



4 June 2010

Public Consultation  
Inland Revenue Department  
PO Box 2198  
**WELLINGTON 6140**

### **Draft SPS ED0119 – Imaging of Electronic Storage Media**

1. The Society welcomes the opportunity to comment on Draft SPS ED0119 (Draft SPS). The Society supports a statement being issued by Inland Revenue on this topic, as there have been inconsistent approaches taken by Inland Revenue officials. In part, the lack of guidance for Inland Revenue officials has led to that inconsistent approach.

#### **Exercise of the Power**

2. The Draft SPS should acknowledge that in most cases the imaging of an electronic storage medium will be a significant intrusion on a person's privacy. Although not a fixed rule, ordinarily a taxpayer's co-operation to obtain information should be sought first. Only if this fails, or some other good reason exists, should the Commissioner seek to image an electronic storage medium. In all cases the officials should consider whether it is necessary to image an electronic storage medium or whether the information sought could be obtained in another way.

#### **“Necessary or relevant”**

3. At paragraph 5 of the Draft SPS, it is noted that the Commissioner's powers to access a “book and document” is limited to circumstances where it is “necessary or relevant” under section 16 of the Tax Administration Act 1994. At paragraph 16, and paragraphs 38, 39 and 47 it is suggested that if there is a claim of legal privilege or non-disclosure, a relevance search of an electronic storage device will not be undertaken, and that the entire device will be removed or cloned. That device may well contain material that is not relevant to tax issues, nothing to do with the Revenue Acts, and commercially sensitive. The Society notes the suggestions in paragraphs 62 and 63 that secrecy protects the taxpayer's information (such as marketing information for a new product), but the Commissioner should not have material that is not “necessary or relevant”.
4. The Court of Appeal noted in *Green v Housden* [1993] 2 NZLR 293 that to require production of documents outside the range of what was reasonably considered “necessary or relevant” is an abuse of power. The wording in section 17 (considered in *Green v Housden*) is little different to that in section 16 in that respect.
5. In *Avowal Administrative Attorneys Limited and others v The District Court at North Shore and C of IR* [2010] NZCA 183, as the entire computer hard drive had been claimed as privileged, the Court of Appeal held that a preliminary screening to obtain relevant material was not first required as the Commissioner was prevented from doing the preliminary screening by the blanket privilege claim. The Court of Appeal held that whether a preliminary screening was necessary depended on the context. Certainly, as the Court of

Appeal noted at paragraph 23, a preliminary screening may not always be required, but the Commissioner needs to be satisfied that it is necessary to clone the entire electronic storage device before doing so. It is not the case that the Commissioner can determine not to do the preliminary screening and clone the entire storage device in every context where legal privilege or rights of non-disclosure are claimed. The Draft SPS simply does not consider these requirements.

6. While the Society notes that paragraph 38 of the Draft SPS suggests that irrelevant or privileged material can be copied and removed, and cites *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586, the Draft SPS does not cite *Calver v District Court at Palmerston North (No.1)* (2004) 21 CRNZ 371 in which the opposite conclusion was reached in the context of a warrant. It certainly is not clear law as the Draft SPS might suggest.
7. In addition, the suggestion that if a claim of legal privilege or non-disclosure is made the entire electronic storage device will be removed or cloned (with associated business disruption and sensitivities) could provide a disincentive for taxpayers to protect their fundamental rights. The Commissioner should be acting consistently with those taxpayer rights, not discouraging their exercise.

**No need to image privileged material/material over which there is a claim of non-disclosure**

8. To always clone and seize privileged material and/or material over which there is a claim of non-disclosure is unnecessary. It would be possible, for instance, following a relevance search and the cloning of that relevant material, for the taxpayer and/or Computer Audit Inland Revenue official to conduct a further search of that cloned material, deleting information from advisers or firms, to advisers or firms, or which refers to advisers or firms and which might summarise advice received, providing the taxpayer with the ability to claim privilege or non-disclosure rights, or sealing that material if the claim is disputed. The official from the Assurance Unit should not be involved in that process. The taxpayer could provide adviser names for that purpose.
9. If the entire electronic storage device is seized (which should be rare), the Society supports the approach of paragraph 60 and paragraph 61.
10. The approach taken in the Draft SPS suggests that there would invariably be a dispute about whether items are privileged or are subject to the ability to claim non-disclosure. That would surely not always be the case at all, and the Commissioner should not be taking the view that all such claims are disputed. That adds needless cost into the process. There seems no need for the Commissioner to invariably take copies of privileged material or material over which non-disclosure is claimed, nor for that to be the standard approach signalled to officials by the Draft SPS.
11. There is no law justifying the position taken in the Draft SPS. The *Avowal* case was decided on its facts. There a blanket claim of privilege was made over the entire hard drive. It is not the case that *any* claim of legal professional privilege justifies the cloning and seizing of an entire electronic record in the manner proposed by the Draft SPS, and the *Avowal* case does not support such an approach. The Draft SPS needs to acknowledge that such an approach should be rare, not the general rule.
12. Paragraph 18 of the Draft SPS provides that “*Generally, the electronic storage medium will be imaged and sealed until such claims are resolved.*” It is unclear what the “generally” refers to. Presumably there will not be cases of imaging but not sealing such

