

LORD ADVOCATE'S GUIDELINES ON MATERIAL THAT MAY BE SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE (LPP)

GENERAL AWARENESS

1. Officers should at all times be mindful that professional firms, including solicitors, accountancy firms and others, may hold material that is subject to Legal Professional Privilege (LPP).
2. LPP is the principle that a person must be able to consult their lawyer in confidence and that a communication between a person and their lawyer will not be revealed without the person's consent. LPP has been described as a fundamental condition on which the administration of justice as a whole rests. Courts will be careful to protect the right of LPP and it is essential that due caution is taken when seeking a warrant for the recovery of files from professional firms, particularly solicitors
3. LPP is a matter to be asserted by a client. It cannot be asserted by solicitors in the absence of instructions to do so, assuming that there has been time to take such instructions. LPP will not apply where the material was generated in furtherance of an illegal act.
4. Where it is anticipated that material potentially subject to LPP requires to be recovered from a professional firm, advice should be sought from the Crown Office and Procurator Fiscal Service (COPFS) regarding steps to be taken, including contact and discussion with the firm and the potential involvement of an independent commissioner. The costs of the appointment of an independent commissioner, if required, will be shared equally between Police Scotland and COPFS.

WARRANT APPLICATIONS

5. Warrant applications from Police Scotland for a professional firm's premises should include a strategy document containing all relevant information. The strategy document requires to confirm the following:
 - (a) The nature of the investigation – with clear distinction highlighted where the holder of the material is being investigated in respect of criminal allegations; and where the firm is believed to hold material for a related criminal investigation but is not per se being investigated. This information will be relevant to any decision not to intimate a warrant application.
 - (b) What material is being sought?
 - (c) Consideration of LPP.
 - (d) What medium the material can be expected to be found in.
 - (e) A strategy for dealing with digital and hard copy material. This strategy will be informed by the nature of the investigation outlined above.

- (f) Timing of execution of warrant and timing of proactive contact with the firm to allow LPP material to be identified and separated in advance of execution of the warrant. All proactive discussion with the relevant firm should be formally recorded and in particular any discussion of LPP. Any decision not to intimate a warrant application must only be made on strong grounds and be capable of robust defence. All the reasons should be clearly highlighted within the strategy document.
- (g) Handling of material post warrant .

6. The Warrant application will be presented to a sheriff by a prosecutor and not the police. The police will attend and support the prosecutor. No warrant application will be presented to a sheriff until the strategy document outlined above is completed by the police and agreed by the prosecutor.

EXECUTION OF WARRANT

DIGITAL MATERIAL

7. Before searching premises where digital evidence is likely to be found, consideration must be given to what sort of evidence is likely to be found and in what volume; whether it is likely to be possible to view and copy, if relevant, the material at the location; or where, for example it may be hosted by a third party in cloud computing. Investigators will need to consider the practicalities of seizing computer hard drives and other media; the impact this may have on the business; and where it is not feasible to obtain an image of digital material, the likely timescale of returning seized items. All of this should be documented in the strategy document.

8. The approach to seizure of digital material (as with hard copy material) potentially subject to LPP will be dictated by the nature of the investigation and the potential for engagement with the firm. In certain circumstances there may be a need for an independent commissioner to attend the search. The approach should be informed by advice from COPFS.

HANDLING OF MATERIAL POST WARRANT

9. Where material (whether digital or hard copy) has been identified as potentially subject to LPP the material should be lodged within sealed bags and containers along with recorded control of access.

10. Where material has been identified as potentially subject to LPP no member of the investigative or prosecution team involved in the current investigation, or, if the LPP relates to other criminal proceedings, in those proceedings, should have sight of or access to the material potentially subject to LPP.

11. Advice should be sought from the Crown Office and Procurator Fiscal Service (COPFS) regarding steps to be taken, including discussion and contact with the professional firm from which the material was seized, and potentially the involvement of an independent commissioner, to confirm if LPP applies.