



International  
Competition  
Network

# ANTI-CARTEL ENFORCEMENT MANUAL

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Chapter  
Searches raids and  
inspections  
Subgroup 2: Enforcement techniques

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## 1. INTRODUCTION

Competition agencies view searches or raids as one of their most effective investigative tools in the battle against cartels. This Chapter, *Searches, Raids and Inspections*, provides an overview of the search and seizure procedures of various ICN member agencies, and identifies some of the key practices that are common among competition agencies around the world.

The Chapter was originally published based on information collected from ICN members in July 2004 by means of a questionnaire.<sup>1</sup> A revised questionnaire, containing the original questions, as well as 22 new questions, was distributed to ICN members in February 2009.<sup>2</sup> The Chapter has been updated to incorporate new information and changes since 2004. The focus of this exercise was to identify good practices and procedures with respect to the organization, timing and conduct of the seizure of documentary evidence. A concise summary of these good practices is listed in Appendix 3.

Best efforts were made to reflect the responses of all the agencies. However, where there is a reference in the Chapter to the number of agencies that engage in any particular practice or procedure, it should be recognized that this may not be a precise reflection of the experience of all the responding agencies. In some instances, usually due to either confidentiality concerns or to a lack of practical experience in the conduct of searches, some responding agencies indicated they could not provide information. In addition, some agencies provided additional information that was not solicited by the questionnaires. Where possible, this additional information is included in the Chapter.

Other sources consulted include OECD reports on investigative tools and techniques to fight hard-core cartels, and proceedings from various international cartel conferences and workshops.

The *Anti-Cartel Enforcement Manual* is a work in progress. The Chapter complements existing Chapters on leniency, digital evidence gathering, case initiation, interviewing techniques and investigative strategy. The subject of electronic evidence gathering is not addressed in any detail in this Chapter as it is covered in Chapter 3 of the Manual.

The *Searches, Raids and Inspections* Chapter has proven useful to many competition agencies. All of the agencies that responded to the 2009 survey indicated that they consult the Chapter. Three agencies stated that they referred to the Chapter when developing their own search procedures. The majority of agencies use the Chapter to update or improve existing search policies and procedures. Two agencies indicated that they refer to the Manual when new issues arise and three agencies use it as a resource or training tool.<sup>3</sup>

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1 The thirty-eight agencies that responded to the 2004 survey are listed in Appendix 1.

2 The fourteen agencies that responded to the 2009 survey are listed in Appendix 2.

3 **Question 38:** Please describe how your agency uses the current *Anti-Cartel Enforcement Manual Chapter on Searches, Raids and Inspections*. (New question 2009)

## 2. DEFINITIONS AND QUALIFICATIONS

### 2.1. Searches/Raids<sup>4</sup>

Search and raid are terms variously used by competition agencies to refer to the process of examining and removing records from a premises. For ease of reference, in this Chapter “search” is ordinarily used instead of “inspection” or “raid”, and is intended to describe any type of “on-the-spot” investigation where the agency, police, or other designated enforcement body examines, copies and/or removes relevant paper and electronic records from a premises.

Thirty-four of the thirty-nine agencies that responded to the original or revised questionnaire, regardless of the nomenclature employed, define their process in a way that is consistent with this definition. The remaining five agencies use different investigative tools to investigate cartels or have limited search powers.

### 2.2. Legal Authority to Conduct a Search<sup>5</sup>

For all fourteen of the agencies that responded to the 2009 survey, the authority to conduct a search is based upon law (competition law, administrative law or criminal law).

### 2.3. Warrant

In this Chapter, where searches are conducted under some type of advance authorization, the term “warrant” is used to describe the order or documentary authority under which the search is conducted. For ease of reference, “warrant” is used instead of “inspection order”, “inspection decision” or “search authorization.” Using this definition, one agency specifically identified that its “warrant” is issued by the enforcement agency rather than an external judicial body.

Thirty-two of the thirty-nine agencies that responded to the original or revised questionnaire reported that they search under the authority of a warrant. One of these agencies reported that it would be required to give advance notice to the business before executing the warrant.

### 2.4. Agency

In this Chapter, references to “agency” mean the competition or anti-trust legal body with jurisdiction to enforce anti-cartel legislation.

### 2.5. Business

For ease of reference, in this Chapter the term “business” means any undertaking, business, company, firm, or association but does not include private residences or vehicles.

### 2.6. Inspection

In this Chapter the term “inspection” is used to describe an on-site visit without a warrant and usually, although not always, with either the occupant’s permission or advance notice varying between twenty-four hours and ten days. Inspections differ from a search in that the manner and location of inspection may be circumscribed. For example, the agency may only be entitled to request documents rather than actually search for the documents. As with searches, in some instances the type of premises susceptible to an inspection may be limited to commercial and not residential premises.

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<sup>4</sup> **Question 1:** If the definition of “search” (“an on the spot” investigation where the agency, police, or other designated enforcement body examines, copies and/or removes relevant paper and electronic records) does not correspond with your authority to search, please elaborate.

<sup>5</sup> **Question 4:** What legal authority provides your agency with the power to conduct a search? (New question 2009)

At least five agencies reported they have the ability to inspect as well as to search. One agency stated it will search rather than inspect whenever there is a risk that the documentary evidence will be destroyed. Another agency reported that it must request permission to “touch any documents or data” when employing its inspection powers. A third agency reported that it may only require the production of relevant documents and an explanation of the documents produced or, if not produced, a statement as to where the documents may be found. Two agencies reported that inspections may only be carried out at the premises of the business (including vehicles at the business premises) and not at private residences.

## **2.7. Agencies with Limited or No Search Power**

Five agencies reported they have no search power, *per se*:

- One agency reported that it may “audit” all premises, land or transportation vehicles belonging to a business. The agency commented its legislation does not provide much information about the manner in which investigations are to be conducted.
- Two agencies stated that they rely on other investigative techniques as their primary tools for investigating cartels, including document productions and compelling the attendance of witnesses for examination under oath. One agency reported that it might request its national police force to “check offices, private residences or vehicles.”
- Another agency dispatches investigators “for any necessary on-site inspections.” The investigators may question personnel, but are not authorized to examine, copy or remove relevant papers and electronic records from the premises.
- One agency reported that it can conduct a “field check” at premises occupied by executive bodies, economic entities, the central bank and financial organizations for the purpose of obtaining documents and information necessary for the agency to fulfill its functions.

## **2.8. Legal Privilege**

Five agencies offered definitions of documents protected by legal privilege. These definitions are beyond the scope of this Chapter and are not described here, although issues of privilege arising during the conduct of a search or inspection are addressed later in this Chapter.

### 3. SEARCHES VS. OTHER INVESTIGATIVE TECHNIQUES<sup>6</sup>

#### 3.1. Searching as Tool of Choice

**It is good practice to consider whether to conduct a search within the context of available investigative tools and the facts and circumstances of the investigation.**

Most agencies indicated that they use searches in a cartel investigation because searches are an effective tool to obtain evidence, especially when an investigation is still at the covert stage. The serious and clandestine nature of the conduct, and the possibility that evidence could be altered, hidden, removed or destroyed makes searching the investigative tool of choice, and some agencies reported that they employ this tool as their first means of investigation. Searching is key where the element of surprise is considered to be important to securing the evidence.

Searches are resource-intensive, both in financial and human terms. A number of agencies reported that cost is an important factor when considering whether to search. Nevertheless, one agency reported that searches are the most effective tool in terms of conserving resources and expediting investigations. Seizing documents pursuant to a search warrant gives an agency immediate access to critical materials and, by avoiding delays common to subpoena compliance, some agencies report that search warrants can actually save time and resources. In addition to providing immediate access to key documents, one agency pointed out that searching may increase the likelihood that the agency will obtain all of the documents that it is seeking. The element of surprise provided by the execution of a search warrant reduces the threat that documentary evidence will be destroyed or simply not produced. In addition, some agencies report that, in their experience, search warrants also expedite investigations by grabbing targets' attention and sending a message that the investigation has advanced to a critical stage.

Although searches are the preferred choice for some agencies in cartel investigations, a number of agencies indicated that they use searches only when other tools would be less effective:

- Seven agencies reported that the most common circumstance in which they would apply for a warrant is where there exists a suspicion that the business would otherwise not produce the documents and instead would be more likely to conceal, remove, destroy or tamper with them.
- One agency stated that, in deciding whether to employ a search warrant or a without-notice "visit," it will take into account the level of cooperation expected from the business and whether, if required, the business would produce the documents requested.
- A number of agencies will conduct a search only if other investigative tools would not be effective. Two agencies reported that they must first satisfy a type of "needs" test: that is, whether there are other reasonable and less intrusive means to obtain the information sought.
- Another agency stated that, depending on the market structure and the type of cartel behaviour, they may request a judicial authorization for wiretaps.

<sup>6</sup> **Question 2:** Under what circumstances is your agency more likely to conduct a search instead of, or in conjunction with, other investigative techniques?



- Two agencies referred to the proportionality principle in their survey responses, that is, whether the investigation technique is proportional to the expected results. However, it is likely that most agencies operate according to this principle. One agency responded that searches will only be conducted in cases where the agency already has strong evidence. The agency is concerned that searches may be judged as “fishing expeditions.”

### 3.2. Searches in Conjunction with other Investigative Techniques

A large number of agencies stated that they issue formal requests for information and/or interviews either in conjunction with searches, or after the search at a later stage of their investigation. One agency mentioned that written requests for information or documents are sent to entities that are not suspected of having played a role in the cartel. Sometimes - usually towards the end of the investigation - the agency will also send written requests to suspects for information if there are no grounds to believe it would be destroyed or concealed. Another agency will attempt to conduct voluntary interviews at the search site and/or conduct simultaneous voluntary “drop-in” interviews of individuals in conjunction with the search. Two agencies will conduct a search when other investigative techniques have failed and it is believed that documentary evidence may still be found at the business premises.

### 3.3. Search Authorization<sup>7</sup>

All of the agencies that responded to the 2009 survey indicated that the authority enabling them to conduct a search is based upon law. Most responding agencies reported that the search warrant is issued by a judge or court. Some agencies have the power to issue a search authorization themselves. In these cases, the search authorization is typically issued by the head of agency or board of directors.

A number of agencies reported that before a court will issue a search warrant, they must demonstrate “reasonable suspicion” or “probable cause” that an infringement, an offence or other infraction or contravention has been or is about to be committed and that, on any premises to be searched, there are or are likely to be records or other things that will afford evidence of the offence, infraction or contravention. Some agencies are also required to demonstrate that this evidence cannot be or likely cannot be obtained by other investigative means (a type of “needs” test). One agency reported that it is legally obliged to first issue a formal request for information. A search is only possible if the business does not comply with this request.

One agency commented that its evidentiary threshold is difficult to meet at the early stages of the investigation when there is frequently insufficient evidence. Consequently, search warrants are not available in the majority of that agency’s investigations.

Another agency distinguished the requirements to search a third party not involved in the suspected cartel as being even higher. Searches would only be permissible if the evidence sought *will be* (as opposed to “presumed to be”) found at the premises.

In some jurisdictions, the supporting documents and information used to obtain a search warrant are confidential and will not be disclosed until the investigation is complete and the case is brought to the stage of making an infringement decision (for example, by a judge, a competition commission or the head of the agency) and the accused companies get access to the file.

<sup>7</sup> **Question 5:** What authorization is required in order to conduct a search? (New question 2009)

**Question 6:** What process is required to obtain this authorization? (New question 2009)

**Question 7:** Are the documents required to obtain the search authorization considered confidential? If so, what steps are taken to keep the search authorization confidential (e.g., sealing orders issued)? If they are sealed, at which point are they unsealed? (New question 2009)

In some jurisdictions, after a search, the businesses involved have the right to access the documents and information used to obtain a warrant. This right of access can be limited by the agencies if access would seriously jeopardise the investigation. For example, access may be limited if it would compromise the identity of a confidential informant or leniency applicant or compromise an ongoing investigation. In order to limit access and keep the documents confidential, some agencies can apply for a sealing order at the court or with the judge that issued the search warrant. According to a number of agencies, the documents will be unsealed when the case is brought to the stage of making an infringement decision.

### 3.4. Responsibility for Conducting the Search<sup>8</sup>

- Twenty-nine agencies reported they are the entity responsible for conducting cartel-related searches, but twenty-six agencies coordinate with domestic police forces when resistance from occupants of the premises to be searched is anticipated. Five agencies indicated they routinely call on their police force for assistance

Generally, the search responsibility takes one of the following forms:

- The agency conducts the search alone or, when the agency deems it necessary, with the assistance of police;
- The agency conducts administrative searches alone or, if necessary, with police assistance. Criminal searches are conducted by the federal or state law police and the agency requests the judicial authority to participate and use the seized evidence in its administrative proceedings.
- The local, federal or national level agency (depending on the geographic scope of the cartel) conducts the search, in conjunction with a public prosecutor's office (a cooperative arrangement);
- A public prosecutor's office conducts the search, either alone or with the participation of the agency;
- An independent investigative or law enforcement body executes the search warrant with the agency being available to respond to questions from an off-site "command post";
- The Judge authorizing the search exercises control over the search and can inspect the searched location(s) as well as decide when to suspend or terminate the search; or
- The agency has no search powers.

<sup>8</sup> **Question 3:** Does your agency conduct the search or is another entity responsible for this (e.g., other competition agency, the police, etc.)?

## 4. ORGANIZING THE SEARCH

### 4.1. Pre-search Intelligence/Planning<sup>9</sup>

**It is good practice to engage in comprehensive planning prior to a search, including, as appropriate: identifying the premises to be searched, the type of evidence to be seized, and the composition of search teams; assigning responsibilities during the search; undertaking covert reconnaissance of the search venue; and coordinating with other entities that will participate in the search.**

Most agencies engage in a planning process which includes identifying the premises to be searched, the type of evidence to be seized, the composition of search teams, and mapping out who will do what and when during the conduct of the search. For this planning process, one or more of the following factors are considered, some of which might entail advance intelligence gathering exercises in respect of:

- the premises to be searched (location, entry possibilities, maps, etc.);
- the premises' surroundings (hotels, transportation, etc.);
- the type of material to be seized including electronic records;
- the Information Technology (IT) system used;
- the profile of the people likely to be at the premises (for example, with criminal records checks, firearms registry consultations, etc.) and the resistance anticipated; and
- time zone differences and time schedule for search activities.

Most agencies that responded to the 2009 survey obtain assistance from other entities in the planning phase, including police, peace officers, prosecutors, and other agencies, particularly when searches will be conducted outside the agency's locale.

<sup>9</sup> **Question 9:** Does your agency get assistance from other entities when preparing for or conducting a search? (New question 2009)

**Question 10 (a):** What is involved in your preparation of a search? (New question 2009)

**Question 10 (b):** Are there special considerations for a search outside your agency's locale? (New question 2009)

## 4.2. Search Team Composition<sup>10</sup>

**It is good practice to consider requirements such as language, gender, and information technology capacity in the team's composition.**

**It is good practice for the officers assigned to the case to participate in the search, and for the team to be augmented with other officers and experts, as appropriate.**

Agencies consistently reported that the composition of a search team depends on a number of factors, including:

- the size, location and type of the premises to be searched (a private residence vs. business premises);
- the likely duration of the search;
- the number of employees who are targets of the investigation and who are likely to be at the premises;
- the number of people expected at the premises;
- the complexity of the case;
- the classes of information being searched for and estimates of the volume of documents likely to be found;
- whether or not it is expected that computer records will be seized;
- language proficiency;
- the perceived role in the cartel of the entity being searched; and,
- the anticipated degree of resistance by the occupants of the premises.

Depending on these factors, teams might comprise several members including a team leader, case handlers, police officers (mostly when resistance is anticipated), lawyers, information technology or digital experts, economists, translators, interpreters and other experts.

One agency mentioned that it assigns search team members on the basis of their knowledge of the sector/market that is the subject of the cartel. One agency mentioned that it has a special unit responsible for all cartel investigations including the conduct of any related searches. Another agency reported it appoints external experts such as the police force as authorized members of the agency for the purpose of the search. Another agency mentioned that it composes its teams on a very *ad hoc* basis. One agency reported that for the majority of its searches, the average size of a team is approximately eight persons, comprised of two or three specialist cartel investigators, a forensic information technology investigator, and a “legally qualified case officer.” A site exhibit officer may also be assigned at each premises with responsibility for the collation, recording, bagging

<sup>10</sup> **Question 8:** What determines the composition of your search team(s) in terms of numbers, subject expertise and responsibilities?

and sealing of all documents copied or seized during the search. The agency indicated that it tries to ensure that at least one of the team members is female. Some agencies also use mixed teams comprised of junior and experienced enforcement officers.

Two agencies reported minimum team sizes (three members) while another two agencies reported an optimal team size (five to six persons; and two to six persons, respectively). Most agencies reported that the size of the team(s) is a function of the scope and size of the search. One agency stated that ideally investigators search in pairs. Another agency reported that it is not uncommon to have 20 or more officers participating in a search of a corporate office. One agency specified team(s) would be sufficiently large to conduct the search expeditiously but not so large as to make the process unwieldy.

### 4.3. Role of the Team Leader<sup>11</sup>

**It is good practice to appoint a Team Leader who will be responsible for the overall conduct of the search at a premises.**

**It is good practice, in the instance of simultaneous raids, to plan for a central command post to coordinate the sharing of emerging information and strategies among the search teams and ensure overall consistency of approach.**

All agencies that conduct searches appoint a team leader who is responsible for the overall conduct of the search at each search premises. This can be the lead investigator on the case or, in the case of numerous search premises, can be several senior investigators reporting to the lead investigator. Some agencies have pointed out that this person will usually be the most experienced officer on the search team or the highest ranking official of that team.

The role of the team leader may be summarized as follows:

- presents the warrant (or other authorization) and discusses search procedures with company officials and defence counsel;
- deals with claims of legal privilege;
- coordinates the search team and answers questions from the team or corporate representatives;
- liaises between the search team and the corporate representatives and other representatives of the business;
- disperses the search team to secure the premises and monitor key offices to ensure records are not destroyed;
- communicates with the agency and with other team leaders in multiple premises search operations;

11. **Question 22:** Is one person designated as the search leader for the premises? If yes, what are his/her responsibilities (e.g., dealing with representatives of the business, lawyers and media, communicating with other search leaders in the instance of multiple premises searches, etc.)?

- ensures compliance with all statutory requirements and agency procedures (for example, that the search warrant is produced upon entry, and if requested by the occupier at any subsequent time, and that all staff carry and display appropriate identification at all times);
- manages the search including allocation of tasks;
- conducts interviews;
- resolves disputes; and
- deals with any claims that the warrant is defective.

One agency specified that the lead investigator will not take active part in the searching activities although he/she will be present on the premises of one of the businesses. Rather, he/she is responsible for “managing” or “orchestrating” the search. Another agency pointed out that the search team leader should lead rather than search. His/her role is to ensure that the work is thorough and that all team members are doing what is expected. The team leader cannot lead if acting as a searcher but should keep abreast of what is being found and identify and deploy staff to new areas. Another agency referred to a “supreme” leader, responsible for the whole investigation.

Some agencies mentioned that when there are multiple search teams, all team leaders are requested to liaise with a central point back in the office, rather than directly with each other. One agency referred to the establishment of an off-site “command post” where the search team leaders reported. Agencies reported that when sites are searched simultaneously, a central coordinator, usually the lead investigator on the case, remains at the agency to perform tasks, such as obtaining progress reports, passing relevant information to other teams, providing advice and instructions and assisting and coordinating operations as necessary. Most agencies responded that search teams communicate on a continuous basis with each other and the central coordinator using devices, such as cellular telephones, mobile devices or portable facsimile machines. One agency responded that they can access their computers on the premises being searched. Several agencies indicated that they may also hold conference calls or nightly in-person meetings.<sup>12</sup>

Four agencies have indicated that the team leader is specifically responsible for drafting a search report, and to report any circumstances preventing the search team from fulfilling its duties.

At one agency, the team leader is responsible for raising the leniency policy at the searched premises and recording any statements, as well as consulting with the home agency concerning any issues that may require an extension or alteration to the search authority, as such decisions require judicial confirmation. One agency mentioned that the team leader was directly responsible for dealing with media inquiries.

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<sup>12</sup> **Question 30:** If there is simultaneous searching of more than one site, how do you ensure communication among the search teams and the head office? (e.g., cell phones, nightly meetings, coordinator that remains at his or her office, etc.) (New question 2009)

#### 4.4. Training<sup>13</sup>

**It is good practice to offer training programs to professional staff involved in conducting searches.**

Most agencies that responded to the 2009 survey provide ongoing training sessions for investigators on the practical issues of conducting searches and basic IT knowledge. Some agencies have a special course for team leaders; one agency provides intensive training on forensic IT searching. One agency uses the “learn by doing” method for training new investigators. It is therefore considered important to instruct the searching officers about the agency’s procedures prior to the search especially with new officers or when searches are infrequent. As mentioned previously, the *Searches, Raids and Inspections* Chapter can be an effective training tool for this purpose.

#### 4.5. Pre-search Briefings<sup>14</sup>

**It is good practice to precede searches with thorough briefings for team members.**

**It is good practice to prepare “search kits” ready-packed with stationary, seals and other necessities for team members.**

Agencies that responded to the original or revised survey indicated that they hold briefing sessions prior to the execution of the search. One agency indicated that the written briefing note allows the team to quickly assimilate the case information and conduct a quicker and more objective search. Some agencies prepare a documentary briefing or a written briefing package ahead of the oral briefing. Two agencies mentioned that they make this written briefing package available to the search teams before the oral briefing and identified the benefits of this approach to be:

- staff have the opportunity to familiarize themselves with the overview of the alleged case, the businesses or individuals involved and the classes of items to be searched for prior to the oral briefing; and
- staff can ask questions to clarify any ambiguities at the oral briefing.

For some agencies, the briefing package is distributed at the oral briefing where the strategic approach is discussed. Two agencies, in addition to the oral and documentary briefings, hold briefings for each individual team to address particular issues or questions that may arise at each specific site to be searched. At one agency search leaders may be briefed before the rest of the team.

<sup>13</sup> **Question 12:** Is training regarding search techniques, policies or practices provided to the people who will be conducting the search? (New question 2009)

<sup>14</sup> **Question 11:** How are the people who will be conducting the search briefed about the investigation and the evidence sought (e.g., oral or written briefing, individually or in a group)? Please provide any comments you might have as to the benefits/drawbacks of one method over another.

Two agencies provide the briefings to the search team on the day before the search for confidentiality reasons. Another agency reported that the success of a cartel investigation depends on maintaining the security and confidentiality over the facts, so only a few people are aware of the search plan even within the agency. In that instance, the briefing on the search plan is made in the morning of the day of the investigation or just before launching the search.

#### **4.6. Briefing Contents**

A number of agencies described the content of the pre-search briefing. Topics discussed at these briefings include:

- the composition of the team(s) and team leader;
- an overview of the alleged conduct/case/offence;
- the names and descriptions of businesses and key individuals involved in the cartel;
- a description of the location of the premises to be searched and the layout of the premises;
- the type of evidence sought;
- a list of keywords for electronic and paper document searches;
- the names and positions of key individuals at the premises;
- the overall search strategy and the procedure to follow, and the role of each team member;
- any instructions about dealing with the media;
- any occupational health and safety risks; and
- logistical issues and important mobile phone numbers.

Another agency described detailed search briefings to review the premises, the documents sought and the parties involved. At these sessions, the agents are often given maps of the premises and a list of the items to be seized to serve as a quick reference guide during the search. During the briefing, agents on the search team are given specific assignments to be performed during the search. Some agencies prohibit team members from bringing briefing documents to the premises in order to avoid the risk of a breach in confidentiality. As a further confidentiality safeguard, one agency codes each briefing document and ensures that it is returned to the team leader following the conclusion of the search. Several agencies prepare “search kits” ready-packed with stationary, seals (e.g., for use on doors and cabinets) and other necessities for all team members.



## 4.7. Note-taking<sup>15</sup>

**It is good practice to make accurate notes of the events and occurrences as they occur at the search premises.**

All responding agencies that use searches to gather evidence in cartel cases, except one, prepare minutes, or notes, of all aspects of the search.

Two agencies mentioned that note-taking on a search is important proof that the investigators have conducted the search appropriately, and such notes may become part of the evidence presented in court. One of these agencies commented that such notes may be considered by the courts as more reliable than the investigator's memory.

Twenty-eight agencies make notes or prepare a search report or "search protocol" describing one or more of the following elements:

- details obtained during the search briefing;
- time of entry and identification of search officers;
- the fact that all staff (and any other person assisting) carried and displayed appropriate identification (often to satisfy statutory requirements);
- details concerning the presentation of the search warrant (date, time of day, name of company official, title);
- the fact that the search warrant was produced upon entry (often to satisfy statutory requirements);
- description of the premises searched, including sketch diagrams of all areas searched during the execution of a warrant;
- condition of the premises on arrival and any damage caused to the premises during the execution of the search;
- steps taken to secure the premises;
- any use of outside experts or police;
- detailed notes of relevant discussions with business representatives (discussions of an evidentiary nature, or where making notes is prudent from a risk management perspective);
- any cautions administered and statements made, word-for-word, if possible;
- discussions relating to the right to consult counsel;
- claims of legal privilege;
- discussions with counsel;
- steps followed in the gathering, seizure, identification and handling of evidence;
- any instance of obstruction;

<sup>15</sup> **Question 25 (f):** Do you document any aspect of the search (e.g., premises description, entry of the premises, areas of premises searched, discussions with the business' representative or its lawyer, unusual events, etc.)? If yes, in your experience what aspects of a search are important to document by way of notes, and why?

- condition of seals placed on containers, cabinets, locks, doors, etc.;
- condition of seized records left at the premises;
- any significant deviation from established agency procedures;
- details of statements or comments made by any person or events that occur that have a direct relationship to the substance of the investigation (for evidentiary purposes in any subsequent hearing);
- the date, time, location and description of all records seized during the execution of a search and any unique identifying number that was assigned to such records (for evidentiary purposes in any subsequent hearing, and to satisfy the requirements of the chain of custody);
- details of any events that may expose the agency or any of its staff to risk (to satisfy the agency's risk management procedures);
- details of any events that occur that may demonstrate that the subject of the search, or any of its employees failed to provide reasonable assistance during the execution of the search (for evidentiary purposes in any subsequent hearing);
- details of any *prima facie* breach of any legislation not enforced by the agency, or possible breaches of legislation enforced by the agency that fall outside the jurisdiction of the search warrant or substance of the investigation to which the search warrant pertains (so that details can be passed to the relevant enforcement entity or regulator and/or for evidentiary purposes in any subsequent hearing relating to "other" breaches);
- the fact that either a schedule/list of material seized or a notice that records were removed was provided to the occupant of the premises (to satisfy statutory requirements); and
- the time the search warrant was completed (for evidentiary purposes in any subsequent hearing).

#### 4.8. Designated Note-taker or Reporter<sup>16</sup>

Responses were divided into two groups:

- Thirteen agencies responded that one member on the search team was responsible for taking search notes; and
- Ten agencies stated that all investigators are responsible for taking notes. One agency designates one person to record the presentation of the warrant. Otherwise, each team member takes notes in relation to the part of the premises each is searching. At six agencies, the team leader prepares a written report of the search with reference to other team members' notes. One agency reported that two members of the search team take notes and are present during interviews.

<sup>16</sup> **Question 25(g):** If you document aspects of the search, do you designate one search team member as the note-taker or do all search team members take notes and why?

## 5. TIMING

### 5.1. Sequential or Simultaneous Searches<sup>17</sup>

**It is good practice to conduct searches with the element of surprise.**

**It is a good practice to make entry simultaneously with search teams on other premises and equip each Team Leader with a mobile phone and the numbers of a central command post and/or all other relevant team leaders in order to enable continuous coordination.**

Most agencies replied that, in the case of a multiple premises search, entry is made simultaneously with search teams at other premises to minimize the potential for destruction of evidence. One agency splits up its teams and another obtains assistance from other units in order to execute simultaneous searches. If simultaneous searches are not possible due to limited resources, most agencies that responded to the 2009 survey conduct sequential searches, giving priority to the locations most important to the case. Two agencies indicated that premises are sealed until they can be searched.

When sites are searched simultaneously, the majority of respondents to the 2009 survey indicated that a central coordinator remains at the agency to perform the tasks described in Section 4.3 of this Chapter.

### 5.2. Coordination with other Agencies<sup>18</sup>

**It is good practice, where appropriate, to communicate and coordinate with relevant foreign competition authorities.**

**When coordinating with relevant foreign agencies, it is good practice to communicate early in the investigation and on a regular basis.**

**It is good practice, when two agencies have the same leniency applicant, to request waivers of confidentiality from the leniency applicant as early as possible.**

<sup>17</sup> **Question 13:** In the case where several premises need to be searched, how do you handle the process (e.g., sequential searches)? (New question 2009)

<sup>18</sup> **Question 15:** In the context of international cartel conduct, do you coordinate the timing of your search with other foreign agencies?  
**Question 16:** Under what circumstances will your agency consider delaying or expediting a search in order to coordinate timing with a foreign agency? (New question 2009)  
**Question 17:** When preparing for a search do you ever share or request information from foreign agencies? (New question 2009)  
**Question 24:** Please describe how the search is conducted. (New question 2009)

Twenty-four agencies responded they either have coordinated the timing of their searches, or have the ability to coordinate with foreign agencies. Ten agencies responded they either have no experience coordinating the timing of their searches with other foreign agencies or do not have the ability to engage in such coordination. Several agencies indicated that, although they have not yet engaged in such coordination, they are amenable to doing so.

One agency responded that they have coordinated their use of other formal powers (i.e., statutory notices compelling businesses to supply documents or information) on the same day that other foreign agencies conducted searches. Three agencies referred to a coordinated approach (sometimes informal) with other national anti-trust agencies in the instance of cross-border conspiracies.

When preparing for a search, two agencies indicated that they do not generally share information with foreign agencies and one agency indicated that they do so. Several agencies responded that information sharing may be limited to general information. Ten agencies indicated that confidential information would be shared in certain circumstances, subject to applicable policies, laws and cooperation agreements and if doing so would not jeopardize the investigation (for example, in cases where two agencies have the same leniency applicant and the leniency applicant has provided the agencies with waivers of confidentiality). One agency pointed out that they may coordinate activities with foreign agencies in the absence of formal cooperation agreements, but they are more likely to receive judicial authorization to exchange information regarding seized evidence when there is a cooperation agreement in place (based on reciprocity principles). Another agency mentioned that if they receive information indicating that the competition laws enforced by another agency have been infringed, it would share this information.

Most agencies responded that they would consider delaying or expediting a search in order to coordinate timing with a foreign agency on a case-by-case basis. One agency indicated that the main criterion considered is whether essential evidence of the cartel is likely to be found in the territory of the requesting agency. One agency stated that they balance the benefits of cooperation with the risks of delaying a search. Three agencies responded that they would be willing to delay a search unless it would have a negative effect on the investigation or result in the loss of evidence. One agency mentioned that a risk of destruction of evidence could lead them to expedite a search in order to coordinate with other agencies. One agency indicated that once a date has been agreed upon among the various agencies, they are unable to change it due to the implications on personnel, costs and logistics.

### 5.3. Advance Notice<sup>19</sup>

Thirty agencies have no obligation to and do not give advance notice before conducting a search. Three agencies mentioned that their reasons for not giving any advance notice relate to their firm conviction that the unexpected nature of the action is of primary importance for the success of the search. Moreover, targets generally are not informed beforehand in order to avoid destruction or removal of incriminatory evidence.

One agency is required to give advance notice and six agencies replied they *may* give prior notice before conducting a search. One agency provides a notice “not less than ten days before” the search. Two agencies stated that if entry is without a warrant, they are obliged to give the occupier of the premises written notice of the intended entry, at least one or two days in advance. One agency stated that when the prosecutor’s office conducts a search, the parties under investigation are informed

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<sup>19</sup> **Question 18:** Are you required to give prior notice to a business before conducting a search of its premises? If so, how much notice and what level of detail is required?

unless the court authorizes otherwise. Two agencies responded that if an appropriate person or legal representative is not on the site at the time of the search, a notice of citation is left requiring that party to be at the premises at a fixed time on the following business day in order for the agency to proceed with the search. If the company representative is not present at the designated time, the search can proceed.

#### **5.4. Duration of the Search<sup>20</sup>**

Eleven agencies responded that they have no limitations on the amount of time they can spend conducting a search. Of these, two agencies indicated that they remain on site for a continuous period of time until the search is complete. Three agencies indicated that they may search as long as is reasonably necessary. Two agencies reported that the length of time must be proportional to the goal of the search and in practice will be limited to three or four days.

One agency mentioned that they continue to search the premises until they are satisfied that all available evidence has been located. Another agency reported that its officers will stop searching and vacate the premises if any of the following conditions occurs: the warrant expires; all the things described in the warrant are either found or are not at the search premises; or the search officers are served with a court order requiring an end to the search. One agency described its general approach to searching as leaving no place unexamined, with the reminder that even waste paper baskets can be fertile locations.

A number of agencies reported that search warrants are only valid for a specified number of days. For example, one agency responded that the search warrant is valid for 90 days. Another agency indicated that 25 days is the limit for conducting a search and if more than five days are required, a formal extension is required and must be justified. Finally, one agency indicated that warrants to search a private residence are generally valid for a maximum of 24 hours, while warrants to search a business premises are generally valid for up to four weeks.

#### **5.5. Search Hours**

Seven agencies indicated that they are not limited to searching during specific hours. Of these, one agency stated that they always search during business hours. Another agency indicated that searches often extend beyond normal working hours, but the agency takes into account the company's business hours based on the principle of proportionality.

One agency indicated that they usually begin searching in the morning and can continue searching during the evening if the search is not finished. However, they usually cannot conduct a search on a Sunday, public holiday or during the night unless it is very important to do so and there is an "imminent danger" of loss of evidence or obstruction. One agency responded that they can obtain an authorization to search outside of normal business hours and non-working days. Another agency reported that searches begin during business hours, but may continue outside of business hours or during holidays. One agency reported that it must serve search warrants between 06:00 and 22:00, but once the warrant has been served, the search may last as long and be as thorough as reasonably necessary to fully execute the warrant. An agency indicated that they normally seal relevant areas of the premises after 18:00 and resume at 08:00 the following day.

Four agencies responded that they are only allowed to search during specific hours. The earliest time a search may begin for these agencies varies from 04:00 to 06:00. One agency reported that searches may be conducted between 06:00 and 21:00, unless authorized by a judge. Another agency

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<sup>20</sup> **Question 20 (a):** Are there any limitations on the amount of time your agency can spend conducting a search? (New question 2009)

indicated that a search warrant may be exercised at a time that is reasonable in the circumstances, based on the particular case and relevant legislation. It is likely that this would mean during normal business hours. One of these agencies stated that searches are generally conducted during normal business hours, but that some searching may occur beyond the hours stipulated in the search warrant (e.g., when downloading data from a computer system). One agency indicated that they are not entitled to conduct a search at night time. One agency reported that a search may only be conducted during the period from sunset to sunrise if it is specified in the search warrant. Also, a search that was initiated before sunset may be conducted beyond sunset when necessary.

## 6. ARRIVAL AT PREMISES

### 6.1. Entry and Identification

**It is good practice to preserve the element of surprise during entry by not disclosing your precise purpose to a receptionist.**

One agency reported that its staff carry and display appropriate identification at all times during a search. One agency is required to carry an authorization certificate with them and present it to the authorized personnel of the business. Another agency does not need to display a permit of any kind when searching businesses, but upon request of the business owner, the investigators will identify themselves as authorized government employees and show their credentials.

One agency indicated that upon initial entry to the premises, the team leader will evaluate the circumstances to determine whether or not to immediately disclose that he/she is there to execute a search warrant. If there is any concern about the security of the records, the team leader may merely identify him/herself as a government official and ask to speak to the senior executive of the company (the name of this person would have been discussed at the search briefing). Once the person in charge presents him/herself, the precise reason for being at the premises will be made known to the executive in charge.

### 6.2. Presentation of Warrant<sup>21</sup>

**It is good practice for the Team Leader to furnish a copy of the search authorization to a senior company official, explain the nature of the search, and caution against obstruction.**

**It is good practice to be courteous and diplomatic.**

Many agencies are required to present the search warrant to a senior company official (e.g., the highest level manager available, an official authorized to receive official documents on behalf of the business, or an individual in charge of the premises). Two agencies reported that they must present the warrant to the business' legal representative. Three agencies responded that they are not required to present the search warrant to a particular business representative, however, when searching private residences, they must show the court order to the owner or inhabitant of the house. Another agency indicated that the warrant must be presented to the occupants of the premises or the owner of the objects searched.

Some agencies reported that the team leader presents the warrant to the senior executive of the company and explains the authority of the warrant, the duties of the person in control and the search process. Five agencies also reported that they advise the business representative that they may contact legal counsel. One agency reported that it is required to read the search warrant to any

<sup>21</sup> **Question 23:** Are you required to present your search authorization to a particular business representative (e.g., a director, manager or legal counsel)? (New question 2009)

business representative and that two randomly selected company witnesses must follow the entire search process.

Some agencies also introduce the other members of the search team to the company representative(s). At this stage, team leaders will often ask for a tour of the premises and a description of the responsibilities of the different officials of the company. One agency stated that at this point, the team leader also makes arrangements with the person in charge to have an area, a vacant office or a conference room, to use as a work area for the search team.

### 6.3. Requests to Delay the Search<sup>22</sup>

**It is good practice, if acceding to a request to delay searching, to first ensure that the premises have been adequately secured so the delay does not prejudice the outcome of the search.**

Most agencies replied that they will respect reasonable requests to delay the search until the business has consulted with its lawyer. Such a delay may be granted if it does not interfere with the effective execution of the search, and provided that the premises are adequately secured. Some agencies indicated that this is a question of discretion. Many agencies will grant a “reasonable” amount of time for the occupant of the premises to obtain legal advice, if it is considered appropriate in the circumstances. Some agencies stated that, in practice, they grant between thirty minutes and up to an hour, after which they will proceed with the search.

A number of agencies stated that while businesses have the right to be assisted by legal advisers of their own choice, this right cannot suspend or delay the investigation, especially if there is an in-house lawyer present on the premises. Businesses are permitted to consult either in-house lawyers or external lawyers by telephone. Although they will not delay the search, one agency indicated that they may agree not to remove or copy documents until the external lawyer arrives.

Several agencies reported that their standard response to a request for a delay to obtain legal advice is to grant a reasonable time, but to also take measures to secure the premises to be searched and to ensure that no person has the opportunity to remove or destroy material that may fall within the ambit of the search warrant.

Another agency that routinely agrees to a reasonable request for time to consult with a lawyer has, on some occasions, prepared a draft letter in advance for the purposes of passing it to the target’s lawyer following formal service of the authorization but before the actual search begins. In this way the business’ lawyer obtains a quick and clear understanding of the circumstances and can advise clients promptly.

### 6.4. Delay Concerns

Some agencies expressed concern that an undue delay in commencing a search could adversely affect the ability to execute the search warrant. These agencies emphasized that the exercise of the right to consult a legal adviser must not unduly delay or impede the search. Any delay must be kept to a strict minimum. The main concern for some agencies is the opportunity a delayed start could provide for evidence to be tampered with or for other parties to a suspected infringement to

<sup>22</sup> **Question 19:** How do you deal with requests to delay the search until the business has consulted with its lawyer about the search?



be warned about the search. To reduce this concern, the search leader may attach such conditions as he/she considers appropriate when agreeing to allow a reasonable delay in order for the party being searched to obtain legal advice. Examples of such conditions include requiring that

- cabinets and/or rooms be sealed;
- business records be kept in the same state and place as when the agency arrived;
- officers from the agency be allowed to enter and remain in occupation of selected offices; and
- the premises be adequately secured.

### **6.5. Unforeseen Difficulties<sup>23</sup>**

In order to minimize the effects a security gate-house or other security system can have on a search, several agencies noted that they conduct a covert pre-search reconnaissance of all premises to identify security routines, entry and exit routes and work out the number of staff needed for the task before the search begins. This allows for risk assessment and deployment of staff to cover those risks. One agency stated it made note of any impediments to gaining entry (such as security measures) and built contingencies into the search warrant execution plan and staff briefing. This may include confidential approaches to security organizations to have their staff on standby to facilitate entry. An example of this might be to disable a monitored alarm system, or to provide the appropriate tools to facilitate entry. This will include the use of force if necessary. One agency reported that it may seek a court order for police assistance in order to gain entry.

Some agencies described a two-step process to gaining entry in the face of impediments. As a first step, the team leader will identify him/herself and ask to speak to the individual in charge. When the person in charge is present, the team leader will provide that person with a copy of the warrant and ask permission to enter the premises to conduct the search. In the case of resistance or refusal, or if permission is not readily given, agents will use forcible entry with police assistance so as to eliminate the possibility of evidence being destroyed. Some agencies reported that impeding entry may be considered obstruction and be fined accordingly.

One agency mentioned that it can carry out a search in the absence of the occupier or owner of the premises, but must leave a notice in a prominent place at the premises stating the date and time the search warrant was executed, the name of the person who executed the warrant and the fact that material was removed from the premises.

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<sup>23</sup> **Question 21:** How do you prepare for or respond to situations where a surprise entry to the premises being searched is prevented by virtue of a security gate-house or other security system(s)?

## 7. CONDUCTING THE SEARCH

### 7.1. Limiting Company Access to the Premises or Detention during a Search<sup>24</sup>

**It is good practice to secure the premises and take necessary steps as soon as possible in order to avoid the loss or destruction of evidence.**

A few agencies stated that while business representatives are not required to assist with their searches, interference with the search could result in their being removed from the premises and/or arrested and charged with obstruction of justice.

Many agencies reported that they take measures to control offices considered strategic to the search operation by giving search priority to important areas and offices of key personnel and securing the offices by sealing documents, cabinets or entire rooms. Other agencies reported that they have no authority to seal premises or areas of the premises.

Along with sealing, different approaches to control the premises and the integrity of the search operation upon entry were described in the following examples:

- accompanying key individuals during the early stages of a search to ensure they cannot interfere with documents or ask someone else to do so;
- asking people to leave certain rooms and/or situating investigators in rooms where relevant documents are housed to ensure preservation of the documents;
- unplugging or sealing shredders;
- requesting key individuals of the business to remain at the premises and to collaborate with the search officers in order to hasten the search operation;
- requesting employees at the premises not to move documents on desks or remove files from drawers until after the search has been completed;
- identifying the rooms, computers and documents to be searched, after which the occupants are forbidden to make any changes to them until the search of the specific room, documents or computer is finished;
- advising the occupants of areas of a premises being searched that they are not permitted to continue to work on their computer, and requesting those persons to first seek clearance from a member of the searching agency if they require access to any documents located in that area;
- requesting the searched party to discontinue the removal of records to offsite storage or to ask the cleaning staff not to remove garbage from the premises on the first day of the search;
- advising the occupants against acts of obstruction;
- sealing areas and storing documents in a secure place when the search cannot be completed in one day; and
- prohibiting any person from entering or leaving the site without permission while the search is being conducted.

<sup>24</sup> **Question 25(c):** Under what circumstances and how do you limit access by the management and employees of the business to all or part of the premises and/or documents?

