a copy of the warrant obtained.

If a warrant is valid, it gives those in possession of it a right to search your premises and anyone impeding this would be guilty of obstruction. However, you need to get legal advice quickly, as the warrant may be defective. You must, therefore, know how to get hold of your lawyers in an emergency.

It is sensible to find out in advance whether your usual solicitors have any experience in dealing with these types of matters. Pulling your property lawyer out of the shower at 7am is unlikely to be of much help to you. You need someone experienced on the scene quickly so they can review the warrant with a view to establishing whether there is any basis for challenging it.

'BE CAREFUL WHAT YOU SAY. IT IS SURPRISING HOW OFTEN UNGUARDED ANSWERS TO APPARENTLY INNOCUOUS QUESTIONS COME BACK TO HAUNT'

Be careful what you say. It is surprising how often unguarded answers to apparently innocuous questions come back to haunt. Again, take advice, as you need to understand properly the extent of the co-operation you need to give and the use that can be made of any answers given. Make a note of any conversations you do have.

Most warrants will not allow legally privileged material to be removed. Alerting those executing the warrant to where this material is held and isolating it quickly is important.

You may be asked to consent to extensions to the warrant. A common example is where files are held in distant storage facilities, not named specifically on a warrant. In addition, certain warrants will specify the time during which those executing it are allowed to remain on the premises. Again, you may be asked to agree to longer hours. You must be very careful before giving any such consent. For example, if you are holding confidential documents belonging to someone else, you may well have a defence to any claim they could bring against, for example, for breach of confidence, if those documents were seized by compulsion. If you agree to extend the warrant in any way, that seizure may become consensual and your defence to that claim may fall away.

If you have automatic file destruction procedures in place, they need to be halted straightaway. Nothing could be worse than individuals found shredding documents while a warrant is being executed.

Similarly, think about how your computer systems operate and what material is regularly deleted. Do not forget what those with distant access may be doing. In all likelihood, those searching will want to image your computers' hard drives. This is time-consuming and you will need someone present who is familiar with how your system operates.

You also need an internal strategy for dealing with PR. Large scale operations often attract press attention and you should decide early on what, if anything, you are going to say. You should ask your solicitors to review press releases before they are issued.

In addition, the board and senior management need to be kept fully informed and you must decide what your employees and customers are told. Avoiding a rumour mill springing into action is critical to the operation of your business.

Speed in relation to all of these matters is of the essence. The powers available to different authorities are, in detail, quite distinct. Understanding the exact powers being used and the limits on them is crucial. You will need expert help and you should make sure that you take it quickly.

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