

What to do in a dawn raid - part 3

By [Rosalind Lake](#)

30 Nov 2015

The investigators are allowed to ask for oral explanations arising from any documents which they have requested, e.g., an explanation of entries or codes on an invoice or spreadsheet. They can also ask any person to state where they believe documents can be found. Responses must be given if possible. They should however not begin a general interrogation, and questions of this nature should not be answered.



© Stuart Monk – [123RF.com](#)

Except for basic questions such as "Who is this person?" and "Can a copy of the document referred to here be provided?" no oral questions should be answered until a legal representative is present. Tell the investigators that they should address any other requests to a legal representative and tell other employees not to answer any requests themselves. All answers should be courteous and truthful, but limited to what is required to answer the question.

The investigators do not have the power to question employees generally or go on a fishing expedition. It is quite proper to answer, "I don't know" if a question is outside the knowledge of the person answering it. If a person does not understand the question, they should make it known. If necessary, call a temporary halt to questions to seek advice from the legal representative.

Ideally, the investigators should be asked to put their questions in writing. If the investigators ask for information, which cannot be given orally or in writing, make a written note explaining the reasons why the requested information cannot be given or produced immediately. If a written explanation cannot be given immediately, provide one to the investigators as soon as possible after the visit. If written documents are not immediately available, explain that they will be made available later.

A company employee or representative should make a complete written record of the questions and answers. Record of questions asked by the Competition Commission during a dawn raid can be recorded on a template.

Incriminating statements

Individuals are not obliged to give any self-incriminating answer or statement to the investigator, as such statement or

answer will be admissible as evidence against the individual should criminal proceedings be instituted. If employees are asked a question or requested to produce a document that may incriminate themselves or the company, they should state clearly before answering the question or providing the document that:

- the answer or the document might disclose information that could incriminate them or the company; and
- they request all protections under the Competition Act both for themselves and the company prior to disclosing such information.

Ensure that any such statements are accurately recorded in the written record of the conversation with the investigators. If employees have any doubts, they must consult their legal representative before answering the question.

Legal privilege

During the investigation, documents that are covered by legal privilege do not have to be made available to the investigators.

Legal privilege in this context covers correspondence with professional legal advisers as well as communications made in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings. Legal privilege covers communications with both external and in-house lawyers.

Do not provide any document to the investigators, which involves correspondence with a lawyer, until a legal representative has reviewed it. The legal representative or manager accompanying each investigator must look through each file and remove any documents that are legally privileged. This should be confirmed with the investigator by, for example, showing only the letterhead or other identifying feature. If there is any disagreement, put the document aside in a separate file until a legal representative can review it. A list should be prepared briefly describing any privileged documents and only this should be given to the investigators.

The investigator may, however, request the registrar or sheriff of the High Court to attach and remove the document over which privilege is claimed. Ordinarily, the privileged documents will be delivered to an agreed venue, usually the Competition Tribunal or Registrar of the High Court, for safekeeping until any disputes over privilege can be settled or until a court determines whether the information contained in the document is in fact privileged.

It is good practice to keep any privileged documents in a separate file, marked to indicate its contents. This practice will make it easier to deal appropriately with requests to look at documents if there is an inspection.

End of the inspection

The inspections could be as short as several hours or as long as several days. Before the officials complete the inspection and leave the offices, staff should find out from them the name of the case handler or other relevant contact within the Commission to whom any follow-up contact should be addressed.

In addition, ensure that the company has:

- one full copy of all documents and copies taken by the officials (bearing any annotations or reference numbers added to them by the officials prior to leaving the premises); and
- A signed acknowledgement by the officials of the documents and equipment that they have taken. If any of those documents or information contained in the equipment is particularly sensitive, they should be specified as such in the signed acknowledgment.

ABOUT THE AUTHOR

Rosalind Lake is a director at Norton Rose Fulbright South Africa Inc.

For more, visit: <https://www.bizcommunity.com>