

# Production Orders and Search Warrants

Last reviewed: June 2018

---

## Introduction

We are operating in a climate of increasing international investigations. There are a number of investigative tools available to seek information from Guernsey institutions in support of international investigations. These include a range of mechanisms under The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (**Guernsey POCA**).

This Guide considers how Production Orders and Search Warrants may be obtained, how to respond to them, and issues which may arise.

## Parallel Provisions

This article focuses upon the powers under Guernsey POCA. However there are parallel powers in the following laws:

- Drug Trafficking (Bailiwick of Guernsey) Law, 2000
- Terrorism and Crime (Bailiwick of Guernsey) Law, 2002
- The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007

Production Orders and Search Warrants are obtainable to assist other jurisdictions with investigations. However, it is necessary to identify what the investigation concerns to ensure that the correct statutory power is available and whether it is engaged by the request for assistance.

## Production Orders

Powers to seek orders for the production of materials (**Production Orders**) exist under section 45 of Guernsey POCA. Such orders may require a named person to deliver up or provide access to specified material, and/ or grant a warrant to search any specified premises and seize material found there.

The court may grant an order if satisfied that all of the following conditions are met:

- That there are reasonable grounds for suspecting that a specified person has engaged in or benefited from criminal conduct; and
- That there are reasonable grounds for suspecting that the material to which the application relates is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purposes of which the application is made, and does not consist of or include items subject to legal professional privilege or excluded material; and
- That there are reasonable grounds for believing that it is in the public interest, having regard to the benefit likely to accrue to the investigation if the material is obtained.

Excluded material encompasses personal records (relating to a person's physical, mental and spiritual state), human tissue or similar and journalistic material, provided that the material is held in confidence.

Applications for Production Orders require the consent of HM Procureur, and are typically made ex parte in chambers.

Where orders are made they usually carry a time limit of 7 days for compliance, but a shorter period may be specified.

### **Search Warrants**

Production Orders are the more conventional means of getting access to material. However section 46 of Guernsey POCA provides the court with the power to issue a warrant to search premises and seize material (**Search Warrant**). Circumstances in which a Search Warrant may be issued include:

- In the event of non-compliance with a Production Order.
- Where a Production Order is inappropriate as it is either:
  - Impracticable to communicate with persons entitled to produce the material or grant access to it; or
  - The investigation might be prejudiced unless the police can secure immediate access to the material (i.e. there is a risk of evidence destruction or tampering).

By contrast to Production Orders, Search Warrants may also be given where it is not possible to particularise the material sought, provided that the material relates to either:

- the subject of the investigation;
- the question of the fact and extent to which that subject is involved in criminal conduct; or
- the whereabouts of the proceeds of crime.

Search Warrants allow officers to seize and retain any material, other than items subject to legal professional privilege or excluded material, which is likely to be of value (whether by itself or together with other material) to the investigation for which the warrant was issued.

The premises to which Search Warrants may be directed include any place and in particular also any vehicle, vessel, aircraft, hovercraft, offshore installation, tent or movable structure.

Like Production Orders, Search Warrants require an application, to which HM Procureur must have consented, and are typically made ex parte in chambers.

### **Responding to Production Orders & Search Warrants**

Non-compliance with a Production Order may provide grounds for a Search Warrant to be obtained.

Production Orders and Search Warrants are orders of the court. Non-compliance may constitute contempt of court, which is a criminal offence in itself.

Where there is a live application for a Production Order, or where a Production Order or Search Warrant has been issued, a person is guilty of an offence if, knowing or suspecting that the investigation is taking place, he makes any disclosure which is likely to prejudice the investigation. The potential sanctions for this offence are up to five years in prison and/ or an unlimited fine. There is however a defence where the person can show that they did not know or suspect that an investigation would be prejudiced, or that the disclosure was made with lawful authority or with a reasonable excuse.

### **Issues**

Production Orders or Search Warrants can be challenging for respondents. Search Warrants especially because of the element of surprise, but Production Orders can also be very pressing, particularly where their terms are difficult to decipher and they capture a significant volume of material to be delivered in a short timescale.

### **Conflicting obligations**

Where recipients of orders are financial services businesses (**FSBs**), they must have regard to their obligations to customers in addition to the authorities. This can be particularly onerous where a limited number of staff are available to conduct the identification and review of material. This is compounded if the responsive material relates to persons other than the subject of the investigation, potentially requiring blacking out / redaction.

## Should the Production Order or Search Warrant be challenged?

Guernsey POCA does not provide for a right of appeal. However, the exercise of the powers may be subject to judicial review.<sup>1</sup>

The difficulty for respondents is that the information on the face of the orders is sparse. Where the respondent is not the subject of an investigation, they will typically be a FSB lacking the information as to why the order was made. There is no right for respondents to see the information placed before that court. Were an FSB to seek to engage with its customer it may risk committing the offence of prejudicing an investigation. But the requirements for this offence are less strict than those for tipping off, under other statutory regimes, and a broader range of defences are available. Where the recipient of the order does have additional information, either due to prior notice or having obtained that information, challenges to the appropriateness of the order may be considered prudent.

### Prejudicing an investigation

By contrast to other Guernsey disclosure compulsions, a respondent will not automatically be guilty of tipping off if matters connecting to a Production Order or Search Warrant are discussed with a third party. The potential offence is of prejudicing an investigation.

The threshold is whether the disclosure is likely to prejudice an investigation. As with whether to challenge the relevant order, the lack of information provided to respondents makes it difficult to assess whether an investigation may be prejudiced, and even more difficult to decide if that is a *likely* consequence. There is however not a firm prohibition on discussing matters. This is a factor to which FSBs may wish to have regard when considering if they should seek further information to establish whether an order should be challenged.

But respondents must be especially cautious where money laundering may be involved. In those circumstances tipping off provisions under other Bailiwick laws may be engaged, regardless of whether or not an investigation is prejudiced. The criminal conduct in question need not be identified on the face of the Production Order or Search Warrant, so respondents should approach this risk with considerable caution.

### Other considerations

If served with a Production Order or Search Warrant, FSBs should consider whether the contents of the same give rise to other reporting obligations. In particular:

- Whether a suspicious activity report (**SAR**) to the Financial Intelligence Unit ought to be raised; and/ or
- If there are matters which ought to be disclosed to the Guernsey Financial Services Commission in accordance with Principle 10 of the Code of Principles of Conduct of Financial Business.

These are not automatic consequences of being served with a Production Order or Search Warrant, but are aspects which should be considered.

### Conclusions

Guernsey POCA is one of the Bailiwick's key pieces of anti-money laundering legislation. Production Orders and Search Warrants are only some of the investigative tools available to authorities under this statute. Search Warrants are relatively rare; the use of Production Orders is more common.

Such orders must be taken seriously, but not accepted blindly. On receipt, respondents should keep in mind that their obligations may extend some way beyond what is on the face of the order, and have regard to other stakeholders. If in doubt, respondents should take legal advice.

---

<sup>1</sup> See *Anthony Bell et al v Judge of the Royal Court et al* Guernsey Judgment 20/2016

## Contacts

---



**Robert Shepherd**  
Senior Partner & Advocate, Mourant Ozannes  
Guernsey  
+44 1481 731 418  
robert.shepherd@mourant.com



**Sally French**  
Senior Associate & Advocate  
Guernsey  
+44 1481 739 341  
sally.french@mourant.com

---

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED