

# SFO OPERATIONAL HANDBOOK

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## Section 2 Notices

### Important Notice

It is essential that any person seeking to exercise section 2 powers holds the correct designation from the Director, has been trained in the use of section 2 powers and is familiar with the contents of this chapter.

### Introduction to chapter

This part covers the exercise of powers granted to the Director of the SFO under section 2 of the Criminal Justice Act 1987 ("section 2"). It explains some of the legislation, procedures and documentation required to create a Notice, and it provides guidance on how to deal with issues that may arise. It explains who can exercise section 2 powers on behalf of the Director, and when. It is neither a statement of the law nor an exhaustive guide.

### Section 2 Powers

Section 2 grants to the Director of the SFO powers to be used in carrying out an investigation (and, for certain offences of bribery or corruption with a foreign element, before an investigation has begun under section 2A). These powers are used to compel persons with relevant information to answer questions, furnish information and provide documents to the SFO.

The following provisions contain the main powers:

- |                  |  |
|------------------|--|
| Section 2A(1)    | allows use of section 2(2) and (3) as part of the process for deciding whether to start an investigation in relation to certain offences of bribery or corruption (with a foreign element) |
| Section 2(2)     | provides the power to require a person to answer questions (in interview) or otherwise furnish information at a specified place and either at a specified time or forthwith                |
| Section 2(3)     | provides the power to require a person to produce at a specified place and either forthwith or at a specified time any specified documents   |
| Section 2(10)(b) | requires the Director personally to approve the use of section 2(2) and (3) in respect of banking documents, except in specific circumstances.   |
| Section 2(11)    | refers to the authority of the Director to designate members of the SFO to carry out functions, and to designate non-  |

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members of the SFO who are competent investigators to exercise powers under section 2(2) and (3)

Please note that applications for search warrants under Section 2(4) are dealt with separately in the chapter "Applying for Search Warrants".

### Delegation of Director's Section 2 Powers

The chapter on "Designations" explains the legal background and detailed process for designations for the delegation of certain powers, including under section 2.

Note that the power to use section 2 in respect of banking documents is expressly reserved to the Director and cannot be delegated except where it is impracticable for him to act personally and he has designated a member of the SFO to act on his behalf. See "Notices served on Banks" below. Where this happens, the identity of the designated member of the SFO and the duration of the designation are posted on the Intranet by Private Office.

### Stage of a case when section 2 powers may be used

Section 2 powers can be used in any case which has been formally accepted for investigation by the Director of the SFO. The power to use section 2 continues until the case is fully investigated, including after the institution of proceedings.

Further, pursuant to section 2A CJA 1987, section 2 powers are also exercisable for the purpose of enabling the Director to determine whether to accept for investigation a case where the apparent criminality involves: (a) by virtue of section 3(6) of the Bribery Act 2010, an offence under section 1 or 2 of that Act; or (b) an offence under section 6 of that Act. Section 2A is therefore available for pre-investigations in relation to certain Bribery Act offences with an international dimension.

Section 3(6) of the Bribery Act provides that, for sections 1 and 2 of that Act (offences of bribing and being bribed), a function or activity is a relevant function or activity even if it has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom. Section 2A may therefore be relied on if the apparent criminality under section 1 or 2 falls within the domestic jurisdiction (England and Wales or Northern Ireland) because of section 3(6). Section 2A may also be relied on if the apparent criminality falls within section 6 (bribery of a foreign public official).

The current version of section 2A came into force on 1 July 2011. For the period 14 July 2008 to 30 June 2011 a different version of section 2A was in force, with reference to the now-repealed or abolished bribery and corruption

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offences. By virtue of the transitional provision in section 19(5) of the Bribery Act 2010, it is the previous version of section 2A which must (still) be relied on in respect of pre-investigations into conduct which, at the relevant time was encompassed by one or more of those offences (with the relevant international dimension being provided in this context by section 108 of the Anti-terrorism, Crime and Security Act 2001).

