



Search Warrant Guidelines Between Queensland Law Society and The Queensland Police Service

Search Warrants Executed on Solicitors' Premises

February 2017



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Version 1 | February 2017

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Funded from the Law Claims Levy Fund.

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Objective

These guidelines have been developed between Queensland Law Society and the Queensland Police Service in consultation with the Queensland Courts. The guidelines have been developed to address issues that may arise when a search warrant issued pursuant to the *Police Powers and Responsibilities Act 2000* (Qld)(PPRA) is executed on a solicitor's premises.

The objective of the guidelines is to provide clear protocols in relation to warrant evidence or property, including hard copy documents and forensic copies when:

- An application for a search warrant on a solicitor's premises is made;
- A search warrant is executed on a solicitor's premises;
- A claim for legal professional privilege (LPP) is raised;
- A determination is sought from the court in relation to LPP.

Scope

Section 157(1)(h) of the *PPRA* allows for the seizure of a thing found during the execution of the search warrant if the police officer reasonably suspects that it may be warrant evidence or property. Further, it is accepted that making a forensic copy falls within the definition of seize.¹ Making a forensic copy or seizure of a document without it being read will not infringe LPP.²

The parties acknowledge that the forensic copy of the stored information may contain inextricably linked material that is subject to a claim of LPP and it is important to implement guidelines that will protect documents that may be subject to a claim of LPP from disclosure.

In order to comply with a lawful search warrant, stored information may be copied under section 154(1)(b)(iii) of the *PPRA*, when this provision is relevant.

The parties acknowledge that the administration of justice requires that the Queensland Police Service is able to investigate possible criminal offending without undue obstruction or delay.

Legal professional privilege is a rule of substantive law.³ The privilege is held by the client of the solicitor, as it exists for the benefit of the client. It is the duty of a solicitor to claim privilege; only the client has the power to waive privilege. The *PPRA* does not abrogate legal professional privilege. A document that is subject to confidentiality, but is not legally privileged, can be compelled under the *PPRA*.

¹ Seize is defined in the *PPRA*, Sch 6. Sections 618 and 619 *PPRA* provides further clarification on power to examine a thing seized.

² See for example *JMA Accounting Pty Ltd and Anr v Commissioner of Taxation and Ors* [2004] FCAFC 274, [13].

³ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Baker v Campbell* (1983) 153 CLR 52; *Commissioner of Australian Federal Police and Another v Propend Finance Pty Limited and Others* (1997) 188 CLR 501.

Limitations

These guidelines do not constitute legal advice and Queensland Law Society recommends practitioners exercise their experience and judgement in applying the guidelines to particular matters at hand. The guidelines are not all-encompassing and are not an exhaustive list of every issue that may arise in relevant matters. Practitioners and the Queensland Police Service may need to adapt the guidelines to address individual circumstances. In particular, time periods are provided as a guide only and may be negotiated between the parties depending on the circumstances of the case. If further searches of the forensic copies need to be carried out by the Queensland Police Service and there are documents subject to LPP, Queensland the Police Service will need to consult the holder of the LPP.

These guidelines are not a replacement for legal training or engaging qualified legal practitioners or other professionals. These guidelines are designed to identify and draw attention to some key issues which may arise in matters. The guidelines do not cover:

- Whether material seized falls within the scope of the warrant;
- The reasonableness of the search and/or seizure;
- Whether the warrant was validly issued;
- Any other issues dealing with the validity of the warrant itself, or the execution of the warrant.

Terminology

access information means information of any kind that it is necessary for a person to use to be able to access and read information stored electronically on a storage device.⁴

Client includes a former client

document includes—

- a. any paper or other material on which there is writing; and
- b. any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
- c. any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).⁵

executing officer means the police officer in charge of executing the warrant

forensic copy means an electronic copy of documents stored electronically

full copy means a copy of all the stored information on a storage device (see guideline 3.3.3)

full inspection copy means a copy of the full copy (see guideline 3.3.4)

LPP forensic copy means a forensic copy of material over which LPP has been claimed before forensic copying (see guideline 3.3.1)

LPP inspection copy means a second copy of the LPP forensic copy (see guideline 3.3.4)

storage device means a device of any kind on which information may be stored electronically⁶

stored information means information stored on a storage device⁷

warrant copy means a separate forensic copy of warrant evidence or material that is not subject to LPP (see guideline 3.3.2)

warrant evidence or property means the evidence or property mentioned in section 150(1) for which a warrant is issued under section 151⁸

⁴ *PPRA*, s 154(2).

