

Through the wire – the SFO’s plan to obtain evidence using informants

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An informant is sent into the midst of a criminal gang. He is wearing a concealed device, crudely taped to his chest. Law enforcement agents listen in from the back of an unmarked van parked inconspicuously nearby hoping to obtain crucial evidence by way of a confession, and ready to storm the building at the first sign of danger. Everyone is familiar with the classic movie-style sting, but such scenes may no longer be limited to *The Wolf of Wall Street*. Suspects in white collar crime investigations could soon be asked to wear wires in order to help the authorities expose wrongdoing, with the Director of the SFO, Lisa Osofsky, suggesting that she intends to incentivise such co-operation with promises of immunity or reduced prison sentences. We take a closer look at how this might work.

Why use a wire?

While this may be a movie cliché, and advances in technology mean smaller and less detectable devices are available, the attractiveness of recording conversations with acquaintances remains the same. The use of ‘a wire’ can produce confessions from those most sought after and most intimately involved with alleged criminality. Evidence from a wire recording (rather than mere assertion from a suspect or defendant) may also avoid at least some of the usual allegations used to discredit accounts given by co-operating witnesses – namely, that the evidence is fabricated or that their role has been minimised in order for them to be treated more leniently by the courts.

Ms. Osofsky’s keenness to explore the use of ‘wired-up’ co-operators in white collar investigations appears to stem from her experience in the US. In an interview with the Evening Standard in April 2019, she referred not only to drugs cases involving the US Internal Revenue Service, but also to the FIFA corruption case in which Chuck Blazer’s exposure to liability for tax wrongdoing was used to incentivise him to become an informant, helping the US government to uncover the extent of corruption in football’s governing body. Ms. Osofsky clearly foresees a similar partnership between the SFO and HM Revenue & Customs, stating that the two bodies would work together to uncover breaches before giving offenders the ‘choice’ of spending “20 years in jail for what you did” or “wear a wire and work with us.”¹

¹ <https://www.standard.co.uk/news/crime/wear-wire-or-face-jail-whitecollar-criminals-are-warned-by-top-british-law-enforcement-official-a4127346.html>

Could it happen and under what circumstances?

Many may be surprised to hear that there is in fact some legal basis for Ms. Osofsky's statement about using a covert human intelligence source (a "CHIS") as part of an SFO investigation.

What is a CHIS?

Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA") provides the framework for the use of surveillance and a CHIS. The definition of a CHIS includes a suspect who has been incentivised to wear a wire in order to assist investigators. The provisions governing the use of a CHIS are detailed. Section 26 of RIPA defines a CHIS as a person who:

- (a) establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);
- (b) covertly uses such a relationship to obtain information or to provide access to any information to another person; or
- (c) covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.

A relationship is used covertly, and information obtained is disclosed covertly if, and only if, it is used or disclosed in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the use or disclosure in question – the use of a hidden wire to record or transmit conversations with another person plainly fits this definition (s.26(9) RIPA).

Authorising a CHIS

The use and the conduct of a CHIS is lawful under RIPA if it is authorised by a designated person in accordance with s.29 of RIPA. The SFO is one of over 30 authorities designated by the Secretary of State for this purpose. A designated authority must not grant an authorisation unless it believes (a) it is **necessary** on certain specified grounds (which include the purpose of preventing or detecting crime or in the interests of the economic wellbeing of the United Kingdom), (b) it is **proportionate** to what is sought to be achieved by the conduct or use of a CHIS, and (c) certain arrangements exist that satisfy requirements relating to the security and welfare, oversight and recording of the use of the CHIS.

Notably, RIPA provides for a two-stage authorisation process in relation to the use and conduct of a CHIS. Authorisations by a designated authority under s.29 do not take effect until a relevant judicial authority (a justice of the peace in England and Wales) has approved the grant of the authorisation. Approval may only be given where the judicial authority is satisfied that (a) at the time of the grant, there were reasonable grounds for believing that the requirements for the original authorisation were satisfied in relation to the authorisation, and the relevant conditions were satisfied, and (b) at the time when the judicial authority is considering the matter, there remain reasonable grounds for believing that requirements for the original authorisation were satisfied in relation to the authorisation.

The conduct that may be authorised under Part 2 includes conduct outside the UK.

It is notable that an application for judicial approval of an authorisation can be made without notifying any person to whom the authorisation relates or their legal representatives.

What would legal advisers need to think about?

Lawyers acting for those under investigation by the SFO might wish carefully to consider how they would advise a client asked to co-operate with the SFO by wearing a wire – at what stage of the investigation is this likely to occur? What sort of written agreement might be obtained from the SFO to ensure fairness? What are the expectations and, if the intended target of the CHIS does not incriminate himself or provide the evidence the SFO seeks, will the CHIS still fully benefit from his cooperation? In the same vein, what might the lawyer for the CHIS's target advise his client? How might that evidence be approached or challenged? What disclosure is the target entitled to?

What are the challenges for the SFO?

The idea that a suspect wearing a wire could be used by the SFO to gather evidence in economic crime cases has raised eyebrows among a UK criminal defence community more accustomed to hearing about such techniques being used to infiltrate organised criminal gangs in the UK. The use of a CHIS wearing a wire in economic crime investigations will come as something of a culture shock and careful thought will be required by all parties involved.

