

Checklist for solicitors served with a statutory notice to produce client documents

This checklist has been developed through the Queensland Law Society Ethics Centre for the assistance and guidance of solicitors who receive a statutory notice from a body such as the Crime and Corruption Commission (CCC) or a trustee in bankruptcy requiring you personally to provide documents relating to a current or former client's matter.

There are many such bodies having the power to issue such notices. Each has its own differing legislative provisions and you are unlikely to be familiar with the relevant law and procedures, but the checklist is no substitute for your detailed consideration of the applicable law. Because of the range and diversity of these provisions, the checklist can only provide generic suggestions as to how to deal with this situation.

The aim of the checklist is to assist you to act ethically and within the law in complying with the notice and protecting the interests of your client or former client.

These are not rules to be slavishly followed and you will need to use your professional judgement as to which steps need to be taken, when and in what order. Relevant factors may include, for instance:

- the time needed to retrieve documents from off-site storage;
- the difficulty of establishing whether documents can be withheld on the grounds of confidentiality, legal professional privilege or some other privilege;
- whether you can get instructions from a former client; and
- whether the client or former client already has, or instructs, a solicitor for the matter in question.

If the client has a solicitor for the matter many of the checklist steps may be dealt with by that other solicitor, in particular assertion of claims of confidentiality and privilege, and you may simply follow the client's instructions provided through that solicitor, subject to your personal obligation to comply with the notice.

In the absence of instructions to waive confidentiality or privilege (for instance if you cannot contact a former client) you will have a duty to the client to protect their interests by asserting all available claims, as your duty to maintain confidentiality and privilege continues indefinitely.

Usually, a notice will state a reasonable period for compliance, typically 14 or more days, and this checklist is primarily intended for such notices. It is rare for a notice to require immediate production of the documents, but this can occur, for example under s 74A(3) [Crime and Corruption Act 2001](#) (CCA). In such an instance, it is to be hoped that the serving body will have a set procedure for dealing with claims of confidentiality or privilege, or that the legislation will provide for this (as in ss 78A-C of the CCA). Otherwise, one approach would be to make a blanket claim of privilege over all files and documents to which the notice might apply and (after taking photocopies for your later reference) have the originals placed in a sealed container and delivered to the court or an independent third party, pending your seeking instructions and considering the position more fully. The Queensland Police Service and Australian Federal Police each have procedures for dealing with execution of search warrants on solicitors' premises and these procedures may be a useful guide in these circumstances in the absence of any other specific procedures – details of these procedures are contained in the document referred to in the next paragraph.

Note: This checklist is to be read in conjunction with the FAQ [‘Search Warrants and Statutory Notices to Produce’](#) on the QLS Ethics Centre Website.

Checklist

1. Check and record (photocopy) details of proof of identity of the persons attending with the notice (if the notice is served in person for immediate execution).
2. Note and diary the date for compliance.
3. Check the validity of the notice against the requirements of the legislation. (If you have any doubts, raise these with the serving body and/or do your own legal research on the question and/or seek expert legal advice).
4. Contact your client or former client. You should first ensure that there is no statutory provision that prohibits you from disclosing details of the notice to your client (this is rare and the notice should make this clear, but if necessary check the relevant legislative provisions and/or seek confirmation of this from the serving body).
 - a. Send them a copy of the notice, explain its terms and your obligations under the notice (and stress any deadlines for compliance with the notice);
 - b. Ask if they already have a solicitor for the matter or intend to instruct one, and if so ask them for contact details or to have their solicitor contact you urgently; and
 - c. Seek their instructions about waiver of confidentiality or any privilege, if such claims are available. This step may be premature. You should ultimately be in a position to advise them about these issues if they don't have a solicitor, don't intend to instruct one and wish to assert these claims if available. However, at this early stage, prior to assembling the documents and considering the availability of these claims and their application to the specific documents, you may not be in a position to provide the advice needed to seek informed instructions, in which case simply tell the client that these claims may be available, and that you will be considering this and will advise further in due course (step 11). In seeking instructions for waiver of available claims you should consider and advise as to any potential detriment to the client in doing so. This may require detailed knowledge of the matter and the background and may be best dealt with by referral of the client to a specialist solicitor, for instance a criminal solicitor in the case of a notice from the CCC.
5. Get together all files and documents (including archived files and documents) to which the notice may apply. Then go through these to identify which specific documents are covered by the notice. (If the files are extensive, and even though the notice may be in general terms and specify a wide range of documents, you may be able to establish by contacting the serving body that they are really only interested in a few particular documents).
6. Give the client or their solicitor copies of the documents. Send the documents or have the client come in to your office to go through the documents. If they have a solicitor for the matter, get the client's written authority to forward a copy of the documents to their solicitor. Of course, you should not give them or their solicitor the original documents until you have fully complied with the notice and received confirmation of this from the serving body (step 21).
7. Consider the law applicable to the notice. Note the statutory provisions relied on in the notice, especially the particular section requiring you to produce the documents. If the notice is not clear as to what statutory provisions are relied on or their effect, seek clarification from the serving body. Get up-to-date copies of all provisions referred to in the notice, and any other relevant

