

Criminal investigations in to fraud

Individuals who are to be investigated will be anxious to avoid arrest; and to have as much information about the enquiry as is possible, so that the best decisions can be made. Recent developments in the Codes of Practice made under the Police and Criminal Evidence Act (“PACE”) 1984 and case law provide assistance in both respects.

Interviews under Caution

Any individual legal person or authority may invite a suspect to take part in an interview under caution so that the result may be introduced in to evidence in any proceedings. However, only a constable may arrest. The grounds for an arrest are fully considered in Code G. A volunteer may leave the interview at any time.

The fact that a suspect may leave cannot justify a constable making an arrest until the time that the volunteer chooses to leave (Code C para 3.21).

The routine arrest of a volunteer on arrival at the police station without further justification is unlawful (*Richardson v Chief Constable of West Midlands Police* [2011] EWHC 733 (QB)) and officers must consider other alternatives short of arrest. If there is no power to arrest and there is no interview there can be no inference from silence in relation to individual questions (*R v Argent* [1996] EWCA Crim 1728).

A volunteer must be treated with no less consideration than a person under arrest (Code C NfG 1A).

Pre-interview disclosure of information

Historically there have been few rights to disclosure and police officers, and those trained by them, often remain reluctant to give information to a suspect.

On 2 June 2014 significant changes were made to codes C and H to comply in England and Wales with provisions of EU Directive 2012/13/EU. The Directive relates to rights to information in criminal proceedings before interview. If the police do not carefully consider their position it may be difficult for a court to allow inferences from silence, and evidence may be excluded under s.78 PACE as unfair in the proceedings.

The relevant provisions are Articles 3, 4 & 6 of the Directive. Article 3 provides a right to information about rights. Many of these are already provided for by the earlier PACE codes but the rights include the right to be informed of the accusation in accordance with article 6. Article 6 is in the following terms:

Right to information about the accusation

6.1 Member states shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

6.2 Member states shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention including the criminal act they are suspected or accused of having committed.

Article 4 provides for a letter of rights on arrest. In addition to the information set out in Article 3 this letter shall contain information about the right to access to the materials of the case. It must also contain basic information about any possibility under national law of challenging the lawfulness of the arrest, obtaining a review of the detention or making a request for provisional release.

The transition of these rights into the code of practice is reflected primarily in two of the provisions.

Code C para 3.4(b) states that documents and materials which were essential to effectively challenging the lawfulness of the detainees arrest and detention must be made available to the detainee or their solicitors. Documents and materials will be essential for this purpose if they are capable of undermining the reasons and grounds which make the detainees arrest and detention necessary. The decision about whether particular documents or materials must be made available rests with the custody officer in consultation with the investigating officer. The sub-paragraph also applies to the purposes of the extension of detention and the charging detained persons.

Solicitors will therefore wish to request information about anything available to the investigator that may undermine the allegation against the suspect.

Code C para 11.1A provides for the interviewing or questioning of a person regarding their involvement or suspect involvement in a criminal offence(s) which, under Code C para 10.1 must be carried out under caution. Before a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence and why they are suspected of committing it in order to allow for the effective exercise of the rights of the defence.

However, whilst the information must also be sufficient for the person to understand the nature of any offence (see Code C NfG 11ZA) this does not require the disclosure of details at a time which might prejudice the criminal investigation, although no such limitation appears in the Directive itself.

The decision about disclosure for this purpose rests with the investigating officer. There is likely to be significant debate about the information which might prejudice a criminal investigation. Whilst this could clearly enable the police to withhold information whilst a further suspect was still to be arrested or when a search was still to be carried out, it may be doubted whether it can assist officers in the use of phased disclosure seeking to catch out a suspect in a lie.

Other amendments to the Codes require that (under Code C para 2.4) solicitors are given access to the whole of the custody record. However, the property record does not form part of the custody record and a custody office will decide whether this may be view or not (Code C para 4.4).

Search Warrants

This emphasises the importance of recent decisions on disclosure about the basis for a search whether under s.8 PACE (*Bangs v Metropolitan Police Commissioner* [2014] EWHC 546 and now Criminal Procedure Rules Part 5) or under Schedule 1 PACE for special procedure material.

In the latter case, it is impermissible for a party obtaining a warrant on a without notice basis to refuse to disclose the material placed before the judge to the party against whom the warrant has been obtained. It can only be withheld if the court sanctions the withholding of that material on public interest grounds (*R (Golfrate Property Management Ltd) v The Crown Court At Southwark & Anor* [2014] EWHC 840 (Admin)) (*R (S and others) v Chief Constable of BTP* [2013] EWHC 2189 (Admin)).

Adverse Inference/Pre-Interview Disclosure

Although less of a concern in interviews conducted by the Serious Fraud Office or Financial Conduct Authority, those advising in interviews under caution must consider whether pre-interview disclosure is sufficient for an adverse inference from silence to be drawn under s.34 Criminal Justice and Public Order Act 1994.

The decision of Rose LJ remains significant in complex and lengthy enquires:

“...legal professional privilege is not waived merely by evidence from the accused, whether on the voire dire or before the jury, that he had been advised not to answer questions in interview. But, in itself, such advice is not likely to be regarded as a sufficient reason for not mentioning facts relevant to the defence. The evidence must generally go further and indicate the reason for that advice, for this must be relevant when the jury are assessing the reasonableness of the conduct in remaining silent.

Good reason may well arise if, for example, the interviewing officer has disclosed to the solicitor little or nothing of the nature of the case against the defendant, so that the solicitor cannot usefully advise his client or, where the nature of the offence, or the material in the hands of the police is so complex, or relates to matters so long ago, that no sensible immediate response is feasible.”

The material considerations are found in *R v Argent* [1996] EWCA Crim 1728 where Bingham LCJ set out the six formal conditions which must be present before a jury may draw an adverse inference:

1. There must be proceedings against a person for an offence;
2. The alleged failure must occur before a defendant is charged;
3. The alleged failure must occur during questioning under caution;
4. The questioning must be directed to trying to discover whether or by whom the alleged offence had been committed;
5. The alleged failing by the defendant must be a failure to mention any fact which the defendant has relied on in his defence; and

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6. The failure to mention a fact must occur in circumstances existing at the time in which the accused could reasonable have been expected to mention when so questioned.

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