## 7.2. Arrests and Searches of Individuals<sup>25</sup>

**It is good practice, where permitted, to ensure the search authorization covers moveable objects such as briefcases, handbags, electronic diaries, and portable computers.**

No agencies reported having the power to arrest individuals in order to search for records on their person (i.e., briefcases, pockets, etc.). Nine agencies stated that either they or police officers attending the search are authorized to search each person present or each person leaving the premises who is suspected of hiding relevant documents. Eleven agencies responded that they would request key individuals wishing to leave the premises to produce any documents/diaries/agendas on their person before leaving. One agency reported its officers do not have the right to search for records on the person. However, if that person removes a document and tries to hide it during the search, the officer is allowed to take it back from the person, unless the record was already on the person before the search began. Three agencies reported having the authority to search briefcases and similar articles found at the premises. One agency indicated that it had no authority for a search of this nature and would request police to intervene. Other agencies may be able to search individuals, briefcases, etc. under certain conditions, which vary widely, as follows:

- There is “reason to believe” that a record specified in the warrant would be found in the briefcase, etc.
- The search warrant specifies that the locations to be searched include briefcases, laptop computers and such other movable document containers located at the premises in the possession of, or readily identifiable as belonging to specific individuals identified in the search warrant.

<sup>25</sup> **Question 25(d):** Does your search authority permit you to search for records on the person before they leave the premises (i.e., briefcases, pockets, etc.)? If you have this authority, how do you carry it out? If you do not have this authority, what precautions do you take to minimize the removal of records on the person?

- The warrant holder (usually the search team leader) has reasonable grounds to suspect that an individual has, on their person, documents, articles or things covered by the search warrant and that individual refuses to hand them over for examination. In such circumstances, that individual may be in breach of the requirement to provide all reasonable assistance and may face prosecution for their actions.
- The individual has given his/her consent.

### 7.3. Taking Statements During the Search<sup>26</sup>

**It is good practice to ensure that a strategy is in place as to who will conduct the interviews, and that complete notes are made of the interviews.**

Seventeen agencies stated they take statements from management and employees of the business during the search, including any clarifications provided in response to questions from members of the search team. One agency records statements taken during a search on tape and in written form. Some agencies indicated that they conduct interviews whether or not consent is required.

At least four agencies have their search report signed by an official from the agency and from the business being searched. One agency requires that any explanation of the alleged conduct be written down and signed by the individual who provided the information, including a statement to the effect that the individual has read the statement and acknowledges it to be a true statement in his/her words. Another agency responded that the statement-giver is under no obligation to sign the statement and can also “announce their different opinion.”

Agencies described many different practices with respect to interviewing or questioning management and employees at the premises during the conduct of the search. A number of agencies question individuals at the premises, but only for the purpose of assisting in the conduct of the search. For example, individuals may be questioned for the following reasons:

- to assist in the identification of the locations of relevant documents;
- to provide explanations of written entries or symbols in documents such as calendars or initials and acronyms found in documents; or
- to assist with the search, for example, by providing the combination to a locked safe, or passwords to access computer records or electronic devices.

Some agencies answered that they will attempt to conduct voluntary interviews knowing that the subject may refuse and/or be protected against self-incrimination. Of these agencies, three usually have their officers request voluntary interviews with management and employees of the business during the conduct of a search, although the individuals need not agree to answer questions. A fourth agency reported that it routinely conducts interviews during a search and takes statements from the management and employees of the business regarding their activities or documents that are deemed relevant. The business must be provided with a copy of the recorded statements, but only after the search is completed. A fifth agency views interviews of management and employees during a search

<sup>26</sup> **Question 25 (a):** Do you interview or question the business’ management and employees at the premises about the substance of the investigation? Why or why not?

**Question 25 (b):** Do you require the business’ management and employees to provide information to assist in conducting the search (e.g., computer passwords, tour of the premises, etc.)? (New question 2009)

to be a fast way to get more relevant information about the investigation. Some agencies reported that they may bring their leniency program to the attention of management and employees at the target company.

One agency reported that it cannot question employees of the business but may question the legal representatives/lawyers at the search site regarding the subject of the search.

Some agencies reported that they do not interview any person in relation to the substance of the investigation during a search, with the following explanations:

- Given the inherently intrusive nature of searches, it is not uncommon for emotions to be at the extreme end of the scale such that it is usually neither appropriate nor wise to formally interview the party being searched.
- The statutory requirement for the occupants of a premises to provide all reasonable assistance to the agency during the search does not extend to answering any questions. Occupants may not be aware of their rights and consequently any answers they provide could later be ruled inadmissible in court due to a perception of unfairness. To avoid any subsequent problems, agency staff will generally conduct formal interviews at a later time, unless such delay might prejudice the investigation.
- Statement-taking during a search can distract from the search such that there is a preference to consider the documents obtained, and other information gathered during the investigation, before seeking statements from the management or employees of the business.
- Interviews will not be conducted due to the agency's limited personnel resources. However, the agency informs the parties about the existence and provisions of the agency's leniency policy, informs them of their rights, and gives them the opportunity to make a statement. Statements are recorded in writing and approved by the person making it.
- If management is willing to cooperate with the investigation, the agency can always contact them later.

#### **7.4. Photographs and Videos<sup>27</sup>**

The majority of agencies reported they have the power to take photographs and/or video footage at the premises during the search. However, very few agencies indicated they actually do so. A few agencies responded they have no such powers.

Several agencies routinely take pictures or videotape at a search location. One agency stated that it does so to document the state of the premises, and to rebut any subsequent claims that the premises or property was damaged during the conduct of the search. This agency noted that pictures can also help to document the location of evidence at the search site for identification and chain of custody purposes. A second agency stated that the search team may videotape or photograph the search process as a means of gathering evidence.

A third agency stated that it takes videos or photos, not as a matter of course, but in circumstances where the premises were in poor condition upon arrival. It would record in detail the type of photo or video equipment used, the type of film, the number of frames, and the date and location. In the case of videotaping, these details could be either written or audio recorded.

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<sup>27</sup> **Question 25 (e):** Under what circumstances, if at all, do you take photos or videos on the premises?

## 7.5. Scope of Search

One agency stated that the area it is allowed to search is strictly limited by the wording of the warrant. For example, if the warrant refers to a certain suite number, the warrant would not confer the authority to search multiple suites occupied by the entity being searched, even if the suites were adjacent to the suite specified in the warrant. In order to search adjacent suites, agents would be required to obtain a new search warrant.

## 7.6. Sensitive Areas (such as Private Residences, Law Offices, News Media, and Vehicles)<sup>28</sup>

**It is good practice, when resources permit and having regard to the nature of the premises to be searched, to include both male and female personnel on search teams (particularly when a private residence is to be searched).**

Most agencies reported that in addition to business premises, they could search one or more other types of premises, such as private residences, vehicles, lawyers' offices, and the news media. Most agencies indicated that these searches of these types of premises give rise to special considerations and procedures. One agency commented that extra caution should be taken in the case of residential searches and particular consideration should be given to who may be on the premises at the time, e.g., unsuspecting family members. One agency will consider confining the area to be searched within a private residence to a defined area but in reaching this decision, the agency takes into account the possibility that incriminating records might be located in unexpected places.

Although standards varied according to each jurisdiction, agencies commonly reported they would first be required to show some indication that an infraction, contravention or a crime had been committed and that evidence of that infringement would be located at the premises. One agency indicated that, to obtain a warrant for sensitive locations, the agency would have to establish to a higher standard that relevant documents would be found at such premises. Almost all agencies mentioned that a separate warrant or authorization would be necessary. Two agencies stated that when conducting searches of private residences, the search team must be comprised of at least one female investigator.

Three agencies reported they could search private residences only with the consent of the occupant. One of these agencies reported that, in the face of a refusal by the occupant, the agency could not proceed with a search but the uncooperative occupant could face an administrative fine.

One agency reported it can search vehicles located at the premises identified in the warrant, provided that the records described in the warrant could reasonably be found in the vehicle, or provided the vehicle is specifically mentioned in the warrant or comes within the description of the premises. Another agency is permitted to search vehicles parked in the business' car park provided the agency has a warrant to search the business. Vehicles parked elsewhere require a separate authorization and are subject to the "reasonable suspicion" test and a separate warrant.

<sup>28</sup> **Question 26:** Are you permitted to search other than business premises (e.g., private residences, lawyers offices, vehicles, etc.)? If yes, please describe any different procedures or considerations in conducting searches of such locations.

Another agency reported that as a result of a court decision it could search vehicles, uninhabited rooms, buildings, apartments and other premises or movable properties belonging to other persons but only if the police are present.

One agency reported that it is more difficult to obtain a warrant for sensitive places such as a lawyer's office, and a warrant for such a premises may include specific conditions on the mode of search in order to safeguard privileged or irrelevant material. One agency conducts searches of lawyers' offices in the presence of a representative from the lawyers' bar association and upon notice to the district committee of the bar association.

Another agency described a statutory provision permitting investigators to search any assets of a business, which would include vehicles and the office of an in-house lawyer within the premises. This authority does not, however, extend to private residences.

### 7.7. Unauthorized Removal or Destruction of Records<sup>29</sup>

**It is good practice to ensure that the search team has the power and has been trained to respond to unauthorized removal or destruction of records.**

Most agencies consider attempts to remove material from a premises, or to destroy a record before the searching officer has an opportunity to examine it, to be an obstruction of justice. Some agencies initiate early communication with the person in charge of the premises regarding the consequences of obstruction. A number of these agencies follow a two-step approach to deter such obstruction consisting, first, of some form of warning against interfering with the search, and second, by a possible charge of obstruction if obstructive conduct is discovered. Some jurisdictions also require intervention by the police and others impose a monetary fine for non-compliance.

Two agencies reported they treat the removal or destruction of records during a search as a refusal to cooperate. One agency considers non-cooperation as an aggravating circumstance allowing the agency to increase the amount of the sanction sought. The other agency indicated it usually would issue a fine for non-cooperation, although in exceptional circumstances it would call upon the police for assistance.

One agency described a two-step process whereby the obstructing conduct is documented by investigators in search minutes, which are endorsed by company officials, and subsequently, investigators obtain a court order in order to further investigate the obstruction offence. Following this, fines for non-cooperation can be imposed.

Only one agency indicated that it has no power to respond to the unauthorized removal or destruction of records, physical interference, etc. during the conduct of the search.

<sup>29</sup> **Question 27:** How do you respond to the unauthorized removal or destruction of records, physical interference or other forms of obstruction during the conduct of the search, such as refusing to permit access to the premises?

## 7.8. Evidence of Offences not Covered by the Warrant<sup>30</sup>

**It is good practice to ensure the appropriate resources are available on a stand-by basis to aid the search team if necessary (e.g., legal counsel, supplementary search officers, officer to draft additional search authorizations if necessary).**

Procedures to deal with evidence of other offences found during a search (whether competition-related or not) that are not covered by the warrant vary greatly among agencies.

### 7.8.1. Other Competition Offences

Three agencies responded that if, during a search, officers inadvertently come across evidence of another competition infraction, it might be legally possible to seize it under what is known in those jurisdictions as the “plain view doctrine.” One of these agencies uses this approach in exigent circumstances, when there is no time to obtain a new search warrant and there is a risk that the evidence will be removed or destroyed. However, in the absence of exigent circumstances, the agency is required to obtain another search warrant. The second agency will try to obtain another warrant on the basis of “probable cause to believe” that the additional crime has been committed and that evidence of that crime will be found at the premises. A third agency would have its search team leader make contemporaneous notes of such evidence and once back at the office, the case team will consider internally if there are grounds for making further enquiries or for taking further investigative action.

