

The following is section 2.8.5 of the Queensland Police Service's Operational Procedures Manual, current February 2009.

“Execution of search warrants on premises of lawyers

Legal professional privilege

PROCEDURE

Certain oral and written communications between lawyers and clients are immune from examination by virtue of legal professional privilege. The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.

The privilege attaches to confidential communications passing between:

- (i) A client and the client's legal advisor for the dominant purpose of obtaining or giving legal advice (legal advice privilege) and;
- (ii) A client and the client's legal advisor and third parties for the dominant purpose of use in, or in relation to, litigation which is either pending or in contemplation (litigation privilege).

The privilege does not extend to advice sought or given in the furtherance of, or to facilitate, criminal, fraudulent or other unlawful purposes. Whether or not the lawyer was a party to, or ignorant of, those purposes is immaterial. The client's purpose is the relevant factor.

Communications falling outside the privilege are not limited to those in pursuit of a crime or fraud, but extend to communications in pursuit of an illegal or improper object. Courts have held that the exception covers a range of legal wrongs that have deception, deliberate abuse of, or misuse of legal powers or deliberate breach of a legal duty at their heart.

Any document to which legal professional privilege applies and in respect to which a determination has been made by the issuing authority may not be retained or examined by an officer, either to produce as evidence or to use in the course of an investigation.

Executing warrants generally

PROCEDURE

In circumstances where a claim of legal professional privilege is raised by a claimant as a result of the execution of a search warrant, officers should:

- (i) record the number of pages of the document(s) and place the document(s) subject to the claim of legal professional privilege in a sealed container;
- (ii) obtain from the claimant:
 - (a) a description as to the nature of each document placed in the sealed container; and
 - (b) the grounds upon which the claim is based. The answers provided by a claimant should be recorded.
- (iii) ensure the container is sealed in the presence of the claimant. The sealed container should then be signed by both the investigating officer and the claimant;

- (iv) advise the claimant that the documents have been seized provisionally and will be dealt with in accordance with the law;
- (v) ensure that anything seized is dealt with as prescribed by the Act under which the warrant was issued and place an endorsement on the executed warrant that the documents are subject to a claim of legal professional privilege; and
- (vi) within 30 days deliver the sealed container to a Justice of the Peace (Magistrates Court) or a Magistrate, who may make a determination in accordance with s. 695 : 'Application for order in relation to seized things' of the *Police Powers and Responsibilities Act* as to whether the documents are subject to legal professional privilege. The Magistrate may also direct who will have custody of the documents.

Where a Justice of the Peace, (Magistrates Court) or a Magistrate cannot be located, the sealed container subject to the claim of legal professional privilege should be delivered to a clerk of the court pending a determination by the Justice of the Peace (Magistrates Court) or Magistrate.

The officer who delivers the sealed container to a clerk of the court, Justice of the Peace (Magistrates Court) or Magistrate for a determination is to advise, as soon as practicable:

- (i) the officer in charge of police prosecutions corps for the magistrates court district in which the determination is to be made; and
- (ii) the commissioned officer in line command of that officer so as to consider whether the matter should be directed to the Director of Public Prosecutions.

Executing warrants on lawyers' premises

ORDER

Officers intending to search the premises of a lawyer for documents are to prepare the search warrant and grounds upon which it relies in terms which are as specific as possible. Officers are to ensure warrants and grounds are not prepared in vague or generalised terms, but are to, as far as is possible, identify the specific documents sought (see s: 150 'Search warrant application' of the *Police Powers and Responsibilities Act*).

If the application for the warrant is to be made to a magistrate in accordance with s.150 of the *Police Powers and Responsibilities Act*, the application is to indicate that a direction is required in the warrant by the magistrate for the person in possession of the documents to give all documents relevant to the offence for which the warrant is sought to police.

Officers intending to search the premises of a lawyer are to obtain the warrant from a Magistrate unless otherwise required to obtain the warrant from a judge or Supreme Court judge.

PROCEDURE

After obtaining a search warrant for the premises of a lawyer, the following steps should be taken in the execution thereof:

- (i) on arrival at the lawyer's premises, the senior officer present should explain the purpose of the search and invite the lawyer to cooperate with police in the conduct of the search. Identification of all officers present should be provided to the lawyer. Officers and persons comprising the search team should be kept to a minimum;
- (ii) if no lawyer is in attendance at the premises, then, if it is practicable to do so, the premises or that part of the premises which is of interest should be sealed and the execution of the warrant deferred for a reasonable period consistent with the prevailing circumstances to allow attendance of a lawyer;
- (iii) if access to the office index system is required, request the lawyer to explain how the system functions so that all necessary documents can be located with a minimum of disturbance;
- (iv) generally, the documents required by the officer will normally be located by the lawyer. The lawyer should compile a list of the documents showing:
 - (a) general information as to the nature of each document; and
 - (b) the number of pages in each document;
- (v) a reasonable time should be allowed for the lawyer to obtain legal advice where such a request is made;
- (vi) a reasonable time should be allowed for the lawyer to consult with any client/s;
- (vii) if a claim for privilege is made by the lawyer concerning the documents, the officer should ask the lawyer on whose behalf and on what grounds the claim is made. The answers to these questions should be recorded;
- (viii) if a claim for privilege is made concerning any of the documents, the list made by the lawyer should be noted and the documents placed in a sealed container which should then be signed by both the officer and the lawyer. The lawyer should be advised that the documents are provisionally seized pursuant to the search warrant and will be dealt with in accordance with the law;
- (ix) if a claim of privilege is made concerning any of the documents; the senior officer present and the lawyer should then deliver the sealed container, the list prepared by the lawyer and the executed search warrant forthwith to the Magistrate, or if applicable, judge or Supreme Court judge who issued the warrant;
- (x) where a claim of privilege is made concerning any of the documents the issuer will also direct who will have custody of the documents; and
- (xi) advise the lawyer from whom the documents were seized that they may inspect any of the documents held in the custody of police in accordance with the provisions of s. 623: 'Right to inspect seized documents' of the *Police Powers and Responsibilities Act*.

Action where lawyer uncooperative

PROCEDURE

The steps outlined above have been developed after consultation with the Law Society and Bar Association and those organisations have distributed guidelines to their members. As such, an officer who executes a search warrant on the premises of a lawyer could expect the cooperation of the lawyer to the extent indicated previously in this section.

POLICY

Where a lawyer elects not to cooperate with an officer in the execution of a warrant, the officer should advise the lawyer that the search will proceed in any case. The lawyer should also be advised that because the officer is not familiar with the office index system, a search of all files and documents in the office may be necessary to give full effect to the authority conferred by the warrant.

Where the lawyer still refuses to cooperate and does not claim privilege, or refuses to cooperate and claims privilege, the search should go ahead with the following conditions:

- (i) the lawyer should be advised that a document will not be seized unless, in the opinion of the officer, it falls within the scope of the warrant; and
- (ii) during the course of the search, any document located which may be subject to a future claim for privilege should be brought to the attention of the lawyer and should be dealt with in accordance with the provisions outlined above.”