

## Part VII

# Investigative Orders

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**Drafting note: Investigative orders.** This part contains provisions relating to ancillary orders, which will assist in the investigation of asset recovery cases, whether in the criminal or civil context. Chronologically, the first in many investigations will be the customer information order, followed by the monitoring order, the production order and, finally, the search and seizure order. Not all orders may be necessary, or indeed appropriate, in every case.

The production order and the search and seizure order will be familiar to most jurisdictions. The customer information order and the monitoring order are relatively recent developments in investigative techniques and have considerable potential added value to financial investigations. Disclosure orders are also relatively new, and are included for civil recovery investigations. The provisions in Section 88 could be applied in criminal investigations. Jurisdictions should consider carefully which measures they wish to include.

Sections 79–83 provide four special investigative measures for use in criminal asset recovery investigations: a provision for a customer information order to secure information on the existence of financial accounts (Section 79), a production order for property tracking documents (Section 80), a search warrant power for such documents when they are not obtainable through a production order (Section 82) and a provision for a monitoring order to monitor a financial account (Section 83).

Sections 84–88 contain provisions for investigative measures to be used in civil forfeiture investigations. These measures are the customer information order (Section 84), the production order (Section 85), the search warrant power (Section 87) and the disclosure order (Section 88).

Many states will already have existing provisions in their criminal procedure codes that enable the investigator and prosecutor in a criminal matter to require the production of (or, as necessary, search for) documents, and to secure information from financial institutions about accounts. The question for drafting authorities will be whether existing provisions are of sufficient scope and availability to identify and trace property early in an investigation and otherwise meet the particularised needs of a proceeds investigation.

In some states, for instance in the USA and Canada, authorities rely almost exclusively on existing statutory powers to secure information in proceeds cases. However, in other states, special provisions have been enacted in proceeds of

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crime legislation to support investigations and supplement general criminal investigative provisions.

This is because of a concern that the existing provisions might be inadequate for a proceeds investigation. In some states, the existing provisions might be viewed as applying to only a narrow range of evidence that supports the existence of criminal activity, and not as extending to identifying proceeds and assets to which a benefit recovery order would apply.

The essential point is that drafting authorities need to ensure that there is full capacity to trace proceeds and ascertain the amount of the benefit at very early stages of an investigation as well as after a conviction has been secured. They should ensure a foreign state is able to ask whether an account exists, or a deposit was made, and secure a quick response. This can be through provisions such as those suggested in this part, through other provisions of law or through amendments to existing provisions to apply pre-existing production and search tools to proceeds matters.

## Section 79 Customer Information Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, and any other relevant matter, that there are reasonable grounds to believe that subsections (2) and (3) are satisfied, it may make an order that a financial institution provide to an authorised officer any customer information, as defined in subsection (4) below, that it holds relating to the person or account specified in the application. An application pursuant to this Section may be made *ex parte*.
- (2) The first condition is that the application must state that there is an investigation into a specified offence and that the order is sought for the purposes of a criminal investigation into that offence.
- (3) The second condition is that the court is satisfied that there are reasonable grounds for believing that the financial institution may have information that is relevant to the investigation.
- (4) Customer information is information as to whether a person holds, or has held, an account or accounts at a financial institution (whether solely or jointly), and information identifying a person who holds an account, and includes all information as to—
  - (a) the account number or numbers;
  - (b) the person's full name;
  - (c) his or her date of birth;
  - (d) his or her most recent address and any previous addresses;

