

Are You Prepared for a Search?

Suggested Procedures for Responding to a Competition Bureau Investigation

The *Competition Act* provides the Commissioner of Competition with a number of powerful investigative tools in respect of both criminal and civil matters, including the power to obtain and execute search warrants that allow Competition Bureau officers to enter premises and to seize documentary and electronic records.

This pamphlet briefly outlines suggested procedures in the event that your Company is the subject of a search. For ease of reference, these procedures are organized under the following headings:

- Dealing with Competition Bureau Officers
- Disclosure within the Company
- Document Access and Collection
- Assertion of Solicitor-Client Privilege
- Documenting the Process

Dealing with Competition Bureau Officers

- 1.** Obtain a copy of the search warrant from the key Bureau officers and immediately send it to your legal counsel. If your Company does not have external competition law counsel, it will be necessary to retain a law firm with experience in this area.
- 2.** Ask the key Bureau representatives at each search site for their business cards.
- 3.** Inform the key Bureau officers that you have contacted legal counsel and ask them to wait for legal counsel to arrive before starting their search. Bureau officers will often agree to wait for some limited period of time before starting their search, but are under no obligation to do so. If they insist on starting their search right away, allow them to do so and do not obstruct them in any way.
- 4.** Request that the Bureau officers wait in a boardroom located away from public areas and employees. At each location being searched, if possible provide the Bureau officers with use of a boardroom for their review of documents during the search.
- 5.** Be polite and establish a professional rapport with the Bureau officers. At the same time, do not discuss the Company's business or the substance of the allegations in the search warrant. Avoid any extended discussions until after conferring with legal counsel.

Disclosure within the Company

1. Advise your Company's CEO, General Counsel and other key officers that the Bureau is executing a search warrant. Determine who should advise the Chairman and members of the Company's board of directors of the search.
2. The Company's General Counsel (or other in-house counsel) should send a privileged and confidential memorandum or e-mail to all employees (at least at the relevant sites and/or business units), copied to the Company's CEO and key officers and directors, that:

 - advises employees of the investigation and the scope of the search warrant;
 - informs employees of their obligation to cooperate in the search and that it is a criminal offence to obstruct, hinder or otherwise interfere with a search;
 - instructs employees that while they are to be cooperative, they should not have any conversations with Bureau officers and should refer all questions to legal counsel;
 - alerts employees that the company's document retention policy is suspended immediately for an indefinite period of time and that they are required to preserve all documents, data, correspondence, files and e-mail within their control;
 - advises employees that the investigation is confidential and that they are not to speak to the media, customers, competitors, co-workers, friends or family regarding the search; and
 - asks employees to contact the Company's General Counsel (or other appropriate contact person) if they have any questions, concerns or information in any way related to the search warrant.

Document Access and Collection

1. No documents should be removed from the premises during the course of the search without conferring with legal counsel.
2. The Company's document retention program should be immediately suspended and absolutely no documents should be destroyed during the search.
 - All paper shredders on the premises should be disconnected and locked away.
 - The Company's IT department should suspend the destruction of electronic documents, data and computer back-up disks and tapes.
 - All e-mail should be preserved on a Company-wide basis. Ideally, all potentially relevant e-mail and electronic documents should be copied onto a searchable hard drive.
3. Each Bureau officer taking part in the search should be accompanied by legal counsel or a representative of the Company and careful contemporaneous notes should be taken.
4. The Company should cooperate with efforts by the Bureau officers to access documents within the scope of the search warrant. In the case of electronic documents stored on the Company's computers and other devices, procedures should be put in place to ensure that the integrity of vital computer systems is maintained. Legal counsel should be involved in the arrangements for any computer search.
5. While being cooperative with the Bureau officers, Company employees should do no more than is necessary to facilitate access to documents within the scope of the warrant. Under no circumstances should the Company permit the Bureau officers to interview its employees (absent a specific court order requiring such an interview). Consult with legal counsel if any issues arise regarding the extent of cooperation that should be provided during the course of the search.
6. If there is a disagreement on any matter relating to the search, formally note the disagreement and consult with legal counsel. Keep notes of all conversations with Bureau officers and have at least two Company representatives present at all times during such conversations.
7. Bureau officers typically place seized documents in sealed boxes or packages. It is critical that no seal be broken by anyone other than a Bureau representative.

Assertion of Solicitor - Client Privilege

- 1.** Identify at the outset of the search any documents which are or may be privileged. Keep these documents on the premises in a single location for review by your legal counsel who will claim privilege in the appropriate circumstances. In addition, store all privileged e-mail in a single folder labelled "Privileged & Confidential".
- 2.** If Bureau officers are about to examine, copy or seize any document which is or may be privileged, inform them that a claim for privilege is being made. The Bureau officers are then required to place the document (along with any copies and notes made by the officers in relation to such document) in a sealed package.

Documenting the Process

- 1.** To the extent possible and without interfering with the search, keep a record of the types of documents seized by the Bureau officers. If any of the seized documents are required by the Company for the purpose of carrying on its business, ensure that, under supervision by the Bureau, copies of any such documents are made before the Bureau representatives remove them from the premises.
- 2.** When the search is over, prepare a memorandum setting out everything that took place during the search. If the search is expected to last more than a few days, daily memoranda should be prepared. Such memoranda, if not prepared by legal counsel monitoring the search, should be addressed to the Company's legal counsel in order to maintain applicable solicitor-client privilege.

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Recognition

Our group is universally regarded as one of the leading competition practices in Canada. In 2013, the practice was ranked by the *Canadian Legal Lexpert®Directory* as a “most frequently recommended” firm and six of our lawyers were ranked in the areas of competition law and competition litigation. The *Lexpert®/American Lawyer Guide to the Leading 500 Lawyers in Canada* recognized five of our lawyers, while *Chambers Global* consistently recognizes us as one of the “tier one” competition practices in Canada, based on statements from clients that the group provides “a quality that sets it apart from the competition”. The practice was also profiled in the *Global Competition Review 100* and in the *International Who's Who of Competition Lawyers*.

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Davies has significant expertise dealing with search warrants and the complex issues that often arise during the course of a search. In the event that your Company is the subject of a search warrant, or if you would like additional information regarding the points discussed in this pamphlet, please do not hesitate to contact any of the following Davies lawyers:



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