⁵ *Acts Interpretation Act 1954* (Qld), schedule 1.

⁶ *PPRA*, s 154(2).

⁷ *PPRA*, s 154(2).

⁸ *PPRA*, s 150AA.

Guidelines

1. Application for a Search Warrant on a Solicitor's Premises

- 1.1 The application for a search warrant on a solicitor's premises must be made to a magistrate, unless the warrant must be made to a Supreme Court judge under section 150(3) or (4) of the *PPRA*.⁹
- 1.2 If the application includes an order requiring a person to give a police officer stated documents under section 153 of the *PPRA*, the application must include the name or position description of the person, a description of the documents and information about breaching such an order as set out in section 156(3) of the *PPRA*.¹⁰
- 1.3 If the application includes an order to access information, accessing a storage device and copying stored information under section 154 of the *PPRA*,¹¹ the warrant must include such an order and information about breaching such an order as set out in section 156(3) *PPRA*.
- 1.4 When the search warrant relates to documents and/or stored information, the police officer must provide the magistrate with information on the method that will be applied by the police officers executing the warrant¹² to determine whether there is a reasonable suspicion that the thing (e.g. document or stored information) may be warrant evidence or property.¹³
- 1.5 When applying for a search warrant the police officer must provide the magistrate with information on the process that will be implemented to ensure that, as far as possible, documents that may be legally privileged and/or irrelevant documents will not be forensically copied with other warrant evidence or property.

Example:

A specific police officer will be appointed to liaise with the solicitor over issues relating to legally privileged material. The police officer will provide information on the search and seizure of hardcopy documents and the forensic copying process. This will include information on whether it is feasible to implement partial forensic copying.

2. Execution of a Search Warrant on a Solicitor's Premises

Upon execution of a search warrant on a solicitor's premises the police officer in charge of executing the search warrant (executing officer) should follow guidelines 2.1-2.7.

- 2.1 If no solicitor is in attendance at the premises, ensure that any electronic material is secured and protected before sealing the premises. The execution of the warrant should be deferred for a reasonable period consistent with the prevailing circumstances to allow attendance of a solicitor.
- 2.2 Identify him/herself, and members of the search team.¹⁴ A copy of the search warrant guidelines should be provided to the solicitor.
- 2.3 Provide a copy of the search warrant and a statement in the approved form summarising the occupier's rights and obligations under the warrant.¹⁵

⁹ Section 150 *PPRA* does not specify that the warrant application must be made to a magistrate. However, the powers in s 153 and s 154 of *PPRA* are limited to when the issuer of the warrant is a magistrate or judge. It will be necessary to include orders under these sections when it is envisaged that the warrant evidence or property will include documents and/or access information for storage devices and stored information.

¹⁰ This complies with s 3(4)(a)-(b) *Police Powers and Responsibilities Regulation 2012* (Qld).

¹¹ If the search warrant does not include an order under s 154 *PPRA* and the storage device can only be accessed by using the access information the police officer cannot exercise the powers under s 154.

¹² Sections 612 and 613 provide for assistance in exercising powers under the *PPRA* including the power to assist in a search.

¹³ The term 'reasonably suspects' is defined in schedule 6 of the *PPRA* 'reasonably suspects means suspects on grounds that are reasonable in the circumstances'. *George v Rockett* (1990) 170 CLR 104, 115-116.

¹⁴ Section 637 of the *PPRA* sets out the information that must be provided by a police officer.

¹⁵ See s 158 *PPRA*.

- 2.4 Explain the purpose of the search, including where possible, information about who is suspected of involvement.
- 2.5 A reasonable time should be given to allow the solicitor to consult with his/her client and/or to obtain legal advice.
- 2.6 It is preferable that the forensic copy should be limited to warrant evidence or property. In the case of forensic copies, the executing officer or a person appointed to liaise with the solicitor on LPP issues will provide the solicitor with written information on the process to be used to determine whether stored information is warrant evidence or property. Information on the copying process to be used in relation to documents that are subject to a claim of LPP will also be provided.
- 2.7 Material that is seized under the warrant must be taken to a police property point and processed by a property officer in accordance with the *Police Powers and Responsibilities Regulation 2012, Schedule 9, Responsibilities Code, section 56*.