Investigators and prosecutors themselves will need to proceed in a more considered and targeted fashion to ensure that they identify a CHIS who is sufficiently close to the main target to be of use to the investigation. The investigation will also need to be carefully conducted and planned to ensure that the intended CHIS is identified early enough so that the correct steps can be taken to ensure the CHIS's utility is preserved and the intended target of the CHIS's conduct is not 'tipped-off'. This could pose a particular difficulty in lengthy and complex white collar investigations, where suspects may be identified at different stages – a misguided offer to a potential CHIS who then refuses to co-operate could well endanger the future of any investigation.

Where an offender or defendant offers assistance to an investigation or prosecution, the SFO has a range of powers set out in sections 71 to 73 of the Serious Organised Crime and Police Act 2005 (“**SOCPA**”):

- Firstly, it may issue an immunity notice to an offender, under which no proceedings for an offence of a description specified in the notice may be brought against the assisting offender.²
- Alternatively, the SFO may give an offender a “restricted use undertaking”, which states that any information provided will not be used against the person in particular proceedings.³
- Finally, a reduction in sentence may be offered to a defendant who pleads guilty to an offence and who has assisted or offered to assist a prosecutor in relation to any offence.⁴ The case of *Blackburn* suggests that such a reduction may be significant (up to two thirds in normal cases, but potentially more than three quarters in the most exceptional case).⁵

However, it appears that there are limits to the circumstances in which it will be appropriate to use such powers:

- CPS guidance asserts that “*only in the most exceptional cases will it be appropriate to offer full immunity*”,⁶ while the Government White Paper which preceded SOCPA set out the Government's intention that “*the assumption will always be...that the majority of co-operating defendants would be offered sentence reduction rather than full immunity.*”⁷
- CPS guidance also states that “*where sufficient evidence exists to provide a realistic prospect of conviction, the public interest will normally require that an accomplice should be prosecuted, whether or not he or she is to be called as a witness.*”⁸ Where a suspect has accepted culpability for a serious offence (as will almost invariably be the case where a suspect is seeking to benefit from immunity or a witness agreement), it may be a challenge for the SFO to argue that there is a sufficiently strong public interest to rebut this presumption of prosecution.

In this context, Ms. Osofsky's statement that offenders can co-operate **or** be sent to jail may somewhat overplay the SFO's hand, and raises the question of whether or not a reduction in jail term will be enough to persuade defendants to risk close personal relationships to “snitch” on colleagues, especially given British attitudes to “grasses” (as opposed to US attitudes to the more neutral “immunised witness”).

² Section 71 SOCPA

³ Section 72 SOCPA

⁴ Section 73 SOCPA

⁵ *R v P; R v Blackburn* [2007] EWCA Crim 2290

⁶ Queen's Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005, available at <https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime>

⁷ One Step Ahead – A 21st Century Strategy to Defeat Organised Crime, page 49, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251075/6167.pdf

⁸ See footnote 5.

Finally, the admissibility of evidence obtained by a CHIS may be open to challenge on human rights grounds. The Home Office Code of Practice on CHISs states that public authorities must ensure that all use or conduct of a CHIS is necessary and is proportionate to the intelligence dividend that it seeks to achieve, but also that it is in compliance with the relevant articles of the European Convention on Human Rights (“**ECHR**”).⁹ Article 8 ECHR, for example, includes the right to establish and maintain relationships; any manipulation of a relationship for the purposes of preventing or detecting crime must therefore be necessary (i.e., there is no less intrusive way to achieve the same goal) and proportionate to that goal. Arguments over necessity and proportionality may provide ample ground for challenges to the use of the evidence produced by the use of a CHIS. Article 8 arguments are perhaps stronger where the use of a CHIS takes advantage of an existing relationship in order to obtain evidence. It may result in the evidence being ruled as inadmissible, and while the courts might be reluctant to find an abuse of process on these grounds,¹⁰ the necessity requirement at least ensures that a CHIS cannot be used as a shortcut, or as an alternative to more familiar investigative techniques, in an SFO investigation.

A game-changer or wishful thinking?

Ms. Ososky’s desire to use co-operating witnesses in SFO investigations is understandable. Perhaps it is based on the view that it could help speed up complex investigations and to provide evidence from key witnesses. While English law does allow the use of ‘a wire’, it is unclear if UK criminal practitioners (be that defence lawyers, prosecutors or investigators) can come to terms with the process, and whether or not a rethink of CPS guidance may be required if wires are to be worn on a more frequent basis. Nevertheless, lawyers and suspects should be prepared for the possibility that they will be asked to play a starring role in Ms. Ososky’s plans to bring the movie-style sting into the real world of economic crime.

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⁹ Home Office *Covert Human Intelligence Sources – Revised Code of Practice – August 2018*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742042/20180802_CHIS_code_.pdf

¹⁰ *Brett (Barbara)* [2005] EWCA Crim 983 – the defendant, Brett, appealed against a conviction for handling stolen goods, which occurred while she was on bail. At trial, evidence from a camera concealed in the hat of an undercover police officer was used to show Brett committing the offences. Brett argued that this was an abuse of process, and that the undercover operation was unnecessary and oppressive. The appeal was refused as the police honestly and reasonably believed that Brett was continuing to commit offences while on bail.