

APPENDIX E PART 3

Part V

PROTOCOL FOR FORENSIC INSPECTION OF ELECTRONIC MEDIA OR RECORDING DEVICES

1. Appointment of computer experts

- (a) **Joint appointment.** The party producing the electronic media or recording device for inspection (“**the Producing Party**”) and the party entitled to inspection of the electronic media or recording device thus produced (“**the Inspecting Party**”), may jointly appoint a computer expert (“**the Joint Expert**”) for the purpose of making a forensic copy of such electronic media or recording device (“**the Original Acquired Image**”). The Joint Expert’s role shall be restricted to the acquisition of the Original Acquired Image and the performance of a reasonable search on a copy of the Original Acquired Image in accordance with the terms of this protocol. Before the Joint Expert commences his appointment, he shall provide, and shall procure that each of his employees, representatives, agents or sub-contractors involved in the engagement provides, an undertaking of confidentiality to the Court and to all parties concerned in the inspection.
- (b) **Costs and expenses of Joint Expert.** All costs and expenses relating to the appointment of the Joint Expert under this protocol shall initially be borne equally between the Producing Party and the Inspecting Party. Nothing in this protocol is intended to or shall be taken to prevent any party to the cause or matter from seeking the recovery of such costs and expenses in accordance with the Rules of Court.
- (c) **Individual appointments.** Nothing in this protocol shall prevent the Producing Party, the Inspecting Party and any other party concerned in the inspection, from appointing his own computer expert.

2. Acquisition of the Original Acquired Image

- (a) **Where Joint Expert appointed.** The Joint Expert shall acquire the Original Acquired Image under the supervision of all parties concerned in the inspection, their representatives or computer experts. Sufficient copies of the Original Acquired Image shall be made as necessary in order that the Producing Party and each of the Inspecting Party may be supplied with an electronic copy of the Original Acquired Image. The Joint Expert shall provide sufficient information with the copy of the Original Acquired Image to enable each party’s computer expert to access the copy supplied.

The Original Acquired Image shall be sealed and delivered to the custody of the Producing Party, who shall enumerate it in a list of documents to be filed under Order 24 of the Rules of Court.

- (b) **Where Joint Expert not appointed.** The Producing Party’s computer expert shall be responsible for acquiring the Original Acquired Image under the supervision of all parties concerned in the inspection, their representatives or computer experts. Sufficient copies of the Original Acquired Image shall be made as necessary for the purposes of inspection and reasonable search to be provided under this protocol. The Original Acquired Image shall be sealed and delivered to the custody of the Producing Party, who shall enumerate it in a list of documents to be filed under Order 24 of the Rules of Court.

- (c) **Original Acquired Image to be produced when ordered by Court.** The party to whose custody the sealed Original Acquired Image has been delivered shall not tamper with or break the seal, and shall produce the Original Acquired Image to the Court or such other person(s) as the Court may direct.

3. Safeguards for reasonable search

This paragraph applies in situations where a reasonable search is conducted on the contents of a copy of the Original Acquired Image.

Where Joint Expert appointed

- (a) **Conduct of reasonable search.** The Inspecting Party shall specify or describe the search terms or phrases to be used in a reasonable search to be conducted on the contents of a copy of the Original Acquired Image to the Producing Party and the Joint Expert.

If the Producing Party does not object to the search terms or phrases so specified or described, he shall communicate his consent to the Joint Expert and the Inspecting Party. The Joint Expert shall make arrangements for the conduct of the reasonable search on a copy of the Original Acquired Image under the supervision of all parties concerned in the inspection, their representatives or computer experts.

If the Producing Party objects to any or all of the search terms or phrases so specified or described, he shall forthwith inform the Joint Expert. The parties shall resolve such objections before any further steps are taken for the conduct of the reasonable search. The Joint Expert shall not take any further steps for the conduct of the reasonable search until:

- (i) he is informed by the Producing Party of his consent to the original search terms or phrases; or
- (ii) the Inspecting Party specifies or describes a new set of search terms or phrases and to which the Producing Party provides his consent in accordance with this sub-paragraph.

A copy of the documents or records that are the results of the reasonable search (“**the Search Results**”) shall be made and released to the Producing Party.

