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## English High Court Continues to Order Disclosure of Interview Notes & Limits Scope of Litigation Privilege in Criminal Proceedings

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### ***Serious Fraud Office v Eurasian Natural Resources Corporation* [2017] EWHC 1017 (QB)**

The Serious Fraud Office (SFO) has successfully challenged an assertion of privilege by mining company Eurasian Natural Resources Corporation (ENRC) over documents created as part of an internal investigation into alleged corruption. In *Serious Fraud Office v Eurasian Natural Resources Corporation* [2017] EWHC 1017 (QB), the English High Court sided with the SFO, ordering ENRC to hand over large swathes of interview notes, accountants reports, and communications with a legally qualified business executive at ENRC.

The decision tracked the recent trend in England towards limiting the ambit of privilege and has made it more difficult for companies conducting internal investigations into possible criminal conduct to be confident about a claim of litigation privilege over the fruits of that investigation. The decision also reaffirmed the approach taken to legal advice privilege in the recent decision of English High Court in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch). In that case, the Court ruled that transcripts, notes, and other records of interviews with employees/ex-employees, created as a result of internal investigations were *not* privileged from production in English civil litigation. [\[Click here for our client alert\]](#)



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## Related Practices

The decision has serious ramifications for internal investigations with connections to England. An application for permission to appeal will be made to the Court of Appeal.

### The Documents Sought

ENRC's internal investigation was triggered by a whistleblower report alleging corruption in relation to the operations of an ENRC subsidiary in Kazakhstan and Africa. ENRC's lawyers, Dechert, were instructed in 2011 to conduct a fact-finding investigation to discover whether there was any truth to the allegations. ENRC also engaged a firm of forensic accountants to conduct a "books and records" review. The SFO became aware of the allegations and opened a dialogue with ENRC which was characterised by the court as an attempt by ENRC to persuade the SFO not to bring charges. The SFO eventually started its own investigation in 2013 which is still on-going; no charging decision has been made yet.

The SFO sought disclosure of four categories of documents from ENRC as part of its investigation into the company. The disclosure was resisted by ENRC on the basis that the documents are protected by litigation privilege and/or legal advice privilege. The categories included:

- **Interview notes.** These were notes of interviews conducted by ENRC's lawyers with employees, former employees of ENRC, their suppliers, and other third parties. ENRC claimed both litigation privilege and legal advice privilege over these documents.
- **Materials generated by forensic accountants as part of a "books and records" review.** ENRC claimed both litigation privilege and legal advice privilege over these documents.
- **Board presentation documents.** These were created as part of an ongoing briefing by Dechert to the ENRC Board indicating or containing factual evidence. ENRC argued that these were subject to litigation privilege, or in the alternative legal advice privilege.
- **Communications with a legally qualified ENRC Executive.** These included internal emails with an ENRC senior executive who was a Swiss qualified lawyer.

### Litigation Privilege

Litigation privilege is the wider of the two arms of privilege and protects communications between clients or their lawyers and *third parties* for the purpose of obtaining information or advice in connection with existing or contemplated litigation when, at the time of the communication the following three tests are met: (i) litigation is reasonably in contemplation; (ii) the sole or dominant purpose of the communications is the conducting of the anticipated litigation; and (iii) the litigation is adversarial not merely investigative or inquisitorial in nature.

ENRC resisted production of the first three categories of documents

(interview notes, accountants reports, and Board presentation) on the grounds that they were protected by litigation privilege. The court applied the test for litigation privilege to the ENRC internal investigation and disagreed with ENRC's arguments.

### ***Adversarial Litigation in Contemplation***

The Court held that a criminal investigation does not in itself constitute adversarial litigation and that litigation privilege will only apply at the point that there is sufficient information to trigger an anticipation of an actual prosecution. In this case, the Court placed a great deal of weight on the fact that ENRC did not believe there to be evidence: (i) implicating it in wrongdoing; or (ii) evidence of a lack of proper internal controls and safeguards against bribery and corruption which might give rise to an anticipation of prosecution. The Court therefore dismissed ENRC's position; it observed that "*the difficulty of [the present] case*" was that there was no evidence that ENRC was aware that a criminal offence had been committed and/or that a criminal prosecution was a real prospect.

Importantly, the Judge distinguished between an anticipation of criminal proceedings which can only progress where the prosecutor is satisfied that there is sufficient evidential basis for prosecution and the public interest test is met, and an anticipation of civil proceedings which may be commenced even where there is tenuous evidence to support a claim, thereby limiting the application of this aspect of the decision to investigations into criminal wrong-doing.

### ***Dominant Purpose***

The Court ruled that the second arm of the litigation privilege test was not met by ENRC since the purpose of the internal investigation was as a fact-finding exercise in order to determine whether the whistle-blower's allegations had any merit. Further, on the facts available to it, the Court concluded that the legal advice sought by ENRC was about how best to persuade the SFO to reach a civil settlement and avoid criminal litigation. Documents prepared for the purpose of avoiding a criminal litigation are not protected in the same way as they were prepared for the conduct of a criminal litigation. Accordingly, it was held that if a document is created with the express purpose of showing it to the prospective adversary, for example to convince the adversary not to bring proceedings, it will not be subject to litigation privilege.

With respect to the materials generated by the books and records review, the Court found that the dominant purpose of that review was not litigation but to meet compliance requirements or to obtain accountancy advice.

Therefore litigation privilege was not engaged and the documents created by the forensic accountants, as third parties, were not protected by litigation privilege.

### **Legal Advice Privilege**

Legal advice privilege attaches to all communications passing between the

client and its lawyers acting in their professional capacity (but not third parties), in connection with the provision of legal advice. There is no need for litigation to be contemplated. The question of who is the client has previously been narrowly interpreted by the English courts and is confined to a limited and identified group within a company and not those who are not authorised to seek and receive legal advice. English courts have also held that where communications between a lawyer and client relate purely to factual information and do not give a clue as to legal advice or any aspect of legal advice, those communications are not privileged.

In *SFO v ENRC*, the Court followed the approach of Hildyard J in the RBS Rights Issue Litigation judgment and upheld the narrow definition of who constituted the considered “*client*.” The Court observed that there was no evidence that any of the persons interviewed as part of the internal investigation were authorised to seek and receive legal advice on behalf of ENRC, and the communications between those individuals and Dechert were not communications in the course of conveying instructions to Dechert on behalf of ENRC.

Second, the Court observed that factual findings with a solicitor carrying out investigations are not privileged, only any advice given about them. The Judge further rejected ENRC’s case that the interview notes comprised lawyers’ working papers since they did not give a clue as to the trend of legal advice.

With respect to the communications with ENRC’s senior executive, the court found that, although he was legally qualified, his communications did not contain advice given in his legal capacity.

### **Order**

Based on this reasoning, the Court ordered that documents in categories 1, 2, and 4 be disclosed. The documents in category 3, the Board presentations, were found to form part of a continuum of legal advice between the client (the company) and its lawyers, and therefore were protected by legal advice privilege.

### **Conclusion**

The decision puts parties who have been alerted to possible criminal wrongdoing in a difficult position. It is entirely reasonable for such parties to want to conduct a fact-finding investigation in order to discover whether there is in fact a problem, however, following this decision it is hard to see how such investigations will be protected by privilege. Although communications between a lawyer and its client for the purpose of seeking advice about possible wrongdoing will be privileged, the fact-finding communications which inform that advice will not be.

While the decision stands, companies will need to show caution in their approach to internal investigations in England and reassess the position at each step of the process.

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