

Code of Practice on the Exercise by Proper Persons of Powers Conferred by Chapter 3 of Part 8 of the Proceeds of Crime Act 2002

Consultation

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Introduction

The Proceeds of Crime Act 2002 (“POCA”) contains a comprehensive package of measures to recover the proceeds of crime. This includes powers to require individuals and organisations to provide information that is of significant value to an investigation, or to search for such information under Part 8 of POCA.

The revised Code, issued under section 410 of POCA, provides guidance on the exercise by Proper Persons, as defined at section 412, of functions conferred by Chapter 3 of Part 8 of POCA – i.e. the powers to execute investigatory orders and warrants, namely:

- Production orders (section 380);
- Orders to grant entry (section 382);
- Search warrants (section 387);
- Customer information orders (section 397); and
- Account monitoring orders (section 404).

These functions are necessary to enable the proper person to fully exercise their powers under Part 3 of Chapter 8 of POCA. However, they are subject to certain limits and conditions and accordingly, section 410(1) requires that the Scottish Ministers make a code of practice in connection with the exercise of these powers by proper persons in Scotland.

The code of practice is intended to ensure that the responsibilities of proper persons are clearly set out and accessible.

Consultation requirement

Section 410 (1) of POCA requires the Scottish Ministers to publish and consult on a draft of any new or revised Code of Practice. Accordingly, they seek views on this revised Code which is further described below. A period of twelve weeks is available for responses. The Code will then be subject to Parliamentary approval before coming into effect.

Given that this Code builds on earlier versions, and/or reflects the provisions of similar Codes, proper persons, as defined at section 412 of POCA, will already be reasonably familiar with the procedures and safeguards set out.

Any failure to comply with a provision of the Code will not, by reason of that failure alone, give rise to any criminal or civil liability for the proper person concerned. However, the Code is admissible as evidence in any criminal or civil proceedings.

How to Respond

The consultation is in respect of the Code providing guidance on the exercise of the functions, rather than the powers conferring the functions. Respondents should be aware of this distinction in making specific comments and suggestions. The Code is intended to be self-explanatory and so we would welcome views on any passages that are confusing, ambiguous or lacking in clarity. In particular, we would welcome answers to the following questions:

Question 1

The draft Code will affect how proper persons in Scotland exercise their functions under Chapter 3 of Part 8 of POCA. Do you have any comments to make in relation to the practical guidance contained within the Code?

Question 2

Do you feel that the draft Code could have an adverse impact on you or your organisation?

Question 3

Do you feel that the draft Code provides adequate guidance to a proper person on how to discharge their functions?

Question 4

Is there anything missing from the draft Code that should be added? (If so, please specify below.)

Question 5

Is there anything in the draft Code that should be deleted or changed? (If so, please specify below.)

Responding to this Consultation

We are inviting responses to this consultation by 3 June 2019

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/code-of-practice-proceeds-of-crime-act-2002>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 3 June 2019.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send it to:

POCA Code of Practice (s410)
Organised Crime Unit
Area 1 WR, St. Andrew's House
2 Regent Road
EDINBURGH
EH1 3DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to alastair.crerar@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>)

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

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CHAPTER 1 - GENERAL

Purpose and Scope of the Code

1. This code is issued by the Scottish Ministers in accordance with section 410 of the Proceeds of Crime Act 2002 (POCA), and replaces the code issued in June 2009¹.
2. It governs the exercise of functions by “proper persons” (defined at s.412 of POCA) in Scotland in relation to investigative orders and warrants under Chapter 3 of Part 8 of POCA (as amended).
3. The purpose of this code is to:
 - set out the principles in accordance with which proper persons carry out their functions;
 - ensure consistency in the exercise of those functions; and
 - specify the information to be recorded in relation to the exercise of those functions.
4. This code applies to the functions undertaken by proper persons in relation to the following investigative orders and warrants under Chapter 3 of Part 8 of POCA:
 - Production orders – section 380;
 - Ancillary orders to grant entry – section 382;
 - Search warrants – section 387;
 - Customer information orders – section 397; and
 - Account monitoring orders – section 404.
5. A summary of these investigatory powers is set out in the table in the Annex to this code. This details the purpose of each order or warrant, and who can apply for it.

Definition of “proper person”

6. Generally, a “proper person” is one charged with the function of executing investigative orders and warrants. The “proper person” in each particular case depends on the type of investigation being carried out, and the specific investigatory power being exercised. Under section 412 of POCA², “proper person” means:
 - in relation to a confiscation investigation³ or a money laundering investigation⁴ –
 - a) a constable of the Police Service of Scotland;
 - b) an officer of Revenue and Customs; or
 - c) an immigration officer;

¹ Entitled “Code of Practice issued under section 410 of the Proceeds of Crime Act 2002”, and brought into operation on 18 June 2009 by S.S.I 2009/245.

² As amended by paragraph 72 of Schedule 5 to the 2017 Act.

³ Defined by section 341(1) of POCA, as amended by section 38(1) of, and paragraph 55 of Schedule 4 to, the Serious Crime Act 2015 (c.9).

⁴ Defined by section 341(4) of POCA.

- in relation to a civil recovery investigation⁵, a detained cash investigation⁶, a detained property investigation⁷ or a frozen funds investigation⁸ it means the Scottish Ministers or a person named by them.

Legal Privilege

7. Legal Privilege is a privilege against disclosure, ensuring clients know that certain documents and information provided to legal professionals cannot be disclosed at all. It recognises the client's fundamental human right to be candid with his legal adviser, without fear of later disclosure to his prejudice.
8. Section 412 of POCA defines "legal privilege" as:

"legal privilege" means protection in legal proceedings from disclosure, by virtue of any rule of law relating to the confidentiality of communications; and "items subject to legal privilege" are-

 - (a) communications between a professional legal adviser and his client, or
 - (b) communications made in connection with or in contemplation of legal proceedings and for the purposes of those proceedings,

which would be so protected.
9. Proper persons are advised to become acquainted with the latest guidance on legal privilege in relation to money laundering cases. The guidance, which is not legally binding, can be found at: (<https://www.lawsociety.org.uk/policy-campaigns/documents/legal-sector-affinity-group-anti-money-laundering-guidance/>).⁹
10. In particular, paragraph 7.4.5 in that guidance sets out the crime/fraud exception, namely that legal privilege protects advice given to a client on avoiding committing a crime or advice that warns against proposed actions that could attract prosecution. Legal privilege does not, however, extend to documents which themselves form part of a criminal or fraudulent act, or communications which take place in order to obtain advice with the intention of carrying out an offence. It is irrelevant whether or not a legal representative is aware that they are being used for that purpose.
11. For example, if a client has made a deliberate misrepresentation on their mortgage application, their solicitor should consider whether the crime/fraud exemption to legal professional privilege applies. Solicitors may also wish to consider sections 383(2), 402 and 407 of POCA which provide that production orders, customer information orders and account monitoring orders have effect in spite of any restriction on the disclosure of information (however imposed).

⁵ Defined by section 341(2) and (3) of POCA. See also section 341A of POCA, as inserted by paragraph 3 of Schedule 19 to the Crime and Courts Act 2013.

⁶ Defined by section 341(3A) of POCA, as inserted by section 75(1) of the Serious Crime Act 2007 (c.27) and amended by paragraph 110 of Schedule 7 to the Policing and Crime Act 2009 (c.26) and paragraph 25 of Schedule 19 to the Crime and Courts Act 2013 (c.22).

⁷ Defined by section 341(3B) of POCA, as inserted by paragraph 39(3) of Schedule 5 to the 2017 Act.

⁸ Defined by section 341(3C) of POCA, as inserted by paragraph 39(3) of Schedule 5 to the 2017 Act.

⁹ This guidance has been prepared by the Legal Sector Affinity Group and approved by HM Treasury. It should be noted that the guidance has been prepared for the legal sector in relation to money laundering which is not the subject of this Code of Practice. However, Chapter 7 sets out further details on legal professional privilege.

Definition of Premises

12. Where an order permits entry into or onto “premises,” these are defined so as to include any place and, in particular, include:
- any vehicle, vessel, aircraft or hovercraft;
 - any offshore installation within the meaning of section 1 of the Mineral Workings (Offshore Installations) Act 1971 (c. 61) and any tent or movable structure.

Status and accessibility of code

13. The code is not a statement of the law. Proper persons must ensure that, at all times, they act in accordance with the statutory requirements in Chapter 3 of Part 8 of POCA (as amended).
14. A failure by a proper person to comply with any of the code’s provisions will not of itself give rise to any criminal or civil liability. However, the code is admissible in evidence in any criminal or civil proceedings, and a court may take account of any non-compliance in determining any question in those proceedings¹⁰.
15. The code must be available to view online¹¹ and at all police stations in Scotland. It must also form part of the published guidance that is made available to officers of Revenue and Customs and immigration officers.

¹⁰ Section 410(6) and (7) of POCA.

¹¹ The code of practice will be published on the Scottish Government’s website at www.gov.scot.

CHAPTER 2 - PROVISIONS RELATING TO ALL INVESTIGATIVE ORDERS AND WARRANTS

Principles governing the exercise of investigatory powers

16. The right to respect for private and family life, home and correspondence and the right to peaceful enjoyment of possessions under the European Convention on Human Rights are both safeguarded by the Human Rights Act 1998 and, so far as acts of the Scottish Parliament are concerned, the Scotland Act 1998.
17. The powers of investigation may involve significant interference with the privacy and property of those whose premises are searched, from whom personal information is obtained, or whose personal information, material or documents are seen and/or seized. The powers therefore need to be fully and clearly justified before they are used. The use of the powers which impact upon individuals' rights should be proportionate to the outcome being sought.
18. Recognising that the exercise of any investigatory power under Chapter 3 of Part 8 of POCA may involve significant interference with the privacy and property rights of the individual against whom an order, warrant or notice is exercised, or of those whose personal information is accessed and/or seized, it must be:
 - **in accordance with law** – i.e. in accordance with any legal duties imposed on proper persons, in particular under the Human Rights Act 1998, the Equality Act 2010 and Chapter 3 of Part 8 of POCA;
 - **necessary** – i.e. necessary in order to achieve the legitimate purpose for which the power exists; and
 - **proportionate** – both in the decision to exercise the power and in the way in which it is exercised. In every case, a proper person must balance the rights of the individual(s) concerned with the perceived benefit of exercising the power and, at every stage, consider whether the necessary objective(s) could be achieved by less intrusive means.
19. In all cases, investigative orders and warrants must be executed fairly and impartially (having particular regard to the public sector equality duty under section 149 of the Equality Act 2010). They must also be executed courteously, and with respect for the persons concerned and their property or information.
20. Proper persons should be aware of the definition and scope of the different types of investigations under Chapter 3 of Part 8, and in this regard should have particular reference to sections 341 and 341A of POCA. They must be satisfied that the statutory requirements are fulfilled in relation to the type of investigation. They should also be aware of the limits to some of the individual powers in relation to the different investigations.

Reasonable grounds for suspicion

21. Whether reasonable grounds for suspicion exist will depend on the circumstances in each case. There should be some objective basis for that suspicion based on facts, information and/or intelligence. The proper person should take into account such factors as how the individual, premises or vehicle were identified, previous intelligence regarding the person(s), vehicle(s) or premises, previous law

enforcement involvement with the person(s), vehicle(s) or premises, and suspected links with criminal activities, whether in the UK or overseas.

22. All proper persons should recognise that investigations are more likely to be effective and legitimate and more likely to secure public confidence when their reasonable grounds for suspicion are based on a range of objective factors, such as up-to-date and accurate intelligence or information. Proper persons should be able to explain the basis for their reasonable grounds by reference to intelligence or information about, or some specific behaviour by, the person concerned.
23. Reasonable grounds can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour that provides an objective basis for that suspicion. Reasonable grounds should normally be linked to accurate and current intelligence or information. They can sometimes exist without specific information or intelligence and on the basis of some level of generalization stemming from the behaviour of a person. However, reasonable grounds cannot be founded retrospectively.

Record of Proceedings

24. Whilst there is no statutory requirement for a written record of proceedings to be made, doing so should be regarded as good practice for the protection of all parties and in terms of legal safeguards. Proper persons should therefore consider making a written record for each notice, order or search warrant executed, where more than one is executed at the same time.
25. The following information should be considered as prerequisites for inclusion in the record of the serving or execution of an investigative order or warrant:
 - a copy of the order or warrant and copies of any notices given under an order;
 - the date on which the order or notice was intimated together with any proof of intimation or the date on which the search warrant was executed;
 - the date and place that the information or documents were received in response to the order; and
 - a copy of any records of articles or materials provided in accordance with the provisions of this code.
26. Nothing in this Code requires the names of proper persons to be shown on the record of search or any other record required to be made under this Code where a proper person reasonably believes that disclosing names might endanger themselves or other persons.

CHAPTER 3 - PRODUCTION ORDERS

General description

27. A production order¹² is an order made by the sheriff on application by the appropriate person¹³ for the production of, or allowing access to material which is specified in the application for the order as being sought for the purposes of:
- a confiscation investigation;
 - a civil recovery investigation;
 - a detained cash investigation;
 - a detained property investigation;
 - a frozen funds investigation; or
 - a money laundering investigation.
28. It requires the person specified in the application for the order (as being the person who appears to be in possession or control of the material) either –
- a) to produce the material to a proper person for the proper person to take it away;
or
 - b) to give a proper person access to it,
- within the period of time stated in the order (usually 7 days).¹⁴
29. A production order may be sought against any legal person, which includes bodies corporate and authorized government departments. An authorized government department is a government department which is an authorized department for the purposes of the Crown Proceedings Act 1947¹⁵ and the Scottish Administration¹⁶.
30. The material specified in an application may consist of documents, information held on a computer or other electronic device, a computer or other equipment (rather than simply the information held on them), or other non-documentary items.

Applications for a production order

31. To obtain a production order there must be reasonable grounds to suspect that:
- in the case of a confiscation investigation, the person specified in the application as being subject to the investigation has benefitted from their criminal conduct; and
 - in the case of a civil recovery investigation, the person specified in the application as being subject to the investigation holds recoverable property or associated property, or has at any time held recoverable property or associated property or the property specified in the application as being subject to investigation is recoverable property, or associated property.

¹² Defined by section 380(5) of POCA.

¹³ Defined by section 412 of POCA

¹⁴ See section 380(6) of POCA.

¹⁵ See section 17(1) of the Crown Proceedings Act 1947.

¹⁶ See section 126(6) to (8) of the Scotland Act 1998 and S.I. 1999/1127, S.I. 2002/801 and S.I. 2005/1267.

- in the case of a detained cash investigation into the derivation of cash, the property specified in the application as being subject to the investigation, or part of it, is recoverable property.
 - In the case of a detained cash investigation into the intended use of cash, the property specified in the order as being subject to the investigation, or part of it, is intended by any person to be used in unlawful conduct;
 - in the case of a detained property investigation into the derivation of property, the property the application for the order specifies as being subject to the investigation, or a part of it, is recoverable property;
 - in the case of a detained property investigation into the intended use of property, the property the application for the order specifies as being subject to the investigation, or a part of it, is intended by any person to be used in unlawful conduct;
 - in the case of a frozen funds investigation into the derivation of money held in an account in relation to which an account freezing order made under section 303Z3 has effect (a "frozen account"), the money in the account to which the application for the order specifies as being subject to the investigation, or a part of it, is recoverable property;
 - in the case of a frozen funds investigation into the intended use of money held in a frozen account, the money in the account to which the application for the order specifies as being subject to the investigation, or a part of it, is intended by any person to be used in unlawful conduct;
 - in the case of a money laundering investigation, the person specified in the order as being subject to the investigation, has committed a money laundering offence.
32. There must also be reasonable grounds for believing that the material is likely to be of substantial value (whether or not by itself) to the investigation for which the order is sought, and that it is in the public interest for the material to be produced, or for access to it being given, having regard to –
- (a) the benefit likely to accrue to the investigation if the material is obtained; and,
 - (b) the circumstances under which the person the application specifies as appearing to be in possession or control of the material holds it.
33. There must also be demonstrated reasonable grounds that the person specified in the application as being in possession of the relevant material or property is, in actual fact, in possession or control of it.

Serving the Order

34. When serving a production order, a covering letter should be provided that includes the following information (unless it is already included in the order, search warrant or the notice):
- the name of the person specified in the application for the production order, or the name by which they are known;
 - a statement to the effect that disclosure of information about the investigation or falsifying, concealing, destroying or otherwise disposing of, or causing or permitting the falsification, concealment, destruction or disposal of documents which are relevant to the investigation may be an offence under section 342 (offences of prejudicing investigation) punishable by up to five years' imprisonment, a fine or both;

- that the individual may wish to seek independent legal advice; and,
 - the individual's right to make an application to the sheriff to discharge or vary the production order or the order to grant entry.
35. A production order should be served on the person named in the order as appearing to be in possession of the material. If the order is made against a company or institution, the proper person should direct the order to a person in authority and with responsibility for the material.
36. When serving a production order, the proper person should ask for the material specified in the production order to be produced. A proper person may take away the material covered by the production order, except where the production order is made under section 380(5)(b) and only allows access to, rather than removal of, the material.
37. If any of the material so specified is information contained in a computer, then –
- a) where the order requires the material to be produced to a proper person for the proper person to take it away, the material must be produced in a form in which the proper person can take it away and in which it is visible and legible; or
 - b) where the order requires a proper person to be given access to the material, the proper person must be given access to the material in a form in which it is visible and legible¹⁷.
38. However, where the material specified is the actual computer or other equipment (instead of the information held on it), a proper person must ensure that this is produced rather than information extracted from it. The proper person should ensure that care is taken when the individual produces the material so that the material on the computer is not, for example, deleted or corrupted (whether deliberately or accidentally).

Copying and retention of material

39. A proper person may take copies of, or photograph, any material which is produced, or to which access is given, in compliance with a production order. Any such material may also be retained for as long as it is necessary (in its original form) in connection with the investigation for the purposes of which the order was made.
40. Moreover, if the proper person has reasonable grounds for believing that the material may need to be produced for the purposes of any legal proceedings, and that it might otherwise be unavailable for those purposes, the material may be retained until the proceedings are concluded.

Legal Privilege

41. A production order **does not** require an individual to produce, or give access to, any items subject to legal privilege (see paragraphs 6 - 10).

¹⁷ See section 384 of POCA.

Written record of proceedings

42. In cases where a proper person intimates in person a production order authorising access to material, they should make, or cause to have made, a record of the articles and material removed and/or accessed in compliance with a production order, unless it is impracticable to do so. A copy of this record should be made available to the subject of the order upon request.
43. The subject of the order must be informed that the record of proceedings will be made available to them upon request.
44. If appropriate (usually where an order to grant entry is made) the proper person should provide a receipt to the owner or occupier of the premises entered and to the subject of the order (if present) before leaving the premises.

Ancillary order to grant entry

45. Where the sheriff makes a production order requiring a person to give a proper person access to material on any premises, the sheriff may also make an order (under section 382 of POCA) to grant entry to the premises. This is an order requiring any person who appears to the appropriate person to be entitled to grant access to the premises to allow a proper person to enter the premises to obtain access to the material.

CHAPTER 4 - SEARCH WARRANTS

General description

46. A search warrant¹⁸ is a warrant issued by the sheriff, on application by the appropriate person¹⁹, and where the requirements at section 388 of POCA are fulfilled, in relation to:

- a confiscation investigation;
- a civil recovery investigation;
- a detained cash investigation;
- a detained property investigation;
- a frozen funds investigation; or
- a money laundering investigation.

Appropriate persons should ensure that they are familiar with, and that the application complies with, the provisions of section 388 of POCA.

47. A search warrant authorises a proper person to:

- enter and search the premises specified in the application for the search warrant; and
- seize and retain any material specified in the search warrant which is found there, and which is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the application is made.

48. The material specified in a search warrant application may consist of documents, information held on a computer, a computer or other equipment (rather than simply the information held on it), or other non-documentary items.

49. Search warrants under Chapter 3 of Part 8 of POCA only authorise the searching of premises, not persons (see Paragraph 11).

Steps to be taken when executing a search warrant

50. Before entering the premises in respect of which the search warrant is issued, a proper person must first attempt to communicate with the occupier, or any other person entitled to grant access to the premises, in order to identify themselves, state the purpose of the search and the grounds for undertaking it and to explain the authority under which entry is sought to the premises and asking the occupier to allow entry.

51. However, a proper person does not need to do this if:

- the premises to be searched are known to be unoccupied;
- the occupier and any other person entitled to grant access are known to be absent, or

¹⁸ Defined by section 387(4) of POCA.

¹⁹ Defined by section 412 of POCA.

- there are reasonable grounds for believing that any such attempt to engage with the occupier, or any other person entitled to grant access, would frustrate the object of the search or endanger the proper person or any other person(s).

Executing a search warrant

52. When executing a search warrant, a covering letter should be provided that includes the following information (unless it is already included in the search warrant):
- the name of the person specified in the application for the warrant, or the name by which they are known;
 - a statement to the effect that disclosure of information about the investigation or falsifying, concealing, destroying or otherwise disposing of, or causing or permitting the falsification, concealment, destruction or disposal of documents which are relevant to the investigation may be an offence under section 342 (offences of prejudicing investigation) punishable by up to five years' imprisonment, a fine or both; and,
 - that the individual may wish to seek independent legal advice.

Conduct of searches

53. All search warrants issued under section 387 of POCA are time-limited. A proper person must therefore execute a search warrant within one month of it being issued; otherwise it will no longer be in force.²⁰
54. Premises may be searched only to the extent necessary to achieve the object of the search, having regard to the size and nature of whatever is sought. No search may continue once the proper person is satisfied that whatever is being sought is not on the premises. This does not prevent a further search of the same premises if additional grounds come to light which support the granting of a further search warrant - e.g., when, as a result of new information, it is believed that material previously not found or additional material is on the premises.
55. All searches must be conducted fairly, with due consideration and respect for the property and privacy of the occupier of the premises searched, and with no more disturbance than necessary.
56. A proper person may, if necessary, use reasonable force when executing a search warrant.²¹ This means using the minimum amount of force required to achieve the lawful objective of the search. Accordingly, the use of reasonable force should generally be considered as a last resort if this appears to be the only way to give effect to the search warrant.
57. Where a search warrant is issued in relation to a civil recovery investigation or a detained cash investigation, a detained property investigation or a frozen funds investigation, a proper person should check the terms of the search warrant and act in accordance with:
- any condition(s) specified; or

²⁰ Section 390(2) of POCA.

²¹ Section 387(4A) of POCA, as inserted by section 86 of the Serious Crime Act 2007 (c.27).

- any provision(s) authorising the proper person to do certain other things which need to be done to give effect to the search warrant²² (e.g. to open lockfast places).

Seizure of computer information and computers etc.

58. Where a proper person believes that information which is held in a computer and is accessible from the premises specified in the search warrant application is relevant to the investigation, the proper person may require the information to be produced in a form in which –
- it can be taken away; and
 - it is visible and legible.
59. So, even where such information is held on a server located on different premises, a proper person may still seize and retain the information so long as it is accessible from the premises in respect of which the search warrant was issued. However, where the material specified in the warrant application is the actual computer (instead of the information held on it), a proper person must seize this rather than any information extracted from it.

Leaving premises

60. If a proper person enters any premises by force, the proper person should ensure that the premises are secured before leaving.

Copying and retention of material

61. A proper person may take copies of any material which is produced, or to which access is given, in compliance with a production order. Any such material produced may also be retained for as long as it is necessary (in its original form) in connection with the investigation for the purposes of which the order was made.
62. Moreover, if the proper person has reasonable grounds for believing that the material may need to be produced for the purposes of any legal proceedings, and that it might otherwise be unavailable for those purposes, the material may be retained until the proceedings are concluded.

Written Record

63. Where premises have been searched under a warrant issued under Chapter 3 of Part 8 of the Act, a proper person must make, or cause to have made, a record of the search and make such a record available if requested to do so unless circumstances make it impracticable to do so.
64. There may be situations in which it is not practicable to obtain all the information required to complete a written record, but the proper person must make every reasonable effort to do so and, if necessary, make a partial record of the search. If a written record is not made at the time, the proper person must make one as soon as reasonably practicable afterwards and also note the reasons for the delay.

²² See section 390(5) and (6) of POCA, as amended by paragraph 66(4) of Schedule 5 to the Criminal Finances Act 2017.

65. The following information should always be included in the record of a search:

- the address of the premises searched (and if relevant and possible the part of those premises searched);
- the grounds for making the search;
- the date, time and duration of the search;
- the authority under which the search was made;
- the name of the officer in charge of the search and the names of all other proper persons who conducted the search;
- the names of any people on the premises if they are known;
- details of any damage caused during the search and the circumstances in which it was caused; and
- the outcome of the search (e.g., recovery of material, no further action).

66. Unless it is impracticable to do so, or it would jeopardize a wider, on-going operation or investigation, a copy of the record should be given immediately to the person in charge of the premises searched. If a record cannot be made at the time, the individual should be informed how they can apply for a copy of the record once it is made. This applies to records made electronically as well as in writing.

Legal Privilege

67. A search warrant **does not** confer any right to seize any items subject to legal privilege of proceedings (see paragraphs 6 – 10).

CHAPTER 5 - CUSTOMER INFORMATION ORDERS

General description

68. A customer information order is an order made by the sheriff, on application by the appropriate person²³, for the provision of certain customer information²⁴ for the purposes of:
- a confiscation investigation;
 - a civil recovery investigation; or
 - a money laundering investigation.
69. A customer information order is not available in relation to a detained cash investigation, a detained property investigation or a frozen funds investigation.
70. A customer information order²⁵ compels a financial institution covered by the application for the order,²⁶ on being required to do so by notice in writing given by the appropriate person, to provide any such information it has relating to the person specified in the application. The information must be provided to a proper person in such manner, and at or by such time, as that person requires.

Steps to be taken when serving a customer information order

71. When serving a customer information order, a covering letter should be provided that includes the following information (unless it is already included in the order):
- the name of the person specified in the application for the order, or the name by which they are known;
 - a statement setting out the effect of section 400(1) and (3); namely, that a warning be given in plain language that failure without reasonable excuse to comply with the requirement, or knowingly or recklessly providing a false or misleading statement for the purpose of purported compliance, may be an offence and could result in prosecution; and,
 - a statement to the effect that disclosure of information about the investigation or falsifying, concealing, destroying or otherwise disposing of, or causing or permitting the falsification, concealment, destruction or disposal of documents which are relevant to the investigation maybe an offence under section 342 (offences of prejudicing investigation) punishable by up to five years' imprisonment, a fine, or both; and,
 - the financial institution's right to make an application to the sheriff to discharge or vary the customer information order.
72. The appropriate person must give notice in writing to the financial institution, specifying the customer information that is required in accordance with section 398 (1)(a) and/or (1)(b) of POCA, and the name and address of the proper person to

²³ Defined by section 412 of POCA.

²⁴ Section 398 of POCA sets out the meaning of "customer information", which varies depending on whether the person whose information is sought is an individual or a corporate body.

²⁵ Defined by section 397(6) of POCA.

²⁶ See section 416(4) to (6) of POCA for the definition of "financial institution". The application does not need to name every financial institution individually. It may specify all financial institutions or a particular description of institutions, or it may name a particular financial institution: section 397(5) of POCA.

whom the information must be produced. The appropriate person will specify a reasonable time limit for production of the information depending on the nature of the institution and the information which is requested.

73. A financial institution which receives a notice given under a customer information notice may require to see evidence of the authority to give such notice. Where it does so, it is not bound to comply with a requirement imposed by the notice unless such evidence has been produced. Accordingly, when the appropriate person gives a financial institution notice under a customer information order, the notice must be accompanied by a certified copy of the interlocutor, or a copy thereof, granting the customer information order.

Statutory requirements

74. The application for a Customer Information Order must state that:
- a person specified in the application is subject to a confiscation investigation, a civil recovery investigation or a money laundering investigation;
 - the order is sought for the purposes of the investigation; and
 - the order is sought against the financial institution(s) specified in the application.
75. In the case of a *confiscation investigation*, there must be reasonable grounds for suspecting that the person specified in the application for the order has benefited from their criminal conduct.
76. In the case of a *civil recovery investigation*, there must be reasonable grounds for suspecting that the person specified in the application for the order:
- holds recoverable property or associated property, or
 - has, at any time, held property that was recoverable property or associated property at the time.
77. In the case of a *money laundering investigation*, there must be reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence.
78. In the case of *any investigation*, there must be reasonable grounds for believing that customer information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes for which it was sought.
79. In the case of *any investigation*, there must be reasonable grounds for believing that it is in the public interest for the customer information to be provided, having regard to the benefit likely to be accrued to the investigation if the information is obtained.
80. When serving a notice under a customer information order, the appropriate person should inform the financial institution of their right to refuse to comply with any requirement imposed upon them unless the appropriate person has, if required to do so, produced evidence of their authority to issue the notice.

