Client Alert | White Collar/Investigations

Plus ça change… the SFO's approach to Section 2 Interviews

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The approach of the Serious Fraud Office (the "**SFO**") to compelled interviews is a longstanding source of frustration for criminal defence lawyers. The beginning of Lisa Osofsky's tenure as Director and the introduction of updated guidance on compelled interviews provided some hope that the SFO's stance may be softening. In practice, however, it seems that little has changed.

All Change?

Under Section 2 of the Criminal Justice Act 1987, the SFO can compel individuals to attend interviews and answer questions in relation to an SFO investigation. Failure to do so is a criminal offence, but individuals cannot be compelled to disclose information covered by legal professional privilege. In addition, statements made in interview cannot be used as evidence against that individual unless (a) they are prosecuted for making a statement that is false or misleading in a material particular; or (b) they are prosecuted for some other offence and, when giving evidence, they make a statement which is inconsistent with a statement made during the interview.

Criminal defence lawyers have been dissatisfied with the SFO's attitude towards Section 2 interviews for a long time. One of the criticisms is that, despite the potential implications of an interview, the SFO had been reluctant to allow lawyers to attend interviews with their clients. In the case of *Lord*,[1] it was confirmed that individuals have no legal right to representation during an SFO Section 2 interview. The SFO's Operational Guidance issued in 2016 provided that a lawyer would be permitted to attend the interview "*if the case controller believes it is likely that they will assist the purpose of the interview or provide essential assistance to the interviewee by way of legal advice or pastoral support*." Only one lawyer was allowed to attend, and such attendance was also dependent on the lawyer giving certain undertakings (which are problematic for the reasons set out below).

The appointment of Lisa Osofsky as Director of the SFO in summer 2018 brought with it hope that there would be significant changes to the SFO's policy in relation to Section 2 interviews. In February 2019, the SFO published updated Operational Guidance, but it made only one limited concession. It stated that an additional lawyer could attend a Section 2 interview in order to take a note (although such a note would have to be taken by hand). Separately, it had also been reported that the SFO was carefully considering the undertakings that it requested from lawyers. Many practitioners hoped that allowing an additional lawyer would be the first of many concessions from the SFO which would help to make the Section 2 process fairer and more cordial.

The Reality

Unfortunately, such progress has not materialised, and experience suggests that a number of major problems remain:

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[1] *R (Lord & Others) v SFO* [2015] EWHC 865 Admin

Undertakings

The SFO's Guidance for legal advisers attending Section 2 interviews (the "**SFO Guidance for Lawyers**") still includes a set of standard undertakings, compliance with which may be impossible and/or put a legal adviser in conflict with their professional obligations.

- **Providing or discussing documents** – Issues arise when a firm is asked to undertake that no relevant documents will be provided to or discussed with anyone other than the client without the written authority of the SFO. This means that documents cannot be shared with others who might be able to assist a client, or be shared further to a client's request. As such, a firm may be constrained from acting in the client's best interests, or from acting upon instructions. It may also inhibit the ability of a legal adviser to take a witness statement in circumstances where the client becomes a suspect at a later stage.

- **No copies of documents** – Another example of a plainly unhelpful and unduly restrictive undertaking is the prohibition on copying documents disclosed pre-interview. The undertaking ignores the practical realities of assisting an interviewee to prepare for interview. It is uncontroversial that a legal adviser would want to make copies for members of the legal team as well as a copy for the client himself to review pre-interview, yet the undertaking would prevent this and thus inhibit effective preparation in the best interests of the client. The undertaking also conflicts with the SFO's own method of disclosure. The technology used by the SFO when providing documents on a disk positively requires a local copy of materials to be made before they can be accessed. This undertaking is counter-productive, inhibiting the client's ability to prepare for interview and his ability to give accurate and helpful information to the SFO.

- **All documents to be kept securely at law firm offices** – Even where the SFO allows documents to be copied, it may require that no documents are taken out of the law firm's offices. This is clearly problematic for interviewees working full time, who have to attend the offices of their legal advisers during working hours rather than being able to take documents home to review in their own time.

- **Representing suspects** – Firms are often asked to undertake that they do not represent any individual or legal person who is a suspect in the relevant investigation. However, the SFO often refuses to provide the names of any suspects or the breadth of an investigation. Clearly, a firm cannot agree to the obligations imposed by an undertaking on these terms without some disclosure about the investigation from the SFO.