Before a section 2A Notice can be issued, it must appear to the Director that such offences may have taken place and the power must only be exercised to enable the Director to determine whether to start an investigation. For more information on Bribery and Corruption offences, please **see the topic on "Bribery and Corruption"**.

Section 2A should not be used for any purpose other than to enable the Director to start an investigation in relation to bribery and corruption with an international element as explained above. Care should be taken when Notices under section 2A are issued that any material sought is necessary, reasonable and proportionate for that purpose only.

### Section 2 Notices and Scotland

Although the remit of the SFO is to investigate and prosecute within England, Wales and Northern Ireland, under section 17(2) of the CJA87 the powers of the Director to issue section 2 Notices extends to Scotland. However, by custom we liaise closely with the Crown Office and Procurator Fiscal's Office in respect of any investigations involving Scotland. [See the Handbook topic "Jurisdictions within the UK outside of England and Wales"].

### Purpose of issuing a Notice under Section 2

The section 2 Notice is an investigative tool available for obtaining information and documentation (including digital material) during the course of an investigation relatively quickly. It also enables the SFO to obtain confidential material without the need for consent.

Such material will be used to further the investigation and may subsequently be used in a prosecution.

Section 2 powers can in principle be used against suspects, with the proviso that answers given by a person in response to a Notice under section 2(2) may not be used in evidence against him or her (section 2(8) and (8AA) CJA87). [See "Service section 2 notices on suspects" below]. It is more common to use section 2 powers to obtain documents from a suspect [See "Serving section 2 Notices on Suspects" below].

If the recipient of a section 2 notice is not a suspect, recipients of section 2 notices are potential witnesses for the Crown who should therefore be treated according to the principles set out in the "**Victims and Witnesses Chapter**".

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One of the main benefits of using section 2 powers to obtain information and documents is that it overrides any obligations of confidentiality or secrecy attaching to the information or to the holder; such as those obligations to their clients held by banks, solicitors, accountants and financial advisors.

Section 2 powers protect the recipient from liability for breach of confidence, without the need for a court order. For this reason, the recipient may welcome the compulsion which comes with a section 2 Notice.

### What to consider before issuing a Notice under Section 2

Section 2 powers are inherently intrusive and, as such, their use can conflict with Article 8(1) of the European Convention on Human Rights (the right to respect for private and family life). Article 8(1) is a qualified right, which means that the use of intrusive investigatory powers, such as those provided by section 2, is permissible only if it is necessary, reasonable and proportionate. In broad terms this means that the use and scope of any section 2 Notice must be a reasonable measure in the circumstances to achieve the objective of investigating serious or complex fraud and should not go beyond what is strictly necessary to achieve that end.

Great care and consideration should therefore be made before a Notice is issued. The decision making process must always be fully documented **[See the "Case Record" topic.]**

In deciding whether the use of section 2 is necessary, other means of obtaining the information or documentation should first be considered such as obtaining it on a voluntary basis.

It is also necessary to assess whether the circumstances of the proposed use of section 2 make it reasonable and proportionate.

For further details see "Decide if a Section 2 Notice should be issued" below.

The Notice should be addressed to a named individual (not a company) and this person will be legally responsible for compliance and hence legally liable for possible sanctions for non-compliance.

Where documents are held by other Government Departments or Agencies appropriate gateways will exist for the supply of material by the Department or Agency to the SFO. However, if consideration is being given to issuing a section 2 Notice upon another Government Department or Agency, General Counsel should be consulted before any decision is made.

### Compulsory nature of section 2 powers

Compliance with a section 2 Notice is compulsory unless there is a reasonable excuse. Specifically:

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- Failure to comply with a section 2 Notice, without a reasonable excuse, is a criminal offence under section 2(13). The question of reasonable excuse is considered below.
- Giving false or misleading information in response to a section 2 Notice is a criminal offence under section 2(14).