- (e) the date or dates on which he or she began to hold the account or accounts and, if he or she has ceased to hold the account or any of the accounts, the date or dates on which he or she did so;
  - (f) such evidence of his or her identity as was obtained by the financial institution;
  - (g) the full name, date of birth and most recent address, and any previous addresses, of any person who holds, or has held, an account at the financial institution jointly with him or her;
  - (h) the account number or numbers of any other account or accounts held at the financial institution to which he or she is a signatory and details of the person holding the other account or accounts;
  - (i) if a legal entity:
    - (i) a description of any business that it carries on;
    - (ii) the jurisdiction or territory in which it is incorporated or otherwise established and any number allocated to it;
    - (iii) its registered office and any previous registered offices;
    - (iv) the full name, date of birth and most recent address and any previous addresses of any person who is a signatory to the account or any of the accounts;
    - (v) the beneficial owner(s); and
    - (vi) any other information that the court specifies in the customer information order.
- (5) A financial institution shall provide the information to the authorised officer in such manner, and at or by such time, as is specified in the order.
- (6) An authorised officer for the purposes of this Section shall be [name authority that shall apply for and execute customer information orders].
- (7) No obligation to maintain the confidentiality of information held by a financial institution, whether imposed by a law or contract, can excuse compliance with an order made under this Section.
- (8) A financial institution, for purposes of this Section, means a bank or other credit institution, a life insurance or investment-related insurance company, insurance underwriters or insurance agents or brokers; an investment bank or firm; a brokerage firm; a mortgage company; cheque cashers and sellers or redeemers of travellers' cheques, money orders, or other monetary instruments; and any person that engages as a business in funds transfer, cheque cashing or the purchase, sale or conversion of currency.
- (9) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it knowingly:

- (a) fails to comply with the order; or
  - (b) provides false or misleading information in purported compliance with the order;
- (10) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it discloses the existence or operation of the notice to any person except:
- (a) an officer or agent of the institution for the purpose of complying with the order;
  - (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
  - (c) an authorised officer referred to in the order.
- (11) In the event of a conviction for an offence under either subsection (9) or (10) in the case of a natural person who is a director, employee or agent of a financial institution, the penalty shall be imprisonment for a term not exceeding [insert period] or a fine of up to [insert amount], or both, and in the case of a legal entity a fine of up to [the designated amount].

**Drafting note:** Section 79(10) contains a ‘tipping off’ provision. This is a useful addition to protect the confidentiality of an on-going criminal investigation.

## Section 80 Production Order

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that the conditions set out in subsection (2) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may make the order requiring a person believed to have possession or control of any document relevant in identifying, locating or quantifying property or necessary for its transfer to produce such document. An application may be made *ex parte*.
- (2) There must be reasonable grounds to believe that a person has been, is, or will be, involved in the commission of an offence, and that any specified person has possession or control of a document relating to:
- (a) the property of a person involved in the commission of such an offence; or
  - (b) the proceeds or instrumentalities of such an offence.
- (3) If any of the material specified in an application for a production order consists of information contained in a computer, the production order has effect as an order to produce the material in a form in which it can be taken away, and in which it is visible and legible.

- (4) A person to whom documents are produced under this Section may:
- (a) inspect the documents; and
  - (b) make copies of the documents; or
  - (c) retain the documents for as long as is reasonably necessary for the purposes of this Part, provided that copies of the documents are made available to the person producing them if requested, or reasonable access is provided to the documents.

**Drafting note:** Section 80(4)(c) provides for the enforcement authority's retention of documents if copies are available to the producing party upon that party's request. Since there may be situations in which documents may be costly to copy and the person producing them cannot demonstrate significant current need for copies, perhaps because they are historical in nature, the enforcement authority can opt to provide reasonable access to the documents.

Drafting authorities should ensure that the issue of cost is dealt with in a practical and fair manner under local practice. The framework should be such that prohibitive costs cannot easily be used as a means to frustrate an investigation.

- (5) A person may not refuse to produce a document ordered to be produced under this Section on the ground that:
- (a) the document might tend to incriminate the person or make the person liable to a penalty; or
  - (b) the production of the document would be in breach of an obligation (whether imposed by a law of [insert name of State] or otherwise) on the person not to disclose either the existence or contents, or both, of the document;
  - (c) But a production order granted under this Section does not require a person to produce or give access to any items subject to legal privilege.
  - (d) A production order granted under this Section has effect notwithstanding any restriction on the disclosure of information, however imposed.
  - (e) A production order may be made in relation to material in the possession or control of a government department and may include material which would otherwise be regarded as confidential.
  - (f) A production order granted under this Section does not grant right of entry to premises other than for the purpose of serving notice of an order made under this Section.
- (6) A production order may be made subject to such other conditions as the court may impose.