Other agencies reported that they would seize the records of another competition offence notwithstanding that their warrant relates to either another product or offence. Two agencies reported they are empowered to take copies of documents that are not covered by the warrant when such documents happen to be discovered in the course of the search (i.e., without being deliberately sought) and constitute evidence of an infringement of competition rules. This is particularly the case where such documents provide further elements as regards the actual scope of the suspected infringement (for example, in terms of its duration and/or geographic dimension, the number of businesses implicated therein, or additional products covered by the cartel activity under investigation). Another agency reported if such documents are found during the course of a search, the agency can copy or take them, and use them to either expand upon the existing investigation or launch a new one. One agency reported that it would seize the evidence but if the business contested the seizure, the documents would have to be returned to the business.

### 7.8.2. Non-competition Offences

A number of agencies stated they neither have authority to use evidence of other offences (whether competition-related or not) that are not covered by search warrant nor to transmit it to other agencies. One agency specified it is bound by professional secrecy and information collected by its personnel can only be disclosed to other agencies if a public interest can be established.

Other agencies will seize documentary evidence relating to a non-competition offence and refer it to the proper agencies including, for example, the national competition agency, tax agency or police.

<sup>30</sup> **Question 29:** What do you do if you find evidence of other offences (whether competition-related or not) that are not covered by your authority for the search?



One agency stated that it would seize the documents based on its domestic legislation mandating civil servants to inform each other of information that comes to their attention during the exercise of their functions. Some agencies stated that they are compelled to inform the competent entities about the fact or document found during the search. For one agency, this duty extends only to offences against life or the “royal dignity” as well as offences by civil servants. Another agency will submit a report to the court describing the alleged offence. One agency deals with evidence of other offences found during a search by having the team leader make a note of such evidence in his or her contemporaneous records and, on return to the office, he or she will decide if any other agency needs to be informed, for example, the police.

**[When to Stop Searching** - Moved to Section 5: Duration of the Search]

## 8. CLAIMS OF LEGAL PRIVILEGE<sup>31</sup>

This section deals with attempts by lawyers, either inside or outside counsel, to pre-examine the records on the premises, in advance of the search team, in order to determine whether or not the records to be examined by the searching officers fall into the category of documents covered by legal privilege. The most common argument voiced by these lawyers is that the privilege may be lost if a third party (namely, a search officer) has access to such documents.

One agency stated it offers the opportunity to the occupant or the occupant's legal advisor to identify immediately any files or documents known to be privileged in order that it can be sealed for subsequent resolution of the claim by the court. The team leader will also explain to the lawyer that further opportunity to make a claim of legal privilege will be afforded to the occupant or his legal representative before any records are removed from the premises. If, at the search site, the occupant or the occupant's legal advisor persists and attempts to pre-screen records by claiming privilege over all records at the premises, the team leader will refer them to the part of the agency's legislation that details the offence related to impeding an inquiry and will also explain that in the event they wish to claim privilege over all the records at the premises then the records (including computers) will be boxed, sealed, and transported to the court for resolution of the claim. A second agency also indicated that it usually allows company officials to review the seized documents and make any legal privilege claims. Another agency stated that company officials are required to identify and claim legal privilege over documents before active searching begins and may not review documents for relevance or privilege during or at the conclusion of the search process.

Three agencies responded they had no such concept as legal privilege. Several agencies indicated that legal privilege does not extend to in-house lawyers.

### 8.1. Procedure for Handling Claims of Legal Privilege

Nine agencies indicated that privilege claims could be made, but either provided no procedures for addressing such claims, or indicated that their procedures are being developed. Agencies described different procedures with respect to claims of lawyer-client privilege during the conduct of a search. These procedures may be grouped as follows:

- Eight agencies reported that their officers may browse or partly browse the documents before making a determination whether the privilege should apply in the circumstances.
- Five agencies reported that documents are sealed and the determination is made by the court.
- One agency reported that it avoids searching areas at the premises where it is anticipated such privilege claims would or could be made.
- One agency relies on independent lawyers to resolve privilege issues.
- One agency requests a justification from the person making the claim.

Some examples of the procedures within each of these groupings are elaborated upon below.

#### ***8.1.1. Allowing Officers to Browse or Partly Browse the Documents Before Making a Determination***

At least eight jurisdictions noted that they could browse or partially browse the documents in order to assess whether the documents are privileged. Six of these eight agencies stated they browse documents to verify privilege claims. If the documents are not overtly privileged, the agency will ask

<sup>31</sup> **Question 28:** How do you deal with claims of lawyer-client privilege during the conduct of the search?

the business to explain why the document should be categorized as legally privileged. This might be effected by browsing parts of the document, such as the letterhead, to determine if the document emanated from the business' external legal advisers. Any disagreement as to the status of these documents may be resolved by the courts.

### ***8.1.2. Documents are Sealed for a Determination by the Court***

Four agencies commented that, when privilege is claimed over any documents, such documents will not be examined or copied by the searching officers unless an agreement can be reached with the business to do so. If no agreement is reached, then each jurisdiction applies its own procedures variously as follows:

- On the day of the search, the team leader will request that the business make a copy of the privileged documents and, in his/her presence, place the documents in a sealed envelope. The team leader will then request the legal adviser of the business to give a written undertaking that the envelope or package will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.
- When a question concerning the seizure of confidential documents is raised, those documents are sealed in an envelope and are brought to a judge for a ruling.
- When a claim of privilege is made, the officer must place the record, without examining it or making a copy of it, in a package and seal and identify the package. The package must be kept in a secure location, for example, a company safe or secure file cabinet, for the remainder of the search. Upon completion of the search, the package is placed either in the custody of the court or another specified person agreed upon by the officer and the person making the claim. The officer should turn the package over to the custodian within twenty-four hours of the completion of the search or, if that is not feasible, at the first available opportunity, and thereafter the person claiming privilege has thirty days to bring an application to the court for a determination.

### ***8.1.3. Dealing with Claims of Legal Privilege by Avoiding Likely Areas***

One agency requests that its agents make every effort to avoid seizing documents that appear to be privileged. The agency will not usually entertain assertions by counsel during a search that certain documents are privileged. If there is reason to believe that privileged documents are located in certain areas of the premises to be searched, agents will avoid searching those areas. The agency will develop procedures on a case-by-case basis to ensure that, post-search, agency staff do not inadvertently review privileged documents and that documents which are clearly privileged are returned. The agency sometimes gives counsel for the subject company a specified number of days in which to review seized documents and designate documents they assert are privileged and then the agency works with counsel to resolve privilege issues.

### ***8.1.4. Use of Independent Lawyers to Resolve Claims of Legal Privilege***

One agency reported that it relies on independent lawyers to resolve claims of legal privilege, summarizing its procedure as follows:

- Prior to commencing a search of any area, the occupant is asked if there is any material located in that area that the occupant considers privileged. If the occupant does not understand the concept of privilege, an explanation, including a brief description of the types of records that may attract such privilege, will be provided.

- Any material identified by the occupant as privileged is immediately placed in a container and sealed. It is not viewed or commented on by the searching officer.
- At the completion of the search of the business or residence etc., the occupant is offered two options:
  - an independent lawyer that is acceptable to both parties can be asked to go to the premises, review the documents over which privilege is asserted, and render an opinion as to whether or not privilege may apply; or
  - the records are sealed and delivered to an independent lawyer for an opinion whether or not privilege applies to any or all of the documents.
- If neither of these options is agreed to by the business or occupant, option two is instituted by the search team leader.
- Any records that the independent lawyer considers to be privileged are immediately returned to the business or occupant and under no circumstances are viewed by any agency staff member.
- Records that the independent lawyer considers are not privileged are given into the custody of the agency, unless the business or occupant disputes that opinion. If there is opposition to the opinion, the agency (in conjunction with the business or occupant or independently) will apply to the appropriate court for a ruling on privilege.

#### ***8.1.5. Justification from Person Making the Claim***

When a claim of legal privilege is made, one agency asks the person making the claim to explain the nature of the document, including such information as the addressee, addressor, purpose and context (without revealing the contents). If a satisfactory answer is received, the document is not seized. Otherwise, the document is sealed in an envelope and seized.

## 9. SEIZURE

### 9.1. Selection, Examination and Seizure of Records<sup>32</sup>

**It is good practice to triage the documents in order to ensure that only documents relevant to the warrant are seized.**

Most agencies described a two-step procedure to select the documents to be seized. First, an initial selection of documents is made on the basis of being enumerated in the warrant. A final selection is completed on the basis of relevancy. Several agencies reported that team members consult the team leader if they are unsure if a document should be seized and/or the team leader performs the final selection. A number of agencies do the preliminary selection during the search and the final selection at the agency. At least one agency performs both steps at the premises.

One agency described its procedure in detail. According to this agency, the description of records listed in the warrant serves as a guideline for the preliminary selection of records to be seized. Given that at the initial selection stage it is often difficult to determine relevancy, the agency will first select records that seem relevant but will, during a secondary selection, reject some of these documents as unnecessary. A “Location Identifying Note” (LIN) is affixed to the record or group of records as they are selected by the search officer and the records are then placed in an expandable folder. The LIN includes information about the precise location where each record was found (e.g., third drawer of desk in file labeled “Sales Report” in office of Ms. X, Sales Manager), as well as the search officer’s name and the date the document was selected. Each expandable folder is identified in terms of the area searched (e.g., Office of Mr. X, President or Ms. Y, Accountant, etc). Each time a new office or area is searched, a new expandable folder is used as a temporary repository for the preliminary record selections from that area. Once the search of that area or office has been completed, the folder is sealed and placed in a pre-determined secure area and the officer will proceed to search the next assigned area. Further examination and culling of records is done during the secondary examination at the search team’s work area at the premises being searched. Records that are deemed not to be necessary during the secondary selection, or culling phase, are returned to the office from which they were initially selected. The secondary, or final selection of documents to be seized, is usually done by the search team leader who will have the advantage of looking at all the records. The team leader also ensures that all selected records fall within the scope of the warrant and can therefore be seized.

Another agency follows a specific procedure in identifying the selected documents. The agency notes the time and place of the seizure of the document as well as a description of the document. Information about the person working in the relevant place of the seizure and other identifiers may also be included in the note or protocol. If it is possible, documents are copied and the copies seized. Originals are seized when the search team does not have the means to copy documents at the premises (for example, if the business refuses to allow its own copying equipment to be used). It will be noted in the protocol whether the original was seized or a copy taken.

<sup>32</sup> **Question 31 (a):** Do you follow a particular process when selecting records to take from the premises and if so please describe (e.g., initial triage followed by final selection, etc.)?

**Question 31 (b):** If applicable, please describe the measures you take in order to keep track of the location of records selected during a search (i.e., to determine where to return them if records are subsequently not seized). (New question 2009)

**Question 24:** Please describe how the search is conducted. (New question 2009)

A third agency reported that its search warrants stipulate the classes of material sought under the warrant. For example, a search warrant may refer to “correspondence between XYZ (Country A) Ltd. and XYZ (Country B) Ltd. relating to contract arrangements with third parties” or “agendas, minutes or other documents that indicate an agreement may exist between competitors as to the price at which goods or services will be bought or sold.” The “classes” of material sought are also detailed in the written and oral briefings to search participants. Staff is required to conduct an initial triage at the search scene, and to conduct a further, more detailed, analysis at the agency’s office.

Many agencies stated that they seize a photocopy of the final selection of documents and leave the original documents at the business. One agency reported that it may seize excerpts of documents. In its procedure on document selection, the agency will identify relevant documents, prepare a list of all documents, and then make copies or obtain excerpts of the documents.

Two agencies stated that they do not follow a particular process; it may vary on a case-by-case basis. However, one of the agencies indicated that they always triage the documents to avoid seizing information unrelated to the investigation. The other agency usually knows in advance the type of documents it is searching for – at times it knows the specific documents it seeks.

## 9.2. Coding and Other Forms of Document Identification<sup>33</sup>

**It is good practice to ensure that documents seized during a search are duly coded by means of affixing an identifier to each document seized.**

Ten agencies indicated that they affix some type of unique identifier to the seized documents. Six agencies record a number on the documents along with a description or a list of the seized material. Eleven agencies employ other methods. Thirteen agencies specified that coding is done at the premises during the search. One agency stated that if a large quantity of documents is seized, the files are marked at the business premises and the rest of the documents are marked at the agency.

## 9.3. Alpha Numerical Identifier

Two agencies indicated they use the agency’s Exhibit Label or stamp to enter the alpha- numerical identifier. Other agencies reported labeling or coding their documents using a combination of the initials of the officer conducting the search, the name of the entity searched, or a unique alpha code with a serial number. Some of these agencies also make a list of the documents seized, or make note of the particular location the documents were found. This procedure includes such steps as:

- Each document is labeled according to the initials of the officer conducting the search and the number of the document found in a certain room (e.g., ABC1, ABC2, ABC3). A list of documents is compiled consisting of the room where the documents were found, the full name of the officer conducting the search, and a brief description of the document (e.g., ABC1: An e-mail from John Doe to Jane Doe dated 5-5-2004).

<sup>33</sup> **Question 32:** Do you code or use other means to uniquely identify records being taken from the premises? If yes, please describe, including indicating whether this is done at the premises or upon return to the agency.

- When selecting a record, the officer affixes a “Location Identifying Note” (LIN) to the document. Each LIN contains the following information concerning each record or group of records found at any given location:
  - the office or general area where the record was found (e.g., Mr. X, Vice President of Sales);
  - the exact location in that area or office where the record was located, i.e., filing cabinet, desk, credenza, box, etc.;
  - the file name in which the record was found;
  - the name of the selecting officer and her/his signature;
  - the alpha numerical code (ABC 001 to ABC 004) of the record (with the alpha portion being uniquely identified to the premises searched);
  - the name of the coding officer and her/his signature; and
  - any relevant comments.

#### 9.4. Numbering and Listing Seizures

Six agencies reported that they number and list their seized documents. For example,

- two agencies write the number on a sticker which will then be attached to the records.
- some of these agencies list or describe the seized documents as well as the locations where they were found.

#### 9.5. Other Methods

One agency stated that it places its records in plastic bags. Another agency affixes labels to the bags containing details, such as a unique number and the date the records were found. One agency places each document in an envelope or box duly identified. At the end of the search, the seized material is kept in a sealed bag with a detailed list of the seized materials. Another agency assigns numbers to the rooms searched at each premises and marks them on a floor plan of the premises. Boxes of documents are usually identified with a box number as well as the room number from which they were taken. One agency reported that it is moving to bar codes to identify seized documents and another agency reported it uses bar codes, with the details of the document and the place where it was located being recorded against the bar code. Two agencies reported using the seal of the agency to identify the documents. One agency also marks serial numbers on documents seized.

One agency reported placing the documents in special files for seizure. Another agency does not code or uniquely identify records, but organizes the records in a way that can be traced.

#### 9.6. Continuity of Possession<sup>34</sup>

The responses described two distinct approaches to preserving the chain of custody and continuity of possession of documents during a search. These approaches vary according to the type of legislative regime applicable to cartels in particular jurisdictions. All jurisdictions with a criminal enforcement regime described a procedure used to preserve the chain of custody of documents during the search. A large number of agencies responded that, as their competition regimes are administrative, they do not require procedures to ensure continuity of possession.

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<sup>34</sup> **Question 34:** If applicable, please describe the measures you take to safeguard the chain of custody or continuity of possession over the records you select both during and after the search.

Six agencies responded that they appoint an evidence or document custodian to record the chain of possession of the original documents during the search. In the majority of cases the document custodian is an agency staff member, however, one agency reported that the police are responsible for keeping the seized evidence and maintaining the chain of custody. The various procedures for doing so are summarized below:

- Continuity of possession begins at the point of preliminary selection. To make seized records useful for legal proceedings, a complete chain of possession must be recorded in order that one is able to say that the record tendered is the seized record. One must be able to attest that the record is in the same condition as it was when seized, that is to say, unaltered. Similarly, if copies rather than the original records are seized or retained, an officer must be able to say that the copy is a true copy of the record and that, when copied, the record was not altered from its seized condition. The records must be secured from the time of selection until they are copied. True copies must be kept secure until they are filed as evidence. From the time the original documents are selected for further examination, they must be kept secure in one of the following ways:
  - the original documents must remain in the possession of the searching officer;
  - the original documents must be in the view of another officer; or
  - the original documents must be placed in a sealed container with the seals remaining intact thereafter.
- Each member of the search team remains responsible for his or her documents throughout the course of the search until the documents are handed over to a site exhibits officer who places them in a plastic bag, which is then sealed. That bag is not opened until the officers return to the office. The agency operates a document handling system that is intended to preserve the chain of custody from the moment a document comes into its possession through to the conclusion of the investigation.
- An officer is designated as the evidence custodian in each search. He/she is responsible for maintaining the document log and also for ensuring that it is kept in the appropriate evidence locker during the search.

The following methods were also mentioned.

- The search team leader as well as the lead case investigator has custody of the documents until the documents are exhibited as evidence in court or until the case ends.
- When conducting a search, investigators of the agency request that a representative of the business be present at the search, and order the representative to submit the records with an identified seal or with serial numbers to identify the source of the records.
- During the course of the search, the search officers may examine, obtain copies or take extracts from books and documents and, if necessary, retain them for a maximum of ten days.

The majority of agencies that answered this question stated that they have no specific procedures for taking copies of documents. For these agencies, document copying procedures are administrative and the chain of custody issues which arise in criminal regimes are not applicable. One agency describes its procedures to copy documents as follows:



- The authenticity of the records is safeguarded by the agency taking only copies of the documents selected during the search. The agency makes two copies of the records it selects under the warrant. The agency retains one of the copies and leaves the other copy as well as the original documents with the business. If subsequent claims concerning the authenticity of the documents are raised, the agency will compare the copies taken from the premises with the duplicate copies given to the business. To this date this method has been sufficient in maintaining a credible chain of custody and continuity of possession of evidence.

Three agencies described the further procedures they follow to maintain the integrity of the documents after the documents have been seized. One of these agencies controls access to original documents by designating a documents custodian who controls access to original documents; handles copies instead of originals whenever possible; scans documents for viewing on computers whenever possible; and whenever possible makes copies of seized computer images or drives and works from copies instead of original data. Another agency attaches a complete exhibit label to all material seized. This information must be noted in the investigator's notebook. The agency's exhibit list has a space for the recording of any movement of exhibits, including the unique identifier, the name and signature of the person releasing the exhibit, the name and signature of the person receiving the exhibit, and the reason for the change of custody. Furthermore, this agency and many others who responded to this question have dedicated secure exhibits rooms, with entry controlled and restricted by the agencies' Exhibits Officer. The exhibits list is located in the exhibit room, along with an exhibit movement form that must be completed when a record is accessed from the exhibit room.

### **9.7. Security of Documents During Extended Searches<sup>35</sup>**

The responses on this subject described four different procedures for ensuring that documents remain secure for searches lasting several days:

- leaving the selected documents under seal on the premises;
- a combination of removal of the selected documents and the sealing of the premises;
- removal of the selected documents on a daily basis; and,
- investigators remain on the premises until the search is done.

One agency responded that they had no procedure to ensure the security of the selected records.

#### **9.7.1. Leaving Documents Under Seal at Premises**

Five agencies mentioned that their procedure is to leave the selected documents on the premises if they cannot finish the search in one day. These agencies seal the documents, premises or devices to be searched. One agency explained its procedure in the following terms: In a situation where a search lasts more than one day, and the team leader is of the view that there is little or no risk that the seized documents will be destroyed, removed or altered, then the records are left in sealed containers at a secure area or office on the premises. Each container is labeled in terms of where on the premises the records were seized (name of individual, title, office location, name of the search officer and date). These sealed containers are placed in a document locker which is also locked and left in the area or office assigned by the business at the start of the search. That location is then sealed by the team leader and a warning poster indicating that entry is forbidden is affixed to the entrance door of the said office or area. The person in authority at the premises is also warned that

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<sup>35</sup> **Question 35:** In the instance of a search that continues for more than a day, are the selected records removed on a daily basis? If records are not removed from the premises each day, what, if any, procedures are employed to ensure the security of the selected records?

the documents left at the premises are under his/her safekeeping. Search officers note the number of sealed containers left at the premises, the name of the individual responsible for the safekeeping of the sealed containers, and the time of day the officers left the premises. The following day, the search officers make a note whether there has been any tampering with the seals on the entrance door. If there has been any tampering, then search officers will make a note of the incident and report it to the lawyer advising the search team, who will determine whether or not to prosecute for obstruction.

### **9.7.2. Daily Removal of Documents vs. Sealing at the Premises**

Twenty-four agencies stated their procedure is to remove the documents on a daily basis. If the search is not completed in a single day, some agencies stated they either seal, or have the authority to seal cabinets, offices, areas etc. that were not searched on the first day. A number of agencies did not elaborate on their sealing procedures.

### **9.7.3. Keeping Search Officers at the Premises Until the Search is Complete**

Three agencies mentioned that their investigators stay at the premises until the search is completed. This can be the result of the limitations of search authorizations, which may allow for single entry only. One of the three stated that it usually removes documents on a daily basis and, if the search is not completed the first day, they can seal the premises overnight to protect the integrity of the search or, officers can remain at the search premises until the search is completed. This agency may take pictures or video of the premises before the search begins, and before leaving and upon returning each day, to ensure that there is no tampering with evidence.

## **9.8. Document Review<sup>36</sup>**

**When business representatives are permitted to review their own seized documents, it is good practice to conduct the review in a controlled fashion in order to maintain continuity of possession of the documents.**

Many agencies reported that they allow business representatives to review their own seized records. In some jurisdictions, parties have the right to inspect seized records. In other jurisdictions, parties are only allowed to review seized records if they can demonstrate a particular need.

Reviews are typically conducted in a controlled fashion in order to maintain the continuity of possession. One agency reported that access to the documents is typically provided under the supervision of agency personnel and only once documents have been inventoried and secured. Another agency reported that the process is often documented in officer notebooks.