### Non-compliance with a section 2 Notice

The penalties for offences within section 2 are as follows:

- Any person who fails to comply without **reasonable excuse** is liable on summary conviction to a term of imprisonment not exceeding six months or a fine or both (section 2(13)). Prosecutions under section 2(13) must be commenced within 6 months of the alleged non-compliance.
- Any person who knowingly or recklessly makes a false or misleading statement in a material particular is liable on indictment to a term of up to 2 years or a fine or both (section 2(14) and (15)).
- Any person who destroys, conceals, falsifies or disposes of relevant documents is liable on indictment to a term of up to seven years and a fine or both (section 2(16)). This provision applies to the recipient of a Notice under section 2 and also to any other person who knows or suspects that an investigation by the police or the SFO is being or is likely to be carried out.

The case controller should discuss any potential prosecution for failure to comply with a section 2 Notice with the Head of Division and General Counsel and a Decision Log entry should then be created for the outcome of the discussion.

### Reasonable excuse for non-compliance

If a person has a "reasonable excuse" for not complying with a section 2 Notice, then that person does not commit any offence under section 2(13).<sup>1</sup> All purported excuses for non-compliance with a Notice under section 2 must be treated on their own merit and any actual or apparent non-compliance on account of a purported excuse should be brought to the attention of the case controller who should notify his or her Head of Division and General Counsel's office.

While the SFO must ensure that the investigation is not delayed or frustrated, section 2 Notice recipients should always be treated with consideration and fairness.

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<sup>1</sup> Section 2(13) provides as follows: "Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence [...]" (emphasis added).

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It will be possible to address many purported excuses (not amounting to reasonable excuses) by explaining the relevant law clearly and courteously. Depending on the circumstances, this may include reference to:

1. the compulsory nature of section 2 and the offence in section 2(13);
2. the fact that section 2 compulsion overrides any duty of confidentiality and even the recipient's privilege against self-incrimination;<sup>2</sup> and
3. the safeguards in respect of legal professional privilege.<sup>3</sup>

The SFO will want to put recipients of Notices at ease as far as possible and help overcome any practical obstacles to compliance.

The recipient must be given sufficient information (or advance disclosure) to be able to comply with the Notice. Any disclosure of information obtained from a third party should be authorised by the case controller and the procedures for recording a section 3(5) disclosure followed [**See the "Information Gateways" topic**].

If a section 2 Notice cannot, for a reasonable excuse, be complied with in a material way, and new terms are agreed, a new notice must be issued. Notices are formal documents and therefore written or oral amendments should be avoided. Notices that are re-issued should be registered as a new Notice whilst the original notice should be cancelled.

### When section 2 powers are not used

Despite the otherwise apparent justification for using section 2 powers, there are a number of instances where it is not necessary or appropriate to use them, including the situation where:

- the documents or information are already in the public domain, for example Land Registry or Companies House documents
- the documents or information contain or relate to communications data held by Internet Service and Telephone Providers. Notices under the Regulation of Investigatory Powers Act 2000 (RIPA) must be used to obtain communications data (not section 2 of the CJA87). [**See the "Covert Investigative Techniques" topic**]

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<sup>2</sup> But section 2(8) provides an important safeguard: "A statement by a person in response to a requirement imposed by virtue of [section 2] may only be used in evidence against him—  
(a) on a prosecution for an offence under subsection (14) [...]; or  
(b) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it."

<sup>3</sup> See section 2(9).

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- in Restraint and Confiscation proceedings, the information is not required for the criminal investigation [See the “Production Orders” topic]

### Serving section 2 Notices on suspects

Caution should be exercised when contemplating the use of section 2 powers on suspects in an SFO investigation. A distinction is to be drawn between using section 2(2) to elicit answers to questions and to obtain information on the one hand, and using section 2(3) to obtain documents (including digital material) on the other.

Section 2(8), referred to above, gives effect to the fundamental right that a person cannot be compelled to incriminate him or herself. Section 2(8) permits answers to questions or information given by an individual in response to a section 2(2) Notice to be used in evidence against him or her only where the individual is prosecuted for providing false or misleading statements or where the individual in giving evidence in a prosecution for some other offence makes a statement inconsistent with his or her response to the section 2(2) Notice.