3. Claims of Legal Professional Privilege

A solicitor has a duty to assert a client's claim of privilege, unless the client has clearly waived their right to claim privilege.¹⁶ The onus rests on the party asserting the privilege to show that the claim is a proper claim. Any claim for privilege must be specific.¹⁷

3.1 HARD COPY DOCUMENTS – LPP claim identified

When a solicitor asserts a claim of LPP over hard copy documents and is able to identify the privileged documents during the course of the execution of the search warrant, the following applies:

- 3.1.1 Complete an Appendix 1 form; a copy of the completed Appendix 1 form should be kept by the Queensland Police Service and the solicitor.
- 3.1.2 Material that is subject to a claim of LPP should be separated and placed in a container. The container should be sealed and signed by the solicitor and the police officer and lodged, along with the Appendix 1 form with the Queensland Police Service and held at the Queensland Police Service property point (property point).¹⁸ The material that may be subject to LPP will not be examined by the Queensland Police Service unless by consent or order of the court.
- 3.1.3 The remainder of the warrant evidence or property (non-privileged material) can be removed from the property point and will become part of the warrant evidence or property that can be examined by the Queensland Police Service.¹⁹

3.2 HARD COPY DOCUMENTS – LPP claim unable to identify

When a solicitor asserts a claim of LPP over hard copy documents and is unable to identify the privileged documents during the course of the execution of a search warrant, the following applies:

- 3.2.1 Complete the Appendix 1 form within 14 days. The Queensland Police Service must ensure access as is required to complete the form or provide a copy of the material.²⁰
- 3.2.2 During the course of the execution of the search warrant the solicitor should indicate the documents that may be subject to a claim of privilege. These documents should be recorded in a list in general terms (e.g. file or client names, number of pages). This list must be signed by the solicitor and police officer.
- 3.2.3 The material that may be subject to LPP should be placed in a container. The container should be sealed and the seal signed by the solicitor and the police officer and lodged, along with the list collated under 3.4 and held the property point.

¹⁶ *Spalding v Radio Canberra Pty Ltd* (2009) 224 FLR 440, [17].

¹⁷ *Grant v Downs* (1976) 135 CLR 674,689.

¹⁸ See, *Police Powers and Responsibilities Regulation 2012, schedule 9, Police Responsibilities Code 2012* (Qld) s 56.

¹⁹ The warrant material or property that is not subject to LPP can still be examined as described in s 618 and s 619 *PPRA*.

²⁰ See s 623 *PPRA* regarding requests for copies of warrant material or property.

- 3.2.4 The Appendix 1 form must be completed within 14 days. The solicitor should arrange with the police officer to move the material subject to a claim of LPP to a separate container (**privileged material container**). The privileged material container should be sealed and the seal signed by the solicitor and the police officer.
- 3.2.5 The privileged material container and the Appendix 1 form will remain in the custody of the Queensland Police Service. The solicitor and the executing office will be provided with a copy of the Appendix 1 form. The material in the privileged material container will not be examined by the Queensland Police Service unless by consent or order of the court.
- 3.2.6 The remainder of the warrant evidence or property (**non-privileged material**) can be removed from the property point and will become part of the warrant evidence or property that can be examined by the Queensland Police Service.²¹

The relevant process set out in guideline 8 *Application to the Court for a Declaration Relating to Legally Privileged Documents* should be followed in relation to documents over which a claim of LPP has been made.

