
SEARCHES BY THE FINANCIAL MARKETS AUTHORITY

JANUARY 2014

This note explains how to respond if the Financial Markets Authority (**FMA**) seeks to execute at your premises a search warrant issued under section 29 of the Financial Markets Authority Act 2011 (**FMA Act**).¹

Immediate action

- Ask the lead officer to produce identification, and a copy of the search warrant.
- Ask the lead officer if he is willing to wait until your legal adviser arrives. (He does not have to wait.)
- Contact senior management, and your Bell Gully legal adviser.
- Check that the search warrant:
 - states the name of the issuing officer and the date of issue;
 - states that it was issued pursuant to section 29 of the FMA Act (including, where relevant, the suspected offence or offences);
 - is directed to the lead officer (it may be directed generally to every constable and/or every FMA officer);
 - is being executed in accordance with any conditions specified in it (such as the time of execution);
 - states the address or description of the place(s), vehicle(s) or thing(s) being searched;
 - contains a description of what may be seized;
 - states the period during which the warrant may be executed (usually 14 days from the date of issue);
 - has not previously been executed (unless it states that it may be executed more than once);
 - contains an explanation of relevant privileges and an outline of how those privileges may be claimed;
 - does not provide for a remote access search unless cannot be searched at physical address.
- If the lead officer does not produce a valid search warrant, advise him that the search cannot lawfully proceed at that time. If in any doubt, obtain legal advice.

During the search

- Deal with the investigating team co-operatively and with as little aggression as possible. It is important to establish early a working relationship that will assist in achieving a cross-flow of information.
- Inform your colleagues of the search, and read out general points 1, 2 and 3 so that they are aware what the investigating team is allowed to do. This can be done conveniently in a group, with the investigating team present.
- Assign a representative to stay with each member of the investigating team during the search, and take notes (especially in relation to any searching or cloning of computers). Advise the investigating team to whom they should refer any enquiries.
- Ask the lead officer to confirm that each member of the investigating team is authorised to be present, and to provide a list of their names.
- Ask the lead officer for particulars of the allegations: what, when, by whom, who complained? (He does not have to provide you with these details at this stage.)
- Ensure that the search is carried out in accordance with the terms of the search warrant, and with general points 1, 2 and 3.
- You must be given a reasonable opportunity to claim privilege. You may prevent the search of any privileged material pending determination of a privilege claim (although the investigating team may take a copy of the relevant material and deliver it to a court to determine the claim). Special rules apply in respect of privileged materials held by a lawyer (e.g. the lawyer must be present).

Follow-up action

PRIOR TO DEPARTURE OF INVESTIGATING TEAM

- Request a written notice specifying what was seized. If it is not practicable for the investigating team to provide this before departing, it must be provided within 7 days. Check the written notice before accepting it.

¹ The FMA has other information gathering powers under 25 which it uses more commonly and also is open to receiving information voluntarily from parties.

- Advise the lead officer in respect of any items in the written notice over which you wish to claim legal privilege. See general points 1, 2 and 3 for further comment on this.
- Confirm who is in charge of the matter overall, and to whom any further enquiries should be addressed; likewise advise the lead officer to whom in your organisation he should refer any further enquiries.

Follow-up action

FOLLOWING DEPARTURE OF INVESTIGATING TEAM

- Prepare a written summary of the events, attaching copies of the search warrant and written notice.
- Consider your organisation's other needs. Do you need to issue a press release, make disclosure, or contact clients? Do you need to convene a Board meeting? Do you need to initiate an internal investigation?
- Seek legal advice on follow-up action regarding:
 - possible challenges to the validity or execution of the search warrant;
 - the provision of a list of things in respect of which privilege is claimed, and determination of any claims to privilege;
 - requests for confidentiality;
 - the return of any documents or things such as equipment removed during the search, or copies thereof;
 - rights in relation to any thing seized or data copied (e.g. access, release and destruction);
 - further details of the allegations.

General points

- 1) In summary, the investigating team can:
 - enter and search the place, vehicle or other thing specified in the search warrant;
 - request and use such assistance as is reasonable in the circumstances;
 - use any force in respect of any property that is reasonable for the purposes of carrying out the search (including entering or breaking open or accessing any area within the place being searched);
 - seize anything that is the subject of the search or may be lawfully seized (note that the investigating team may remove things that are in plain view, or where it is not reasonably practicable to determine at the time if they may be lawfully seized);
 - use any equipment to carry out the search (including your equipment, and your power points);
 - copy any document that may lawfully be seized;
 - use any reasonable measure to access a computer system, data storage device or other thing;
 - copy any intangible material that is the subject of the search or may otherwise be lawfully seized (including by previewing, cloning, or other forensic methods);
 - take photographs, sound and video recordings of the place, vehicle, or thing searched;
 - secure the place, vehicle or thing being searched;
 - exclude any person from the place, vehicle or thing being searched, or give any other reasonable direction;
 - require a person to provide access information and other information and assistance.
- 2) Generally, a search warrant will not allow the investigating team to:
 - require individuals to answer substantive questions;
 - search areas other than those identified in the search warrant, e.g. if the search warrant was issued in respect of the head office of X Ltd, the search cannot extend to areas occupied by Y Ltd (even if the two companies are related).
 - seize any irrelevant or privileged material other than in strict compliance with conditions imposed by the search warrant, e.g. the search warrant may state that if you make a claim of privilege in respect of any hard-copy document or any material stored on a computer or other device, the FMA may seize that material provided that it is then placed in a sealed envelope pending determination of your privilege claim.
- 3) There are substantial penalties for intentionally resisting, obstructing or delaying any person acting under a search warrant (including fines of up to \$300,000).

Contact details

AUCKLAND

Ian Gault PARTNER

DDI 64 9 916 8967 MOB 021 640 508

ian.gault@bellgully.com

David Cooper PARTNER

DDI 64 9 916 8978 MOB 021 608 470

david.cooper@bellgully.com

Andy Glenie SENIOR ASSOCIATE

DDI 64 9 916 8811 MOB 021 568 923

andy.glenie@bellgully.com

WELLINGTON

Mike Colson PARTNER

DDI 64 4 915 6857 MOB 021 429 625

mike.colson@bellgully.com