Obtaining documents from a suspect is permitted by section 2(3). The privilege against self-incrimination does not ordinarily apply to *documents* obtained through the use of compulsory powers against a person if those documents have an existence independent of the will of that person, even if they incriminate the provider.<sup>4</sup> This is sometimes referred to as the “real evidence exception”.

However, it will usually be preferable for a section 2 Notice to be served on a person other than a suspect (if that person may, or may also, have custody and control of the documents) so that the “real evidence exception” need not be relied upon, particularly as this exception would itself appear to be subject to one or more exceptions.

Where the suspect of the investigation is a corporation, it is likely to be unavoidable to obtain documents by way of a Notice under section 2(3) and served on a representative of that corporation.

### Legal Professional Privilege (“LPP”)

As noted above, one of the main benefits of using section 2 powers is that it overrides any obligations of confidentiality or secrecy. However, this should not be confused with LPP which has its own provision within the CJA87. For more guidance, see the topic “LPP”.

A person shall not be required to disclose any information or produce any document under section 2 which he or she would be entitled to refuse to

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<sup>4</sup> *Saunders v United Kingdom* (1996) 19187/91 (ECtHR).  
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disclose or produce on grounds of LPP in proceedings in the High Court, except that a lawyer may be required to furnish the name and address of his client (section 2(9)).

It should be borne in mind that:-

- LPP is the privilege of the client, not the lawyer, and if the client so wishes LPP may be waived. A lawyer may authorise this on his client's behalf.
- The scope of LPP is defined by case law. Not all material held by a lawyer is necessarily protected by LPP.
- LPP is subject to limitations. For example, the protection does not extend to advice provided for the purpose of committing or furthering an offence.

Generally, it will be the recipient of the Notice that will be in a position to determine if any material sought is subject to LPP and not the issuer of the Notice. However, the circumstances may dictate whether any blanket or partial claims to LPP are reasonable.

The process for dealing with data or other material over which there is an LPP claim is explained at "LPP".

### Types of Notice issued exercising powers under section 2

Notices are written documents which refer to the specific power by reference to the relevant sub-section: –

#### Interviews

- Section 2(2) requires a person whose affairs are to be investigated or any other person whom the Director has reason to believe has relevant information to **answer questions** or otherwise **furnish information** with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith [See "Notices under section 2(2) to answer questions or furnish information" below].

#### Producing Documents

- Section 2(3) requires a person under investigation or any other person to **produce** at such place as may be specified in the Notice and either forthwith or at such time as may be so specified any **specified documents** which appear to the Director to relate to any matter relevant to the investigation or any documents of a **specified description** which appear to him so to relate [See "Notices under Section 2(3) to produce documents" below].

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A Notice may be issued exercising either or both of the powers shown above.

### **Notices under section 2(2) to answer questions or furnish information – section 2 interviews**

When a Notice under section 2(2) is issued requiring the recipient to be interviewed, there is no legal right for the recipient to have a particular legal representative at the interview. The conduct of section 2 interviews is covered in the “Interviews Chapter”.

The information or answers required must relate to a matter relevant to the investigation. The relevance test is applied by the person using the powers and it is not necessary to justify to the recipient or their legal advisor why the information or answers sought relate to matters relevant to the investigation.

Usually the Notice will specify a time and place for an interview or by means of written correspondence, for the answers or information to be provided, although the requirement can be to do so immediately or forthwith, otherwise known as a ‘Here and Now’ Notice.

The recipient is compelled to answer questions and provide information which can be useful when the recipient is un-cooperative or owes a duty of confidentiality to his client.

A Notice may be issued exercising either section 2(2) or 2(3) or both.

For information on serving Section 2 Notices on suspects, see the section in this chapter. [See “Serving Section 2 Notices on suspects” above].

### **Notices under section 2(3) to produce documents**

The documents required must relate to a matter relevant to the investigation and are generally those within the **custody and control** of the recipient of the Section 2 Notice. The relevance test is applied by the person using the powers and it is not necessary to justify to the recipient or their legal advisor why the documents sought relates to matters relevant to the investigation.