3.3 ELECTRONIC DOCUMENTS – LPP claim made prior to forensic copying

When a solicitor asserts a claim of LPP over warrant material or property that has not yet been forensically copied, the police officer will:

- 3.3.1 If possible, take a forensic copy of those documents over which a claim of LPP is asserted (**LPP forensic copy**); and
- 3.3.2 Take a separate forensic copy of the remaining warrant evidence or property that is not subject to a claim of LPP (**warrant copy**); or
- 3.3.3 If it is not possible to take a separate LPP forensic copy and a warrant copy, the police officer should take a forensic copy of all of the stored information on the storage device (**full copy**).
- 3.3.4 If a request is made by the solicitor, make a second copy of the LPP forensic copy for the solicitor (**LPP inspection copy**) or a copy of the full copy (**full inspection copy**).²²
- 3.3.5 The solicitor should complete an Appendix 2 form. If it is not possible to complete the Appendix 2 form during the execution of the search warrant, the form must be completed within 14 days.
- 3.3.6 The LPP forensic copy or full copy will be sealed and the seal signed by the solicitor and the police officer and lodged along with the Appendix 2 form, if completed, with the Queensland Police Service and held at the property point.
- 3.3.7 If a warrant copy was made the police officer may examine the warrant copy as described in section 618 and 619 *PPRA*.
- 3.3.8 The relevant process set out in guideline 8 *Application to the Court for a Declaration Relating to Legally Privileged Documents* should be followed in relation to documents over which a claim of LPP has been made.

3.4 ELECTRONIC DOCUMENTS – LPP claim made after the forensic copying of material

When a solicitor asserts a claim of LPP over material that has been forensically copied, the solicitor will:

- 3.4.1 Complete an Appendix 2 form. If it is not possible to complete the Appendix 2 form during the execution of the search warrant, the form must be completed within 14 days.
- 3.4.2 If a request is made by the solicitor, the Queensland Police Service should make a second copy of the forensic copy.²³
- 3.4.3 During the 14 days the Queensland Police Service will not examine the forensic copy.
- 3.4.4 The relevant process set out in guideline 8 *Application to the Court for a Declaration Relating to Legally Privileged Documents* should be followed in relation to documents over which a claim of LPP has been made.

²¹ The warrant material or property that is not subject to LPP can still be examined as described in s 618 and s 619 *PPRA*.

²² The Queensland Police Service may require the solicitor to provide a storage device. For requests for copies of warrant material see s 623 *PPRA*.

²³ See s 623 *PPRA* regarding requests for copies of warrant material or property.

4. Determination of Relevant Warrant Evidence or Property that may be Subject to a Claim of Legal Professional Privilege

4.1 Where a forensic copy has been made and the solicitor and the Queensland Police Service agree:

4.1.1 A member of the Electronic Evidence Examination Unit at the Queensland Police Service may under the supervision of the solicitor, implement searches to determine what material is relevant.

Example:

Searches could include keyword searching, date and time searches, image searches, hashtag searches.

4.1.2 No other person within the Queensland Police Service or anyone acting under their direction can access or copy any of the material seized under the warrant, unless by order of the court or agreement.

4.1.3 The results of the searches must be forensically copied and a copy provided to the solicitor with an Appendix 3 form.

4.1.4 If the forensic copy mentioned in 4.1.3 contains material that is subject to LPP, the solicitor must then complete an Appendix 2 form within 14 days.

4.1.5 The relevant process set out in guideline 8 *Application to the Court for a Declaration Relating to Legally Privileged Documents* should be followed in relation to documents over which a claim of LPP has been made.

5. Privilege not Asserted During or After the Execution of the Search Warrant

5.1 If no claim of LPP is raised during or after the execution of a search warrant the Queensland Police Service will be entitled to examine the warrant evidence or property in accordance with section 618 and 619 of the *PPRA*.

6. Claim of Legal Professional Privilege Made After the Completion of a Search Warrant on a Solicitor's Premises

6.1 If a solicitor claims LPP after the Queensland Police Service has commenced an examination of the warrant evidence or property, the solicitor must attend the Queensland Police Service or provide written advice to the executing officer or, if unavailable, another member of the investigating team with particulars of the LPP claim including the name of the client on whose behalf they are claiming LPP.

6.2 No one within the Queensland Police Service or anyone acting under their direction can access or copy any of the material seized under the warrant, or any copies that have been made unless by order of the court or agreement.

6.3 The solicitor should complete an Appendix 1 or Appendix 2 form, as appropriate, within 14 days of advising the Queensland Police Service of the LPP claim.

6.4 The solicitor can request a copy of the warrant evidence or property, or a second copy of any forensic copy made during or after the search warrant.