The timing of the review process varies from jurisdiction to jurisdiction. One agency reported that it allows business representatives to review records prior to their final selection and seizure. This provides business representatives with an opportunity to comment on the content of the records and provide explanations as to why a particular document may or may not be relevant to the case. In contrast, another agency reported that parties are required to identify and claim privilege over

<sup>36</sup> **Question 36 (a):** Does your agency allow business representatives to review the seized or copied documents? If so, when does the review take place? (New question 2009)

documents before active searching begins and may not seek to review documents for relevance or privilege during or at the conclusion of the search process. One agency indicated that parties can review documents on the search site or may look at a CD-ROM of documents after the search is over. One agency indicated that business representatives can only review documents once an accusation has been made.

### 9.9. Receipt for Seized Records<sup>37</sup>

Sixteen agencies responded that they provide a list of the seized documents to a representative of the business searched. One agency allows a company representative to compare the list with the actual documents before signing the list, if they wish to do so.

One agency reported it deposits the list along with the document seizures with the police, and also provides a copy of the list to the business or its legal representative before leaving the premises.

The list may include some or all of the following information:

- the initials or signature of the officer conducting the search;
- the number of the document found in a certain office;
- document types and titles;
- date of the document;
- author of the document;
- a brief description of the document; and,
- time and place of the seizure of the document.

Seven agencies responded that they provide the business with a copy of their search report in addition to a document list. This report may include one or more of the following: relevant comments by the business' employees, conversations with lawyers or other persons and their answers and clarifications to the questions asked by the officials, and a description of any other significant events that occurred at the premises during the search. Four of these agencies require the business representative to sign the report. In one case, two randomly selected witnesses who have followed the entire search process must sign the record.

One of the agencies that seizes original documents provides a receipt listing either the number of containers of records or things seized in the case, or the alpha-numerical code range identifying the records seized. A copy of the receipt is also kept by the seizing officer. Eight other agencies replied that they provide a receipt, but provided no further description of the type of information recorded on the receipt. Three agencies responded that they do not provide a receipt.

### 9.10. Providing Copies of Documents<sup>38</sup>

Several agencies reported that parties are entitled to obtain copies of seized records either during or after the search. Some agencies indicated that they make copies of all records. Others indicated that they will only make copies of essential business records. Another agency stated that companies or individuals under investigation can apply for a copy of all documents seized at their premises after the search.

<sup>37</sup> **Question 33:** Do you issue a receipt for records taken from the premises, either at the moment of removal or at a later time?

<sup>38</sup> **Question 36 (b):** If your agency seizes original documents do you allow business representatives to make copies of these documents? (New question 2009)

Many agencies reported that they will make copies of the records on the search site. One agency indicated that they either make the copies themselves or allow a business representative to do so under close supervision, in order to maintain control over the documents. One agency indicated that parties are not allowed to make their own copies of the documents. Requests for copies may be assessed on a case-by-case basis. Factors considered when assessing the request include the volume of records, the availability of photocopy facilities and the time required to make the copies. If it is not feasible to make copies on the search site some agencies may return to their office to make the copies. One agency reported that it may charge a fee for this service.

Three agencies reported that requests for copies can be denied or deferred if it is determined that providing copies would disrupt the investigation. One of these agencies noted, however, that investigators are required to act reasonably and cooperate with requests for access to the seized documents. All items taken are returned to the company at the earliest opportunity.

### **9.11. Transporting Records to the Agency's Offices**

**It is good practice to deliver all seized documents to the authority's offices as soon as possible upon completion of the search and to ensure all seized materials are secured in a facility with restricted and monitored access.**

One agency stated that once the document seizure is completed, all records seized at one location are transferred to one member of the team. Affidavits are prepared to document the transfer of records by the seizing officer to the appointed record holder. The records, in the sealed expandable folders, are placed in large, locked containers and are transported or shipped from the premises to the agency's office.

## 10. BACK AT THE AGENCY

**It is good practice, where applicable, to consolidate all notes as soon as possible after the search to create a complete record of the search.**

One agency reported that search officers forward copies of all statements, notes and reports to the case officer responsible for the investigation as soon as possible after the conclusion of the search and return to the agency's office. In addition, each search officer must provide his/her search memorandum and a transfer affidavit required to establish continuity of possession. The legislation governing the agency's search powers requires that when records are seized under the authority of a search warrant, a report of the records or things seized must be provided to a judge.

One agency reported that after the search has been completed, the search leader calls a meeting in which all search participants give a short oral report about the search and any particular incidents.

Another agency reported it undertakes an oral debriefing session after the search. This session is considered to be of significant benefit. It is designed partly to pull evidentiary strands of the case together for the case team and partly as a know-how exercise to discuss issues or problems that arose during the searches with a view to developing an approach to deal with such issues in the future.

Another agency holds a debriefing session whereby all aspects and experience are exchanged and the conclusions are used to improve the theory of the case.

## 11. DEALINGS WITH COUNSEL TO PARTIES AND THE MEDIA

### 11.1. Parties' Lawyers

**During the execution of a search, it is good practice to designate one person (e.g., the team leader) to communicate with the parties' lawyers.**

One agency reported that searching officers will nearly always be required to deal with lawyers for parties being searched. Such dealings are usually handled by the team leader who is free to discuss issues of process but will not become involved in detailed discussions about the case. Any discussions regarding legal issues such as the validity or scope of the warrant are referred to the lawyer assigned to the agency's inquiry.

### 11.2. Media Contacts

**It is good practice to consider, before the search is carried out, what the authority's press line should be during the search (in the event that the fact that a search has taken place becomes public during or after the search).**

**It is good practice to designate one spokesperson to respond to media enquiries.**

One agency reported that searching officers are not allowed to make any contact with media representatives during the course of a search. If the media becomes aware of a search and contacts any member of a search team, the media will be referred to the designated agency spokesperson for the matter at headquarters or in the field. In most agencies, media contacts are handled centrally. One agency designates the team leader to deal with media contacts. Other agencies reported that media matters related to searches are dealt with by the agency's spokesperson, in some cases, the head of the agency.

**APPENDIX 1: AGENCIES THAT REPLIED TO THE QUESTIONNAIRE IN 2004**

1.	Australia	20.	Mexico
2.	Belgium	21.	Netherlands
3.	Brazil	22.	New Zealand
4.	Canada	23.	Pakistan
5.	Chile	24.	Poland
6.	Cyprus	25.	Portugal
7.	Czech Republic	26.	Romania
8.	E.U.	27.	Russia
9.	Finland	28.	Senegal
10.	France	29.	Slovak Republic
11.	Germany	30.	Spain
12.	Hungary	31.	Sweden
13.	Ireland	32.	Switzerland
14.	Israel	33.	Taiwan
15.	Italy	34.	U.K.
16.	Jamaica	35.	U.S.
17.	Japan	36.	Ukraine
18.	Korea	37.	Yugoslavia
19.	Latvia	38.	Zambia

**APPENDIX 2: AGENCIES THAT REPLIED TO THE QUESTIONNAIRE IN 2009**

1.	Brazil
2.	Canada
3.	E.U.
4.	Germany
5.	Hungary
6.	Ireland
7.	Israel
8.	Japan
9.	Mexico
10.	Netherlands
11.	New Zealand
12.	Switzerland
13.	Turkey
14.	U.S.



## APPENDIX 3: GOOD PRACTICES RELATING TO SEARCH AND SEIZURE

*The following list reflects key practices common to many of the competition agencies responding to the SG2 surveys that formed the basis for the Chapter on Searches, Raids, and Inspections. This list does not purport to present all of the possible practices, nor does it necessarily recommend these practices over others, as such a choice will depend on the circumstances particular to any given situation. The list is meant to provide a concise summary of common and widely reported practices in the conduct of searches, raids and inspections.*

### I Pre-search Intelligence and Preparation

It is good practice:

1. to consider whether to conduct a search within the context of available investigative tools and the facts and circumstances of the investigation.
2. to engage in comprehensive planning prior to a search, including, as appropriate: identifying the premises to be searched, the type of evidence to be seized, and the composition of search teams; assigning responsibilities during the search; undertaking covert reconnaissance of the search venue; and coordinating with other entities that will participate in the search.
3. where permitted, to ensure the search authorization covers moveable objects such as briefcases, handbags, electronic diaries, and portable computers.
4. where appropriate, to communicate and coordinate with relevant foreign competition authorities.
5. when coordinating with relevant foreign agencies, to communicate early in the investigation and on a regular basis.
6. when two agencies have the same leniency applicant, to request waivers of confidentiality from the leniency applicant as early as possible.
7. to precede searches with thorough briefings for team members.
8. to prepare a “search kit” ready-packed with stationery, seals (e.g., for use on doors and cabinets) and other necessities for team members.
9. to designate one spokesperson to respond to media enquiries.
10. to consider, before the search is carried out, what the authority’s press line should be during the search (in the event that the fact that a search has taken place becomes public during or after the search).

### II Search Teams

It is good practice:

1. to offer training programs to professional staff involved in conducting searches.
2. to appoint a Team Leader who will be responsible for the overall conduct of the search at a premises.
3. to consider requirements such as language, gender, and information technology capacity in the team’s composition.

4. when resources permit, and having regard to the nature of the premises to be searched, to include both male and female personnel on search teams (particularly when a private residence is to be searched).
5. for the officers assigned to the case to participate in the search, and for the team to be augmented with other officers and experts, as appropriate.
6. to ensure the appropriate resources are available on a stand-by basis to aid the search team if necessary (e.g., legal counsel, supplementary search officers, officer to draft additional search authorizations if necessary).
7. in the instance of simultaneous raids, to plan for a central “command post” to coordinate the sharing of emerging information and strategies among the search teams and ensure overall consistency of approach.

### III Entry

It is good practice:

1. to conduct searches with the element of surprise.
2. to preserve the element of surprise during entry by not disclosing your precise purpose to a receptionist.
3. to make entry simultaneously with search teams on other premises and equip each Team Leader with a mobile phone and the numbers of a central command post and/or all other relevant Team Leaders in order to enable continuous coordination.

### IV Search in Progress

It is good practice:

1. to be courteous and diplomatic.
2. for the Team Leader to furnish a copy of the search authorization to a senior company official, explain the nature of the search, and caution against obstruction.
3. to secure the premises and take necessary steps as soon as possible in order to avoid the loss or destruction of evidence.
4. if acceding to a request to delay searching to allow a reasonable time for the target’s legal representatives to arrive at the premises, to first ensure the premises have been adequately secured so the delay does not prejudice the outcome of the search.
5. to ensure that the search team has the power and has been trained to respond to unauthorized removal or destruction of records.
6. to make accurate notes of the events and occurrences as they occur at the search premises.
7. to ensure that a strategy is in place as to who will conduct any interviews and that complete notes are made of the interviews.
8. to triage the documents in order to ensure that only documents relevant to the warrant are seized.
9. to ensure that documents seized during a search are duly coded by means of affixing an identifier to each document seized.
10. during the execution of a search, to designate one person (e.g., the Team Leader) to communicate with the parties’ lawyers.

11. when business representatives are permitted to review their own seized documents, to conduct the review in a controlled fashion in order to maintain continuity of possession of the documents.

## **V Post Search**

It is good practice:

1. to deliver all seized documents to the authority's offices as soon as possible upon completion of the search and to ensure all seized materials are secured in a facility with restricted and monitored access.
2. where applicable, to consolidate all notes as soon as possible after the search to create a complete record of the search.