- (7) The court may vary or discharge an order under this Section in accordance with applicable procedural rules.

## Section 81 Failure to Comply with a Production Order

- (1) Where a production order requires a person to produce a document to the enforcement authority, the person is guilty of an offence against this Section if he or she:
- (a) fails to comply with the order without reasonable excuse; or
  - (b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular and does not so indicate to the enforcement authority and provide to it any correct information of which the person is in possession or control.
- (2) Where a person is convicted of an offence against this Section, he or she will be liable, in the case of a natural person, to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both, and in the case of a legal entity, to a fine of up to [the designated amount].

**Drafting note:** Drafters should also review the analogous provisions of Section 43 providing for compulsory orders, use immunity and limits to that immunity in connection with restraint orders. Whatever language is used, a decision should be made as to whether contravention of a court order will be made a separate statutory offence, as it is in Section 45, or be dealt with under general provisions punishing non-compliance with a court order, as is the case with respect to orders in Part VI in connection with civil forfeiture.

## Section 82 Power to Search for and Seize Property

- (1) Where the enforcement authority applies to the court for a search warrant in accordance with this Section, and the court is satisfied that there are reasonable grounds to believe, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, that the requirements in this Section have been met, the court may grant a search warrant for such property. An application may be made *ex parte*.
- (2) The requirements of which the court must be satisfied before granting an order under this Section are:
- (a) a production order has been served and has not been complied with or a production order would be unlikely to be effective; or
  - (b) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the premises where the material is held without any notice to any person; or

- (c) the material involved cannot be identified or described with sufficient particularity to enable a production order to be obtained;
- (d) the material in respect of which the search warrant is sought is likely to be of substantial value to the investigation; and
- (e) [insert such conditions and grounds from domestic law considered necessary to safeguard issuance of a coercive warrant identified in (1) above.]

**Drafting note:** Subsections (a)–(d) of Section 82(2) set out four alternative circumstances when a search and seizure rather than production order is appropriate. Whichever instance is applicable, in addition, subsection (e) must be met. Section 82(2)(e) requires that the usual grounds and rules for granting a search warrant apply.

Typically this will mean that the enforcement authority will have to show reasonable grounds to believe that a person has been, is or will be involved in the commission of an offence; and that the place or person to whom the warrant applies contains or has or will have possession or control of a document in relation to that offence. It will also require that the usual rules will apply with respect to time of entry, return to the court, etc.

- (3) If during the course of searching under an order granted under this Section, an authorised officer finds anything that he or she believes on reasonable grounds:
  - (a) will afford evidence as to the commission of an offence; or
  - (b) is of a kind that could have been included in the order had its existence been known of at the time of application for the order, he or she may seize that property or thing and the seizure order shall be deemed to authorise such seizure.
- (4) An authorised officer who has seized property and/or other things pursuant to this Section may retain it for as long as is reasonably necessary for the purposes of this Part provided that copies of any documents seized are made available to the person producing them if requested, or reasonable access is provided to them.

## Section 83 Monitoring Orders

**Drafting note: Monitoring order.** Where an account in a financial institution has been discovered, through a customer information order or otherwise, a monitoring order will allow the account to be monitored in real time. Any transactions should be identified quickly. If, for example, the account holder asks for the transfer of a significant sum out of his or her account, a monitoring order

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will enable the investigators to be aware of this intention, and to take appropriate steps to deal with the proposed dissipation of the account holder's assets.

The section provides details as to how the order should be applied for and enforced. The monitoring order applies for a relatively short, fixed time period. As with customer information orders, there is a penalty provision for non-compliance, and a tipping off provision.

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied, having regard to the facts and beliefs set out in the [variants: affidavit; evidence; verified statement] in support of the application, and any other relevant matter, that there are reasonable grounds to believe that the conditions in subsection (3) are met, it may direct a financial institution to give information to an authorised officer. An application under this subsection may be made *ex parte*.
- (2) A monitoring order shall:
  - (a) direct a financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person with the financial institution;
  - (b) not have retrospective effect; and
  - (c) apply for a period of a maximum of [three] months from the date it is made, unless renewed by the court following a further application and then for no more than [ ] months. A monitoring order shall in any event not be in place for more than [six] months in total.
- (3) A court shall issue a monitoring order only if it is satisfied that there are reasonable grounds to believe that:
  - (a) the person in respect of whose account the order is sought:
    - (i) has committed, was involved in the commission or is about to commit or be involved in the commission of an offence; and
    - (ii) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of an offence; or
  - (b) the account is relevant to identifying, locating or quantifying terrorist property.
- (4) A monitoring order shall specify:
  - (a) the name or names in which the account is believed to be held; and
  - (b) the class of information that the financial institution is required to give.
- (5) An authorised officer for the purposes of subsection (1) shall be [name of authority that shall apply for/execute monitoring orders].

- (6) A financial institution, for the purposes of this Section, means a bank or other credit institution, a life insurance or investment-related insurance company, insurance underwriters or insurance agents or brokers; an investment bank or firm; a brokerage firm; a mortgage company; cheque cashers and sellers or redeemers of travellers' cheques, money orders, or other monetary instruments; and any person that engages as a business in funds transfer, cheque cashing or the purchase, sale or conversion of currency.
- (7) Any person who is employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it knowingly:
- (a) fails to comply with the order; or
  - (b) provides false or misleading information in purported compliance with the order.
- (8) Any person who is employed by a financial institution that is or has been subject to an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it discloses the existence or operation of the order to any person except where the disclosure is made to:
- (a) an officer or agent of the institution for the purpose of ensuring compliance with the order;
  - (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
  - (c) the authorised officer referred to in the order.
- (9) In the event of a conviction for an offence under either subsection (7) or (8), in the case of a natural person who is a director, employee or agent of a financial institution, the penalty shall be imprisonment for a term not exceeding [insert number] years or a fine of up to [insert amount], or both, and in the case of a body corporate a fine of up to [the designated amount].
- (10) Nothing in this Section prevents the disclosure of information relating to a monitoring order for the purposes of or in connection with legal proceedings provided that nothing in this subsection shall be construed as requiring disclosure to any court the existence or operation of a monitoring order.

**Drafting note: Civil investigative orders.** Civil forfeiture cases should be governed by the civil procedure rules within a state.

The usual civil discovery mechanisms under state practice should be available to the enforcement authority as they pursue such cases. Some states with civil forfeiture provisions rely exclusively on such mechanisms. Other states have special provisions available to the enforcement authority. If, as is typically the case, the

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pre-filing investigative tools available to the enforcement authority or its general access to information are limited, there will be a need for provisions such as in this part. For states introducing a new civil forfeiture regime, it is generally essential for some investigative measures to be introduced as part of the regime. This is because a civil litigant's ability to require that a person produce documents or provide testimony in support of the civil action is limited in time to the period after the filing of the case and is likely to be restricted in other ways. For instance, in civil proceedings, typically there is no power to search for documents or things although some jurisdictions have developed such a procedure.

Civil forfeiture actions support important public policy goals within a state. They supplement criminal confiscation in seeking to ensure that proceeds do not remain with wrong-doers. As such, they should not be equated with typical civil cases between private litigants where pre-filing investigative tools may be limited.

Four special investigative measures are proposed in the sections that follow:

- Customer information orders
- Production orders
- Search warrants
- Disclosure orders

Drafters should consider the adoption of such provisions in the context of domestic law and practice.

The enforcement authorities may also wish to prepare a code of practice to govern the use of these investigative powers, since the use of civil forfeiture will in most cases be a new and far reaching remedy. Such a code could cover things such as how investigative orders are to be implemented, who should be involved, and what information is provided to the person on whom the order is served. This will of course often not be the person whose unlawful conduct has led to the investigation.

## Section 84 Customer Information Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that the conditions set out in subsections (2) and (3) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may make an order that a financial institution provide to the enforcement authority any customer information as defined in subsection (4) below that it holds relating to the person or account specified in the application. An application may be made *ex parte*.
- (2) The first condition is that the application must state that the order is sought for the purposes of a civil forfeiture investigation.

