

HMRC production orders: what are they and how should you respond?

Adam Craggs and Michelle Sloane explore HMRC's powers to compel the production of documents or information during a criminal investigation

The ability of HMRC to compulsorily obtain information in the course of a criminal investigation is an important power available to HMRC.

When are these powers used?

Notices to compulsorily produce documents and information are commonly used by HMRC investigators during the course of a criminal investigation to compel the disclosure and production of information held by professionals in relation to their clients, which could not be voluntarily produced to HMRC due to client confidentiality obligations owed by the adviser to their client. These compulsory powers are commonly used to obtain documents and information from banks, accountants, company secretaries/company services providers and tax advisors.

What happens if you fail to comply?

Failing to comply with the terms of a disclosure notice or production order may result in fines or imprisonment. If an advisor provides material outside the scope of the disclosure notice or production order without the express consent of their client may lead to legal action for breach of confidence, or professional disciplinary action by their regulator.

It will be appreciated therefore that a clear understanding of the scope of any requirement to produce documents or information is essential.

What powers do HMRC have?

The most common powers under which HMRC investigators obtain documents and information during a criminal investigation is via production orders and disclosure notices/orders. HMRC do have other powers that can be utilised to obtain documents and information, for example, section 20BA, Taxes Management Act 1970 and paragraph 1, Schedule 11, Value Added Tax Act 1994. However, these powers are not normally used due to their more limited scope.

Production orders

A production order can be made under section 9 and Schedule 1, Police and Criminal Evidence Act 1984 (PACE) and section 345, Proceeds of Crime Act 2002 (POCA).

Under section 9 and Schedule 1 PACE, a judge, on the application of an HMRC officer, may order that a person, who appears to be in possession of the material to which the application relates, produce that material to an officer in a legible format, or give an officer access to it, not later than seven days after the date of the order (or such other period of time as may be stated in the order).

A production order can be made under PACE if the court is satisfied that:

- an indictable offence has been committed;
- there is material acquired or created in the course of business and held subject to an express or implied undertaking to hold it in confidence on the premises of the subject of the application;
- the material is likely to be of substantial value to the investigation;
- other methods of obtaining the information have not succeeded or have not been tried because they appeared bound to fail; and
- having regard to the benefit to the investigation and the circumstances under which the material is held, it is in the public interest that the material should be produced.

Failure to comply with a PACE production order may be deemed a contempt of court for which a fine and/or a term of imprisonment can be imposed.

Under section 345, POCA, a judge, on the application of an HMRC officer, may make a production order if:

- a specified person is subject to a confiscation investigation, civil recovery investigation, exploitation proceeds investigation, money laundering investigation or specified property is subject to a civil recovery investigation, a detained cash investigation, a detained property investigation or a frozen funds investigation;
- there are reasonable grounds for suspecting that the criteria are met in respect of the relevant investigation type;
- there are reasonable grounds for believing that the material sought is likely to be of substantial value (whether by itself or together with other material) to the investigation;
- there are reasonable grounds for believing that the material sought is in the possession or control of the person specified in the application; and
- having regard to the benefit to the investigation and the circumstances under which the material is held, it is in the public interest that the material should be produced.

Failing to comply with a POCA production order may be deemed a contempt of court for which a fine and or a term of imprisonment can be imposed.

The powers provided under both PACE and POCA, can also be used by HMRC officers, together with a number of other officers from other investigative and regulatory bodies.

Disclosure notices/orders

A disclosure notice/order can be made under section 62, Serious Organised Crime and Police Act 2005 (SOCPA) and section 357, POCA.

Under section 62, the Director of Public Prosecutions, or delegated crown prosecutor, may issue a disclosure notice if it appears that:

- there are reasonable grounds to believe that a specified offence has been committed (for HMRC's purposes usually cheating the public revenue or false accounting over £5,000);
- any person has information which relates to a matter relevant to the investigation of that offence; and
- there are reasonable grounds for believing that information which may be provided is likely to be of substantial value to that investigation.

This is applicable in England and Wales. There are comparable powers for the Lord Advocate in Scotland and the Director of Public Prosecutions for Northern Ireland.

Failing to comply with a disclosure notice is a criminal offence under section 67, SOCPA, for which a fine and or term of imprisonment can be imposed.

Under section 357, POCA, a judge may make a disclosure order requiring a person to answer questions, provide information or produce documents if:

- there are reasonable grounds for suspecting that the criteria are met in respect of the relevant investigation type;
- there are reasonable grounds for believing that the material sought is likely to be of substantial value (whether by itself or together with other material) to the investigation; and
- having regard to the benefit to the investigation and the circumstances under which the material is held, it is in the public interest that the material should be produced.

Failing to comply with a disclosure order is a criminal offence under section 359, for which a fine and or term of imprisonment can be imposed.

Key takeaways

None of the above powers can require the disclosure of privileged material, which can only be disclosed with the express permission of the privilege holder and you cannot waive someone else's privilege. There are two types of privilege: legal advice privilege, which applies to communications between a lawyer and their client; and litigation privilege, which applies to communications with lawyers, clients or third parties in relation to litigation which is in progress or which is in contemplation. This is a complex area of the law and if in doubt, you should seek expert legal advice.

Disclosure orders and notices require disclosure of information, whether or not contained in a document, so you may be required to write down or record information held by a member of staff or answer questions.

Production orders can only compel the production of documents/material already in existence.

You should usually be given notice of HMRC's intention to apply for a production order or disclosure order and you can oppose the issue of all or part of an order.

However, if the enquiry is sensitive, the application can be made without notice. Whether you attended the hearing or not, you may be able to challenge the decision to issue the order by way of judicial review proceedings if, for example, one of the conditions for exercise of the power was not met, for example, there are no grounds to believe that an indictable offence has been committed or there are no grounds to believe that any material is held by the recipient of the notice.

You may commit an offence if you inform your client that you have been served with a production or disclosure order in relation to an investigation for money laundering or terrorist financing offences. Professional regulators have issued guidance as to whether advisors need to inform clients about a production or disclosure order.

Top tips

- Ensure you have a complete copy of any order or notice made and the application which underlies it.
- If you are a professional advisor, ascertain whether you are required to inform your client about the order or notice.
- It is important to clarify the scope of any order or notice and the timeframe for compliance.
- Only provide material that is within the scope of any order or notice.
- In complying with any order or notice, it is essential that a detailed record is made of what searches were carried out and when, what material was considered and what material was provided/not provided. This is to ensure that you are able to demonstrate full compliance with the terms of any order or notice and to ensure that you are able to demonstrate to your client that you did not produce to HMRC any information which was not required by the order or notice.
- Consider whether any information attracts legal professional privilege and do not provide any material which is legally privileged.

If you are in any doubt about any matter, seek expert legal advice.

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