6.5 If, 14 days after the solicitor advises of a LPP claim, the solicitor has not provided specific details regarding a privilege claim, or has not completed Appendix 1 or 2, the Queensland Police Service should follow the relevant process set out in guideline 8 *Application to the Court for a Declaration Relating to Legally Privileged Documents*.

7. Process When a Solicitor Asserts LPP Over a Document on Behalf of a Client

- 7.1 A solicitor may assert a claim of LPP and in many circumstances has a duty to do so.²⁴ A vague or blanket claim of LPP will not be an adequate assertion of privilege.²⁵ If a blanket claim of privilege is made by the solicitor, the solicitor must take steps to provide specific details of the privilege to ensure that a valid claim of privilege has been asserted on behalf of the privilege holder.
- 7.2 When privilege has been asserted on behalf of a client affected by the search warrant, the solicitor must:
- 7.2.1 Notify the client in writing that a claim of LPP has been asserted;
 - 7.2.2 Seek instructions from the client regarding the claim of LPP; and
 - 7.2.3 If a blanket claim of LPP has been asserted on behalf of the client, inform the client that a blanket claim of LPP is not an adequate assertion of privilege and a specific claim of privilege must be provided to the Queensland Police Service.
- 7.3 It is sufficient if the solicitor contacts the client at the client's last known address.
- 7.4 If the client does not respond or does not provide instructions to the solicitor within 21 days of the notification the solicitor should:
- 7.4.1 Provide names of the clients on whose behalf privilege has been claimed to the Queensland Police Service.
 - 7.4.2 Inform the Queensland Police Service that they have no current instructions to act on behalf of the client in relation to LPP.
 - 7.4.3 Inform the Queensland Police Service that no waiver of the blanket privilege has been made.
- 7.5 If a blanket claim of privilege has been made and the solicitor cannot or fails to obtain instructions from their client in relation to LPP the Queensland Police Service may:
- 7.5.1 Notify the person in writing that a blanket claim of privilege has been asserted on behalf of the person.
 - 7.5.2 Inform the person that a blanket claim of privilege is not an adequate claim of privilege.
 - 7.5.3 Request the person completes either Appendix 1 or 2 or provides specific details of the documents over which privilege is claimed.
 - 7.5.4 Inform the person that if no valid claim of privilege has been received within 21 days of the date of the written notification the Queensland Police Service will examine the documents in their possession on the basis that no valid claim of privilege has been asserted.²⁶
- 7.6 If no valid claim of LPP is received within 21 days of the date of notification the Queensland Police Service may examine the documents in their possession.

²⁴ A solicitor should ensure that they are aware of and comply with their legal and ethical obligations when making a claim of privilege on behalf of a client.

²⁵ *Grant v Downs* (1976) 135 CLR 674, 689; *National Crime Authority v S* (1991) 100 ALR 151, 159-160; *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87, 95.

²⁶ The term possession is defined in schedule 6 of the *PPRA* as 'includes (a) custody; and (b) control'. Seizure is further defined in s 618 and 619 of the *PPRA* and includes the power to examine the thing; and the power to arrange for someone else to examine the thing.

8. Application to the Court for a Declaration Relating to Legally Privileged Documents

Following the execution of a search warrant if LPP has been raised, the following documentation must be completed:

Appendix 1 Hard Copy LPP Privilege Form; and/or

Appendix 2 LPP Privilege Form (Forensic Copy)