Usually the Notice will specify a future time and place for compliance, although a requirement to produce the documents “immediately” or “forthwith” can be imposed, otherwise known as a ‘Here and Now’ Notice.

The service of a ‘Here and Now’ section 2 Notice will require the completion of a Risk Assessment [**See the “Operational Risk Assessment” topic**] on each occasion, and an Operational Order [**See the “Operational Orders” topic**] where appropriate. Staff should consult the topic on Operational Orders for guidance on the specific circumstances when an Operational Order is **not**

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required. A Notice under section 2(3) does **not** confer any right on the SFO to enter premises without invitation: a search warrant is required.

In most cases, the place for the production of the documents will be the address of the SFO.

The recipient is under a legal duty to produce the documents, which can be useful when the recipient is uncooperative or concerned about providing confidential documents to the SFO. A Notice may be issued exercising powers under section 2(2) or 2(3) or both.

For information on serving section 2 Notices on suspects, see the section in this chapter. [See "Serving section 2 Notices on suspects" above].

### Documents definition and digital material

The definition of documents includes information recorded in any form, for example, information on a computer or other electronic storage device (section 2(18) CJA 87). If the documents are not immediately legible, the person holding them may be required to produce them in legible form, for example by printing them out.

If material is sought in digital form it is important that the provider adheres to the practices set out in the document Sending Structured Data to the Serious Fraud Office.

### Photocopies or originals

The requirement under section 2 is for the recipient of the Notice to produce to the SFO the original of the documents. This does not mean that the SFO is entitled to take the original document away; it means that the original may be inspected and then the SFO may take copies or extracts from them. In practice, the majority of responses to section 2 Notices will be, with agreement, photocopies of the documents, and/or suitable media containing digital material, at the expense of the recipient. However, there will be instances where it will be useful to inspect the originals, for instance to review handwriting, where the copies are illegible, where there is evidence of text covered by correction fluid, and so on. Should it be necessary to retain originals, this can usually be made possible by negotiation with the recipient of the Notice.

In the context of MLA requests, it should be noted that section 2(8C) provides as follows: "Where any evidence obtained by the Director for use by an overseas authority consists of a document the original or a copy shall be forwarded, and where it consists of any other article the article itself or a description, photograph or other representation of it shall be forwarded, as may be necessary in order to comply with the request of the overseas authority". Accordingly, there is a legal basis in this context for the SFO to remove original documents.

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### Seeking an explanation of the documents produced or not produced

The SFO may require the person producing the documents in response to a section 2(3) notice to explain them (see section 2(3)(a)(ii)). If there are complex commercial documents to be produced, it may be appropriate to go through them with the person producing them, before any copies are made.

If any documents are not produced then the SFO may require the recipient of the Notice to state, to the best of his knowledge and belief, where they are (see section 2(3)(b)).

### Notices served on Banks

Section 2(10) makes provision in respect of customer-related material held by banks. A person shall not be required to disclose information or produce documents in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless:-

- the person to whom the obligation of confidence is owed consents to the disclosure or production; or
- the Director has authorised the making of the requirement or, if it is impracticable for him to act personally, a member of the SFO designated by him has provided authorisation. In practice, this will be a member of the SFO's Senior Civil Service.

The CJA 1987 provides no definition of banking business but it should be taken to include banking institutions (including building societies) regulated by the Financial Conduct Authority and Prudential Regulation Authority.

Depending on the material sought, out of an abundance of caution it may be preferable to obtain the authority of the Director when obtaining material from banks even if the material does not appear to be customer-related material.

### International Assistance

The Director may issue a section 2 Notice at the request of an overseas authority under section 2(1), (1A) and (1B) of the CJA 87. In the majority of instances these cases will be handled by the SFO's International Assistance team.

The Attorney General of Jersey, Guernsey or the Isle of Man is entitled to make direct requests to the Director under section 2(1A)(a) but all other overseas authorities have to send a letter of request through the UK Central Authority (UKCA), part of the Home Office. **[See the Handbook topic "Jurisdictions within the UK outside of England and Wales"]**.