provisions – see www.legislation.qld.gov.au (for Queensland legislation) or www.austlii.edu.au (for federal legislation). Look for any relevant provisions that deal with potential claims of confidentiality, legal professional privilege or other privilege such as the privilege against self-incrimination (you might search the statute using ‘key words’ such as ‘confidential’, ‘privilege’, ‘incriminate’ and ‘excuse’ (as in ‘reasonable excuse’)). Also look for any relevant provisions that say how a claim of confidentiality or any privilege is to be dealt with (for instance the process described in sections 78A-78C of the [Crime and Corruption Act 2001](#)).

8. Decide if there are grounds to refuse production of certain documents. Establish in your own mind the legal position for potential claims of:
 - a. confidentiality (usually will not be available);
 - b. legal professional privilege (usually will be available); and
 - c. other privileges such as the privilege against self-incrimination (including whether any of the exceptions to confidentiality or privilege apply).

Do this through your own legal research (see ‘Legal Research Suggestions’ below) or by seeking expert legal advice.

9. You may ask the serving body for their views generally on the legal position for these potential claims, and at the same time ask about their usual practice or any protocols or procedures to deal with such claims (especially where the legislation does not specifically provide for this).
10. Sort the documents according to any available claims.
11. Provide the client with further advice about availability of these claims and seek their instructions, directly or through their solicitor, about waiver of confidentiality or any privilege which might be claimed. Refer back to step 4c.
12. Tell the serving body that you are seeking instructions and if necessary ask for an extension of time to comply with the notice.
13. If you do not have current contact details for a client or former client (or this is in doubt as for instance where they are not responding to your communications) and so you are not able to obtain instructions about waiver, tell the serving body this, and ask if they have any current contact details including details of the client’s current legal representation. As noted in the Introduction to this checklist, in the absence of instructions you will need to proceed as though you have instructions to assert and maintain any available claims for confidentiality or any privilege.
14. If the client’s instructions conflict with your view of your personal legal obligations under the notice, for instance if they instruct you not to produce any documents when you have formed the view that certain documents have to be produced, your personal interests will be in conflict with the client’s and you should strongly recommend that they urgently obtain their own legal advice about the issue, if they have not already done so. Where these instructions are provided through their solicitor, you may need to put them on notice that you will be producing the documents to the serving body on a set date and invite those solicitors to apply in advance of that date for a court ruling. A similar approach may be taken where the client will not instruct another solicitor. A client’s instructions cannot override your legal obligations to comply with the notice but if your judgement on the issues (the application of privilege to a particular document for instance) is wrong you may be liable to your client for breach of duty.
15. Give the serving body those documents that you are required to give and that are not subject to claims of confidentiality or any privilege.
16. Give the serving body details of any documents over which you are instructed to claim confidentiality or any privilege, stating the claim(s) made for each document. In order to avoid

disclosing confidential or privileged details, you might give the sort of details normally given for privileged documents on discovery in civil proceedings – see [UCPR Form 19 List of Documents](#).

17. Ask the serving body if they accept the claims or intend to apply to a court for a ruling on the claims.
18. Ask for a review. If the serving body does not accept your claims, ask if they have a process for review of this decision, and if there is, ask for a review (if so instructed).
19. Apply to the relevant court. If the serving body will not accept your claims and will not apply to the court, then you (or the client's current solicitor), if so instructed, will need to apply to the relevant court for a ruling on those claims. This should be done within the time limit for compliance in the notice or any extension granted. Give the serving body prior notice of your intention to apply, as time permits.
20. Comply with the notice in its terms and in accordance with any court rulings obtained.
21. Obtain written confirmation from the serving body that you have fully complied with the notice, and report this to your client. (If at the conclusion of this process you still hold original documents, you may wish to advise your client of their entitlement to these).
22. Keep records. In case of a later query or complaint, ensure you keep all documents relating to this process including the notice, correspondence, file notes of telephone conversations and copies of any original documents produced. Ensure in particular that you have kept details of what documents were produced – this may be in list form or detailed in the letter forwarding the documents.

Legal Research Suggestions

- Look at the details and documents referred to in the Ethics FAQs section '[Search Warrants and Statutory Notices to Produce](#)' on the QLS Ethics Centre Website, in particular the FAQ about statutory notices.
- Send a [Research Request](#) to the Supreme Court library. You might ask for details of any commentary or cases on the particular sections of the legislation referred to in the notice and any others that you have determined may be relevant, or any similar provisions in the same piece of legislation.

For further assistance, contact Ethics Solicitors in the Ethics Centre on 07 3842 5843.

Stafford Shepherd

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(This checklist was previously issued by the Ethics Centre in April 2010 and has been revised to include update links and legislation).