privileged/non-disclosure documents. As stated above at paragraph 11, this should not be the standard approach in any event.

13. There is a suggestion in paragraph 59 of the Draft SPS that the contents of the sealed item may be reviewed. Without further constraints being outlined in the Draft SPS as to that “review”, this suggestion is inappropriate.

#### **Place in which sealed material is kept**

14. There is no detail in the Draft SPS about where sealed material will be kept. Any such material should not be retained nor accessible by the Computer Audit Inland Revenue official, but should be retained at another location, such as the Court, or with the Crown Solicitor, or with Litigation Management or a different part of Inland Revenue. The Society understands that is the current practice, and believes that practice should be outlined in the Draft SPS. If the material was to include legally privileged items or items over which non-disclosure could be claimed, such a measure would promote taxpayer confidence. There is also no reference to the taxpayer having access to seized material. There should be such a reference, as section 16B(4) requires such access.

#### **Removal of entire storage device**

15. In terms of removal of an electronic storage device altogether, there are some problems with the suggestions made in the Draft SPS. The Draft SPS fails to mention section 16C of the Tax Administration Act 1994. Section 16C provides the ability for the Commissioner to remove “books and documents” for a full and complete inspection. This can only be done by way of a warrant or with the occupier’s consent. By referencing only section 16B of the Tax Administration Act 1994, the Draft SPS will guide some Inland Revenue officials to use that provision to remove electronic devices, when the removal is for the purpose of a full and complete inspection. Officials should be advised that is not lawful.
16. Section 16B provides only limited authorisation for the purpose of copying material, not for an inspection. To remove electronic storage devices altogether should not be done without the consent of the taxpayer, unless all other avenues have been exhausted. While section 16B does not require that consent (as is noted at paragraph 25 and paragraph 35 of the Draft SPS), to remove an entire electronic system (such as a hard drive) would cause significant commercial disruption and cost to the taxpayer. The taxpayer may be able to offer alternative solutions.
17. The Society notes that section 16B provides the ability for the taxpayer to access that material, but the Draft SPS makes no note of that. There should be note of that, as removal of electronic storage devices can cause significant commercial disruption and access may alleviate some of that disruption. Further, section 16B requires return of the material as soon as is practicable (this is noted at paragraph 56 of the Draft SPS). Officials should be given guidance that “as soon as is practicable” means within a five day timetable. Copying even encrypted material should not take more than a working week, and the Commissioner should weigh the retention of such devices against the disruption and cost to taxpayers, especially in the case of computer hard drives. Some guidance as to timeframe of retention would be useful.

#### **Non-disclosure rights**

18. Some consideration needs to be given in the Draft SPS to section 20D(4) of the Tax Administration Act and to SPS 05/07. Section 20D(4) provides that for non-disclosure to

be claimed it must be claimed on the very day that powers under section 16, section 16B or section 16C are exercised unless otherwise agreed by the Commissioner. SPS 05/07 requires such a claim to be made in a particular form including the date of the advice, the name of the adviser, the form and subject matter of the advice. Clearly such requirements will not be able to be met in cases where the entire electronic storage device is seized, and access is by way of a warrant or a sudden visit by Inland Revenue on the day of seizure.

19. SPS 05/07 should not apply in this context, and a non-disclosure claim should be able to be made simply by naming the adviser and firm. Alternatively, the SPS should make it clear that in such circumstances the Commissioner will agree to a reasonable later date under section 20D(4)(a)(ii).

If you wish to discuss this submission further please contact the Taxation Committee Convener, Mr Casey Plunket, through the committee secretary, Julie Smith phone (04) 463 2967 or email [julie.smith@lawsociety.org.nz](mailto:julie.smith@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', with a large, stylized flourish at the end.

Jonathan Temm  
**President**