- (3) The second condition is that the court is satisfied that there are reasonable grounds for believing that the financial institution may have information that is relevant to a civil forfeiture investigation.
- (4) Customer information is information as to whether a person holds, or has held, an account or accounts at a financial institution (whether solely or jointly), and information identifying a person who holds an account, and includes all information as to:
  - (a) the account number or numbers;
  - (b) the account holder's full name;
  - (c) the account holder's date of birth;
  - (d) the account holder's most recent address and any previous addresses;
  - (e) the date or dates on which the account holder's began to hold the account or accounts and, if he or she has ceased to hold the account or any of the accounts, the date or dates on which he or she did so;
  - (f) such evidence of the account holder's identity as was obtained by the financial institution;
  - (g) the full name, date of birth and most recent address, and any previous addresses, of any person who holds, or has held, an account at the financial institution jointly with him or her;
  - (h) the account number or numbers of any other account or accounts held at the financial institution to which he or she is a signatory and details of the person holding the other account or accounts;
  - (i) if a legal entity:
    - (i) a description of any business that it carries on;
    - (ii) the jurisdiction or territory in which it is incorporated or otherwise established and any number allocated to it;
    - (iii) its registered office, and any previous registered offices;
    - (iv) the full name, date of birth and most recent address and any previous addresses of any person who is a signatory to the account or any of the accounts;
    - (v) the beneficial owner(s); and
    - (vi) any other information that the court specifies in the customer information order.
- (5) A financial institution shall provide the information to the enforcement authority in such manner, and at or by such time, as is specified in the order.
- (6) No obligation to maintain the confidentiality of information held by a financial institution, whether imposed by a law or contract, can excuse compliance with an order made under this Section.

- (7) A financial institution, for purposes of this Section, means a bank or other credit institution, a life insurance or investment-related insurance company, insurance underwriters or insurance agents or brokers; an investment bank or firm; a brokerage firm; a mortgage company; cheque cashers and sellers or redeemers of travellers' cheques, money orders, or other monetary instruments; and any person that engages as a business in funds transfer, cheque cashing or the purchase, sale or conversion of currency.
- (8) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it knowingly:
- (a) fails to comply with the order; or
  - (b) provides false or misleading information in purported compliance with the order.
- (9) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it discloses the existence or operation of the notice to any person except:
- (a) an officer or agent of the institution for the purpose of complying with the order;
  - (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
  - (c) a representative of the civil enforcement authority referred to in the order.
- (10) In the event of a conviction for an offence under either subsection (8) or (9) in the case of a natural person who is a director, employee or agent of a financial institution the penalty shall be imprisonment for a term not exceeding [insert period] or a fine of up to [insert amount], or both in the case of a legal entity.

**Drafting note: Customer information order.** A customer information order is an order requiring a financial institution to produce to the enforcement authority specified information about its customer(s). It will most typically be used to discover whether a named person has an account at a financial institution.

In some jurisdictions, there are centralised banking registers that make it possible for investigators to establish whether particular persons have accounts with financial institutions in that jurisdiction. However, many other jurisdictions do not have such centralised systems. The procedure provided for in Section 84 will enable a similar effect to be achieved.

The provisions of the section make it clear (especially subsection (3)) that the procedure cannot be used speculatively.

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The information sought can be extremely useful. If, for example, during the course of an investigation, a letter addressed to the defendant from a particular bank is discovered, but there is no knowledge of any account in that bank, then the customer information order could be used to obtain from that bank confirmation as to whether the defendant has an account there. If he does have such an account, then a production order can be sought in the usual way for the relevant documents relating to that account.

## Section 85 Production Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that the conditions set out in subsection (2) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may make the order requiring a person believed to have possession or control of any document relevant in identifying, locating or quantifying property or necessary for its transfer to produce such document. An application may be made *ex parte*.
- (2) There must be reasonable grounds to believe that:
  - (a) specified property is said to be the subject of a civil forfeiture investigation;
  - (b) specified property is proceeds and/or instrumentalities; and
  - (c) the person specified in the application has control of the document or documents.
- (3) If any of the material specified in an application for a production order consists of information contained in a computer, the production order has effect as an order to produce the material in a form in which it can be taken away, and in which it is visible and legible.
- (4) A person to whom documents are produced under this Section may:
  - (a) inspect the documents; and
  - (b) make copies of the documents; or
  - (c) retain the documents for as long as is reasonably necessary for the purposes of this Part, provided that copies of the documents are made available to the person producing them if requested, or reasonable access is provided to the documents.