Conditions under which a lawyer may attend

Once undertakings are agreed and the interview has begun, the SFO's Guidance for Lawyers states that a legal adviser may be excluded from the interview without prior notice if either of the following conditions is breached:

- Whilst the lawyer may provide legal advice or essential assistance, they must not do anything to undermine the free flow of full and truthful information which the interviewee, by law, is required to give;

- The legal representative of the interviewee may bring one additional lawyer who also represents the interviewee solely for the purpose of taking a note. That lawyer must also be covered by the appropriate undertakings. As interviewees and their legal representatives may not use digital devices within the interview room, lawyers should plan to take any note by hand. This restrictive approach may be contrasted with the position in relation to PACE interviews in which, according to a Home Office Circular, a legal representative may even use their own recording equipment to record an interview and a request to do so may only be refused in circumstances specific to the case which may prejudice the course of the investigation.[2]

Significantly, the SFO's Operational Guidance sets out that any decision to exclude a legal adviser once the interview has begun must be taken by the case controller, and is not subject to authorisation by the Head of Division. As such, it is unclear what routes there are for contesting such a decision where the legal adviser feels his intervention has a legitimate basis. It will also leave the legal adviser with the difficult task of ensuring that he is able to convey any required legal advice before leaving the room.

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[2] https://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk:80/cpd/pvu/hoc9824.htm

Helping witnesses help the SFO

Practitioners also have differing experiences in their dealings with the SFO on the topic of Section 2 interviews. In some cases the SFO does not demand the undertakings at all, in others the SFO has agreed to negotiate the undertakings, and yet others where the SFO has stuck rigidly to its standard form undertakings and demanded a signed set of undertakings before proceeding with the interview. Such inconsistency is understandably frustrating for legal advisers, making the Section 2 process something of a lottery depending on the SFO personnel involved. Where undertakings are sought, the process of negotiating and agreeing the precise terms is a time-consuming one. In some cases, negotiations are ongoing until the days before the intended interview date, a time when legal advisers should be free to focus on properly advising their client.

A change in approach to Section 2 interviews would be as beneficial to the SFO as it would be to witnesses and their lawyers. The need for (often protracted) negotiations with the SFO pre-interview contributes to a tense atmosphere between the parties, which is exacerbated when the SFO introduces further documents during the interview itself (sometimes following limited pre-interview disclosure). The most immediate and obvious effect of this is to potentially reduce the completeness of answers given at the interview stage.

However, the long-term impact can be far more damaging for the SFO. Individuals who attend Section 2 interviews are potential witnesses at trial who could provide important evidence for the prosecution case. However, the SFO currently treats these potential assets in a manner which can cause great inconvenience, anxiety and distress and employs an adversarial approach which does nothing to build trust between the possible witness and the prosecution which seeks to rely on them. Recent cases have shown the difficulty that the SFO has in securing persuasive prosecution witnesses to testify at trial, and the combative approach taken in the Section 2 process is surely part of the reason for this.

The way forward

At a recent Fraud Lawyers Association conference, Lisa Osofsky commented that "smart people" will figure out a way to deal with SFO requests for undertakings. The Law Society points out a number of issues with the standard undertakings in its note on representing clients at Section 2 interviews (the "**Law Society Guidance**") including that in each case, a solicitor must consider whether agreeing to the undertakings enables him to act in accordance with his professional duties and on the instructions of the client. Solicitors are reminded that the SFO's guidance does not override their duties, which are at all times defined by the SRA not the SFO.[3] The Law Society Guidance highlights instances where there may be a conflict between the undertakings and professional obligations, such as whether the ability to act in good faith and not feeling inhibited from intervening to provide advice is impaired, and considering whether the undertakings might conflict with client instructions. The SFO is clearly aware of these issues. Given this is the case, it is unclear why the SFO continues to use these undertakings as a starting point – such a position only leads to time-consuming and inevitable negotiations and immediately puts the SFO and the legal adviser onto an adversarial footing.

The SFO is to be commended for seeking to safeguard the integrity of its investigations, but onerous undertakings are not the best way to do so. It is hard to argue with the statement in the Law Society Guidance that "*this goal is achieved by the rigorous application of the professional conduct obligations identified* [in the Guidance]"[4] and incumbent upon all legal advisers who may represent clients at SFO Section 2 interviews.

It is we suggest, high time for the SFO to conduct a wholesale review of the practice of requiring unrealistic undertakings and take into account how its current stance hampers its own objectives and the professional obligations of legal representatives.

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[3] https://www.lawsociety.org.uk/support-services/advice/practice-notes/representing-clients-at-section-2-cja-interviews/

[4] *ibid*

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