CHAPTER 6 - ACCOUNT MONITORING ORDERS

General description

81. An account monitoring order²⁷ is an order made by the sheriff, on application by the appropriate person²⁸, for the provision of certain account information for the purposes of:
- a confiscation investigation;
 - a civil recovery investigation; or
 - a money laundering investigation.
82. It requires the financial institution²⁹ specified in the application for the order to provide account information for a specified period, not exceeding 90 days. The account information must be provided to a proper person in the manner, and within the timescale(s), specified in the order.
83. The account information to be provided is information relating to an account or accounts held at the financial institution by a person specified in the application (whether solely or jointly with another). The specific nature of the information will be described in the order, and will most commonly include transaction details in relation to the account(s) concerned.
84. An account monitoring order is not available in relation to a detained cash investigation, a detained property investigation or a frozen funds investigation.

Applications for an account monitoring order

85. The application for an account monitoring order must specify the account information that is required in accordance with section 404 (5), and the name and address of the proper person to whom the information must be produced. The order will specify a reasonable time limit for production of the information depending on the nature of the institution and the information which is requested.

Statutory requirements

86. The application for an account monitoring order must state that:
- a person specified in the application is subject to a confiscation investigation, a civil recovery investigation or a money laundering investigation;
 - the order is sought for the purposes of the investigation; and
 - the order is sought against a financial institution(s) specified in the application.
87. In the case of a *confiscation investigation*, there must be reasonable grounds for suspecting that the person specified in the application for the order has benefited from their criminal conduct.

²⁷ Defined by section 404(7) of POCA.

²⁸ Defined by section 412 of POCA.

²⁹ See section 416(4) to (6) of POCA for the definition of "financial institution".

88. In the case of a *civil recovery investigation*, there must be reasonable grounds for suspecting that the person specified in the application for the order holds recoverable property or associated property, or
89. In the case of a *money laundering investigation*, there must be reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence.
90. In the case of *any investigation*, there must be reasonable grounds for believing that account information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes for which it was sought.
91. In the case of *any investigation*, there must be reasonable grounds for believing that it is in the public interest for the account information to be provided, having regard to the benefit likely to be accrued to the investigation if the information is obtained.

Steps to be taken when serving an account monitoring order

92. When serving an account monitoring order, a covering letter should be provided that includes the following information (unless it is already included in the order):
 - the name of the person specified in the application for the order, or the name by which they are known;
 - a statement to the effect that disclosure of information about the investigation or falsifying, concealing, destroying or otherwise disposing of, or causing or permitting the falsification, concealment, destruction or disposal of documents which are relevant to the investigation maybe an offence under section 342 (offences of prejudicing investigation) punishable by up to five years' imprisonment, a fine or both;
 - the financial institution's right to make an application to the sheriff to discharge or vary the account monitoring order; and,
 - that the financial institution may wish to seek independent legal advice.

Summary of the Investigatory Powers under Chapter 3 of Part 8 of the Proceeds of Crime Act 2002

	Purpose of the Order or Warrant	Confiscation Investigation - Who can apply for it?	Money Laundering Investigation - Who can apply for it?	Civil Recovery Investigation - Who can apply for it?	Detained Cash Investigation - Who can apply for it?	Detained Property Investigation - Who can apply for it?	Frozen Funds Investigation - Who can apply for it?
Production Order	Obtain material already in existence in control of a known person (e.g. bank statements and correspondence)	Procurator fiscal	Procurator fiscal	The Scottish Ministers	The Scottish Ministers	The Scottish Ministers	The Scottish Ministers
Ancillary Order to Grant Entry	Obtain access to premises to give effect to production order granting access to material on those premises	Procurator fiscal	Procurator fiscal	The Scottish Ministers	The Scottish Ministers	The Scottish Ministers	The Scottish Ministers
Search Warrant	Search premises and seize material where production order either not complied with or likely to be ineffective	Procurator fiscal	Procurator fiscal	The Scottish Ministers	The Scottish Ministers	The Scottish Ministers	The Scottish Ministers
Customer Information Order	Trawl financial institutions for information about particular customer.	Procurator fiscal	Procurator fiscal	The Scottish Ministers	N/A	N/A	N/A
Account Monitoring Order	Monitor transactions through a known account for up to 90 days from date of order.	Procurator fiscal	Procurator fiscal	The Scottish Ministers	N/A	N/A	N/A

Code of Practice on the exercise by Proper Persons of functions conferred by Chapter 3 of Part 8 of the Proceeds of Crime Act 2002

RESPONDENT INFORMATION FORM

Please note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes No



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