- (b) **Review for privileged material.** The Producing Party shall be at liberty to review the Search Results for the purpose of claiming privilege. If the Producing Party claims privilege over any document or record from the Search Results, he shall list the electronic documents or records over which privilege is claimed.
- (c) **Release for inspection.** Thereafter, the Joint Expert shall remove copies of any documents or records over which privilege is claimed from the Search Results (“**the Redacted Search Results**”). The Joint Expert may maintain a separate privilege log which records the documents or records which are thus removed and the reasons given for doing so. For the avoidance of doubt, the privilege log shall not be included in the Joint Expert’s report but the Joint Expert shall produce the privilege log to the Court if so directed by the Court.

The Redacted Search Results shall be released to the Inspecting Party for inspection together with the list of electronic documents or records over which privilege is claimed.

Where Joint Expert not appointed

- (a) **Conduct of reasonable search.** The Inspecting Party shall specify or describe the search terms or phrases to be used in a reasonable search to be conducted on the contents of a copy of the Original Acquired Image to the Producing Party. If the Producing Party objects to any or all of the search terms or phrases so specified or described, parties shall resolve such objections before any further steps are taken for the conduct of the reasonable search.

Upon resolution of any objections or if the Producing Party consents to the specified or described search terms or phrases, he shall make arrangements for his computer expert to conduct the requested reasonable search on a copy of the Original Acquired Image under the supervision of all parties concerned in the inspection, their representatives or computer experts.

- (b) **Review for privileged material.** The Producing Party shall be at liberty to review the Search Results for the purpose of claiming privilege. If the Producing Party claims privilege over any document or record from the Search Results, he shall list the electronic documents or records over which privilege is claimed.
- (c) **Release for inspection.** Thereafter, the Producing Party shall remove copies of any documents or records over which privilege is claimed from the Search Results. The Redacted Search Results shall be released to the Inspecting Party for inspection together with the list of electronic documents or records over which privilege is claimed.

4. Safeguards for forensic examination

This paragraph applies to the forensic examination of a copy of the Original Acquired Image for the purpose of identifying electronically stored documents thereon or for the recovery of deleted files or file fragments from unallocated file space or file slack using computer forensic tools or techniques. A Joint Expert shall be appointed for the purpose of such forensic examination.

- (a) **Conduct of forensic examination.** The Inspecting Party shall specify or describe the search terms or phrases to be used in the forensic examination to be conducted on the contents of a copy of the Original Acquired Image to the Joint Expert. The Joint Expert shall not at any time disclose to the Producing Party the search terms or phrases specified or described by the Inspecting Party and shall not include the search terms or phrases in his report.

The Joint Expert shall make arrangements for the conduct of the forensic examination on a copy of the Original Acquired Image. Neither the Inspecting Party nor the Producing Party, or any of their solicitors, computer experts, employees, representatives or agents shall be present during the conduct of the forensic examination.

A copy of the documents or records that are the results of the reasonable search (“**the Search Results**”) shall be made and released to the Producing Party. The Producing Party is not entitled to a copy, and shall not request the Joint Expert for a copy, of the search terms or phrases specified or described by the Inspecting Party.

- (b) **Review for privileged material.** The Joint Expert and the Producing Party shall jointly review the Search Results for the purpose of permitting the Producing Party to identify electronically stored documents, deleted files or file fragments over which he claims privilege. If the Producing Party claims privilege over any electronically stored documents, deleted files or file fragments from the Search Results, he shall identify them to the Joint Expert. The Producing Party shall list the electronic documents, deleted files or file fragments over which privilege is claimed.
- (c) **Release for inspection.** Thereafter, the Joint Expert shall remove copies of any electronic documents, deleted files or file fragments over which privilege is claimed from the Search Results (“**the Redacted Search Results**”). The Joint Expert may maintain a separate privilege log which records the electronic documents, deleted files or file fragments which are thus removed and the reasons provided for the request. For the avoidance of doubt, the privilege log shall not be included in the Joint Expert’s report but the Joint Expert shall produce the privilege log to the Court if so directed by the Court.

The Redacted Search Results shall be released to the Inspecting Party for inspection together with the Producing Party’s list of electronic documents, deleted files or file fragments over which privilege is claimed.

5. Inadvertent disclosure of privileged documents

Notwithstanding compliance with the procedures in this protocol, nothing in this protocol is intended to be or shall be taken to amount to a waiver of privilege.

6. Discovery and production only if necessary

For the avoidance of doubt, nothing in this protocol shall compel any party to give discovery of any document or produce any document for inspection which is not otherwise discoverable under Order 24, Rules 7 or 13 of the Rules of Court [(*where the party giving discovery is a bank*) or disclose customer information in a manner contrary to its banking secrecy obligations].