- 8.1 When an Appendix 1 form is completed the Queensland Police Service must:
- 8.1.1 Notify the solicitor whether or not the claim of privilege is accepted.
 - 8.1.2 If all claims of privilege are accepted the Queensland Police Service must ensure the return of all privileged material to the solicitor that is in the custody of the Queensland Police Service, without it being inspected or copied by the Queensland Police Service.
 - 8.1.3 If the Queensland Police Service disputes any of the claims of privilege, they must notify the solicitor in writing what claim of privilege is disputed and the grounds on which it is disputed.
 - 8.1.4 If the Queensland Police Service accepts some of the claims of privilege, those documents and any copies over which privilege is accepted will be returned to the solicitor without being inspected by the Queensland Police Service. The remainder of the documents will remain with the Queensland Police Service.
 - 8.1.5 Upon receiving notice under 8.1.3 the solicitor should, within 7 days commence proceedings in the Supreme Court by way of application for a declaration in relation to a claim of LPP.
 - 8.1.6 The proceeding should be commenced as an application and must comply with the Uniform Civil Procedure Rules 1999 and any applicable practice direction.
 - 8.1.7 When the proceeding is commenced by way of application in the Supreme Court any material that may be subject to a claim of privilege must be lodged with the court. An affidavit regarding the custody of the material must accompany the material lodged with the court.
- 8.2 When an Appendix 2 form is completed the Queensland Police Service must notify the solicitor whether or not the claims of privilege are accepted.
- 8.2.1 If all claims of privilege are accepted the Queensland Police Service must ensure that all material that is subject to LPP is permanently removed from all forensic copies. This may involve the Queensland Police Service making a new forensic copy with the LPP material removed. The Queensland Police Service must provide information to the solicitor on how the LPP material will be removed from the warrant evidence or property held by the Queensland Police Service. If an LPP forensic copy was made, the Queensland Police Service must ensure this is destroyed or returned to the solicitor.
 - 8.2.2 If the Queensland Police Service accepts some of the claims of privilege, those documents over which privilege is accepted must be permanently removed from all forensic copies.
 - 8.2.3 If the Queensland Police Service disputes any of the claims of privilege, they must notify the solicitor in writing what claim of privilege is disputed and the grounds on which it is disputed.
 - 8.2.4 Upon receiving such notice the solicitor should, within 7 days commence proceedings in the Supreme Court by way of application for a declaration in relation to a claim of LPP.
 - 8.2.5 The proceedings should be commenced as an application and must comply with the *Uniform Civil Procedure Rules 1999* and any applicable practice direction.
 - 8.2.6 When the proceeding is commenced in the Supreme Court by way of application any material that is subject to dispute in relation to LPP must be lodged with the Court. An affidavit regarding the custody of the material must accompany the material lodged with the court.

9. Solicitor's Obligation to Notify Clients Affected by the Execution of a Search Warrant

The solicitor should take reasonable steps to inform clients affected by the search warrant:

- About the seizure of any of their documents;
- Whether the solicitor has asserted LPP;
- How the affected client or former client can assert or waive legal professional privilege; and
- Any other information that will assist the client in protecting their interests as a result of the execution of a search warrant, including seeking independent legal advice.

If a solicitor is unable to contact the client the solicitor should record:

- Steps taken to locate a client or former client; and
- Whether a claim of legal professional privilege has been made.

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Appendix 1: Hard Copy LPP Privilege Form

Documents for which privilege is claimed during the execution of a search warrant on a solicitor's premises²⁷

Document ID	Document Type	Date Created	Title	# Author (Surname Initials)	#Author (Organisation)	#Recipient(s) (Surname Initials and Organisation)	LPP Claim*

#If multiple parties separate with a semicolon “;”

*Must include:

- Type of LPP claimed and specific grounds on which LPP is claimed
- Facts relied upon giving rise to a claim of LPP
- whether LPP is claimed over whole or part of the document

Signed:

Description:

²⁷ Document ID detail required to this level to ensure that material can be quarantined and excluded if LPP claim accepted by QPS or upheld by the Court.

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Appendix 2: LPP Privilege Form (Forensic Copy)

Documents for which privilege is claimed during the execution of a search warrant on a solicitors' premises²⁸

Document ID Including MD5 Hashtag value (or agreed id protocol)	Document Type Including file name and file path	Date Created	Title	# Author (Surname Initials)	#Author (Organisation)	#Recipient(s) (Surname Initials and Organisation)	LPP Claim*

#If multiple parties separate with a semicolon “;”

*Must include:

- Type of LPP claimed and specific grounds on which LPP is claimed
- Facts relied upon giving rise to a claim of LPP
- whether LPP is claimed over whole or part of the document

Signed:

Description:

²⁸ Document ID detail required to this level to ensure that material can be quarantined and excluded if LPP claim accepted by QPS or upheld by the Court.

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Appendix 3: List of Relevant Warrant Evidence or Material

Document ID Including MD5 Hashtag value (or agreed id protocol)	Document Type Including file name and file path

#If multiple parties separate with a semicolon “;”

Signed:

Description:



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