**Drafting note:** This subsection provides for the enforcement authority's retention of documents if copies are available to the producing party upon that party's request. Since there may be situations in which documents may be costly to copy and the person producing them cannot demonstrate significant current

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need for copies, perhaps because they are historical in nature, the enforcement authority can opt to provide reasonable access to the documents.

Drafting authorities should ensure the issue of cost is dealt with in a practical and fair manner in accordance with local practice. The framework should be such that prohibitive costs cannot easily be used as a means to frustrate an investigation.

- (5) A person may not refuse to produce a document ordered to be produced under this Section on the ground that:
- (a) The document might tend to incriminate the person or make the person liable to a penalty; or
  - (b) The production of the document would be in breach of an obligation (whether imposed by a law of [insert name of State] or otherwise) on the person not to disclose either the existence or contents, or both, of the document.
  - (c) A production order granted under this Section does not require a person to produce or give access to any items subject to legal privilege.

**Drafting note:** This subsection makes it clear that the grounds for refusal to produce documents will be very limited. There will, however, be no obligation to produce material subject to legal privilege.

- (d) A production order granted under this Section has effect notwithstanding any restriction on the disclosure of information, however imposed

**Drafting note:** This subsection addresses data protection or other confidentiality restrictions that might be thought to apply to the material sought.

- (e) A production order may be made in relation to material in the possession or control of a government department and may include material that would otherwise be regarded as confidential.
  - (f) A production order granted under this Section does not grant right of entry to premises other than for the purpose of serving notice of an order made under this Section.
- (6) A production order may be made subject to such other conditions as the court may impose.
- (7) The court may vary or discharge an order under this Section in accordance with applicable procedural rules.

## Section 86 Failure to Comply with a Production Order

- (1) Where a production order requires a person to produce a document or documents to the enforcement authority, the person is guilty of an offence against this Section if he or she:
  - (a) fails to comply with the order without reasonable excuse; or
  - (b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular, and does not so indicate to the authorised officer and provide to the authorised officer any correct information of which the person is in possession or control.
- (2) Where a person is convicted of an offence against this Section, he or she will be liable, in the case of a natural person, to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both, and in the case of a legal entity, to a fine of up to [insert amount].

**Drafting note:** In relation to offences committed in respect of investigative orders under this part, it is necessary to decide whether contraventions of a court order should be categorised as separate statutory offences, as has been drafted here, or are dealt with in some other way under general civil contempt provisions punishing non-compliance with a court order.

## Section 87 Power to Search for and Seize Property

- (1) Where the enforcement authority applies to the court for an search warrant in accordance with this Section, and the court is satisfied that there are reasonable grounds to believe, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, that the requirements in this Section have been met, the court may grant a search warrant for such property. An application may be made *ex parte*.
- (2) A search warrant in relation to a civil forfeiture investigation is an order authorising a person named in the warrant to enter (using such force as is necessary) and search premises specified in the application, and further authorising that person to seize and retain any property or document or documents specified in the warrant that is or are found there and which is or are likely to be of substantial value to a civil forfeiture investigation.

**Drafting note:** This section sets out what can be searched for. This will assist in the investigation. Where it is suspected that there will be material on the premises that actually could itself be subject to an application for forfeiture, that is, proceeds or instrumentalities. then an application under Section 70 will be the appropriate way to proceed.