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## SFO OPERATIONAL HANDBOOK

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Before a section 2 Notice is issued there must be a decision by the Director to accede to a request for SFO assistance from an overseas authority (see section 2(1B)). If the Director has acceded to a request, International Assistance may issue section 2 Notices to obtain information in the same way as for a domestic case.

### Drafting a section 2 Notice

#### Decide if a section 2 Notice should be issued

The Human Rights Act 1998 gives domestic force to the UK's international obligations under the European Convention on Human Rights ("ECHR"). Although a Notice issued under section 2 will interfere with a person's right to have his private life and correspondence respected (Article 8(1) of the ECHR), interference is permitted for the purpose of preventing crime or the protection of the rights and freedoms of others (Article 8(2)), so long as the ECHR proportionality test is satisfied: restrictions on Article 8(1) rights by the use of section 2 powers will be justified where they are a proportionate means of achieving a legitimate aim in the public interest. When making a decision on whether a section 2 Notice should be issued, the following points therefore need to be addressed:-

1. **Necessity.** Consider whether the information can be obtained effectively by another means, such as on a voluntary basis. This is unlikely to be possible for bank documents.
2. **Reasonableness.** Consider the context of all the circumstances of the case, weighing up the public interest in the criminal investigation with the person's right to privacy. There should be reasonable grounds to suppose that the person has information or documents in their custody or under their control which relate to matters relevant to the investigation.
3. **Proportionality.** Consider whether it is proportionate to the scale and needs of the investigation to use section 2 powers. For instance, it may not be proportionate to use the powers on a recipient of a very small amount of the proceeds of a fraud.

In many cases, it is worth making contact with the proposed recipient of the section 2 Notice to discuss its issue, content and compliance date. For example, in respect of a bank, prior contact should be made with the bank's central fraud unit in order to agree the recipient name, content and compliance date. Establishing good contacts at an early stage can result in a more effective response, particularly where there are likely to be follow-up Notices or where documents are likely to be archived.

It is important to document the decision making process carefully in the section 2 Registry Form.

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### Sensitive section 2 Notices

Where there is any potential sensitivity with the issue of a section 2 Notice, before making a decision the case controller should consult with the appropriate Head of Division and General Counsel, who both must approve and sign the Registry Form.

The Head of Strategy and Policy should be consulted. The Director should be informed of any such decisions and consideration should be given to whether the Attorney General's office should also be informed.

### Section 2 powers in restraint and confiscation

Material obtained using section 2 powers may be used in confiscation proceedings where those proceedings overlap with the investigation into serious and complex fraud or corruption. The Notice must be necessary for the purposes of the fraud or corruption investigation.

Section 2 powers should be used in preference to powers under the Proceeds of Crime Act 2002 (POCA 02) wherever appropriate.

If POCA 02 powers are used, for example for restraint or confiscation purposes, and the Accredited Financial Investigator acquiring the material can confirm that the production order application did not rely on information provided by a suspect or defendant under compulsion, then the material acquired may be shared with the case team in any parallel fraud or corruption investigation.

In, for example, restraint proceedings, the court will require an undertaking that, subject to any further order of the court which granted the order, information given by a suspect will not be used in criminal proceedings against the suspect, a co-defendant or partner/spouse of the suspect as they will have been compelled to provide the information. A section 2 Notice may not be used to circumvent this undertaking.

If a section 2 Notice is being considered where a restraint order is already in place, the POC team should be notified and the Registry Form must demonstrate that the information that leads the investigator to believe that there are reasonable grounds (as defined above) which come from a source independent of the POCD, a POCA order or restraint proceedings.

### S2 notices served on defendants after charge

Section 2 Notices should not normally be issued to defendants after charge. *R v SFO ex parte Smith* [1993] AC 1 is authority for the proposition that in exceptional circumstances section 2 powers can be used to obtain documents from a defendant after charge. In *Shannon v UK* [2006] 42 EHRR 31, while the European Court of Human Rights considered the use of interviews after charge,

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obtaining existing documents was not considered. The issue of a section 2 Notice served on a defendant after charge should always be discussed with the case controller and Head of Division.

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