- (3) Before granting an application for a search warrant under this Section, the court must be satisfied that there are reasonable grounds for believing that the property said to be the subject of a civil forfeiture investigation is proceeds or instrumentalities. The court must also be satisfied that there are reasonable grounds for believing that the property or document or documents specified in the warrant is or are on the premises.
- (4) The court may grant the application for a search warrant under this Section if it is satisfied that the requirements of this Section are met and:
  - (a) a production order has been made in respect of the document and has not been complied with; or
  - (b) a production order in respect of the document would be unlikely to be effective; or
  - (c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the enforcement authority does not gain immediate access to the property or document or documents without any notice to any person; or
  - (d) the property or document or documents involved cannot be identified or described with sufficient particularity to enable a production order to be obtained; and
  - (e) the property or document or documents in respect of which the search warrant is sought is or are likely to be of substantial value to the civil forfeiture investigation; and
  - (f) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the property or documents or document identified in (1) above, and note they must be met].

**Drafting note:** This section sets out four circumstances in which a search and seizure order, rather than a production order, is appropriate. Whichever instance is applicable, in addition, subsections (e) and (f) must be met. The section requires that the usual grounds and rules for granting a search warrant apply.

Typically this will mean that the authorities will have to show that they have reasonable grounds to believe that a person has been, is, or will be, involved in the commission of an offence; and that the place or person to whom the warrant applies, contains, or has or will have possession or control of a document in relation to that offence. It will also require that the usual rules will apply with respect to time of entry, return to the court, etc.

- (5) If during the course of executing an order granted under this Section, the enforcement authority finds any thing that it believes on reasonable grounds:

- (a) will afford evidence relevant to the civil forfeiture investigation; and
  - (b) is of a kind that could have been included in the order had its existence been known of at the time of application for the order, he, she or it may seize that property or thing and the seizure order shall be deemed to authorise such seizure.
- (6) A search warrant granted under this Section does not confer the right to seize any items subject to legal privilege.
- (7) If any of the material specified in an application for a search warrant consists of information contained in a computer, the search warrant has effect as an order to produce the material in a form in which it can be taken away, and in which it is visible and legible.
- (8) Any person who intentionally obstructs a person authorised by the court under this Section to carry out a search of premises commits an offence and shall be liable to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both.
- (9) Documents seized as a result of a search warrant under this Part may be retained for as long as is reasonably necessary for the purposes of this Part provided that copies of them are made available to the person from whom they were seized within [insert number of days] of the seizure if requested. Where property other than documents is seized, a list of such property shall be provided to the person from whom it was so seized.

## Section 88 Disclosure Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that there are reasonable grounds to believe the conditions set out in subsection (2) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may grant the order. An application may be made *ex parte*.
- (2) A Court may make a disclosure order where it is satisfied on reasonable grounds that—
- (a) any property specified in the application for the order is proceeds and/or instrumentalities;
  - (b) a person specified in the application for the order has derived a benefit from his or her unlawful conduct;
  - (c) information that may be provided in compliance with a requirement imposed under the order is likely to be of substantial value to a civil forfeiture investigation; and
  - (d) it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to a civil forfeiture investigation if the information is obtained.

- (3) A disclosure order shall authorise the enforcement authority to give to any person it considers has relevant information notice in writing requiring him or her, with respect to any matter relevant to an investigation for the purposes of which the order is sought, to—
  - (a) answer questions, either at a time specified in the notice or at once, at a place so specified;
  - (b) provide information specified in the notice, by a time and in a manner so specified; or
  - (c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.
- (4) A person shall not be bound to comply with a requirement imposed by a notice given under a disclosure order unless evidence of authority to give the notice is produced to him or her.
- (5) Any information obtained from a person in compliance with the disclosure order shall not be used in evidence in any proceedings other than the civil forfeiture proceeding to which the order granted under this Section relates, unless—
  - (a) he or she subsequently denies having made the disclosure; or
  - (b) he or she is charged with an offence relating to the provision of false or misleading information.
- (6) A disclosure Order may not compel any person to disclose material subject to legal privilege.
- (7) Where a person who has been served with a disclosure order under this Section fails to comply with the order without reasonable excuse; or in purported compliance with the order, makes a statement, or produces or makes available a document, known to the person to be false or misleading in a material particular, he commits an offence under this Section.
- (8) Where a person is convicted of an offence against this Section, he or she will be liable, in the case of a natural person, to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both, and in the case of a legal entity, to a fine of up to [insert amount].