

Subsidiary Legislation made under s. 166(Y).

**Code of Practice - Unexplained Wealth Orders and
Interim Freezing Orders**

LN.2025/071

Commencement **27.3.2025**

1. In exercise of the powers conferred upon me by section 166(Y) of the Proceeds of Crime Act 2015, the code of practice annexed to this notice is hereby published and comes into operation on 27th March 2025.

2015-22

Proceeds of Crime

2025/071

**Code of Practice - Unexplained Wealth Orders and
Interim Freezing Orders**

ANNEX

PROCEEDS OF CRIME ACT 2015

CODE OF PRACTICE

UNEXPLAINED WEALTH ORDERS AND INTERIM FREEZING ORDERS

Issued by the Minister under section 166(Y).

About this Code

The purpose of this Code is to guide an enforcement authority in the exercise of its functions under section 166A to 166X of the Proceeds of Crime Act 2015 (“POCA”), which relate to Unexplained Wealth Orders (“UWOs”).

In this Code, references to sections are to provisions of POCA, unless otherwise stated.

An enforcement authority is defined by section 166A(10) as follows:

- the Royal Gibraltar Police;
- HM Customs;
- the Attorney General; or
- any other person designated by the Minister with responsibility for justice by Order.

The Code should not be regarded as a complete or authoritative statement of the law. Only the courts can give an authoritative interpretation of the legislation, and the contents of this Code may be affected by subsequent judicial decisions. This Code refers to the law as it applies in Gibraltar. However, it is important to note that the Gibraltar legislative regime forming UWOs was adopted from and essentially mirrors the regime applicable in England and Wales¹.

There are functions also conferred on an enforcement authority by any Orders made under section 184, 184A, 184ZA and 184B of POCA which apply to the operation of external investigations and requests. This Code applies to those powers, to such extent as such Orders

¹ See further under United Kingdom legislation in Part 8 of the Proceeds of Crime Act 2002; specifically, s.362A to 362U, as further amended by (i) the Criminal Finances Act 2017, (ii) the Economic Crime (Transparency and Enforcement) Act 2022, and (iii) the Economic Crime and Corporate Transparency Act 2023.

may make provision with respect to UWOs. In particular, the following orders have been made under these provisions of POCA:

- The Proceeds Of Crime Act 2015 (External Requests And Orders) Order 2019.
- Proceeds of Crime Act 2015 (External Investigations in a Civil Context) Order 2019.
- Proceeds Of Crime Act 2015 (External Investigations Ancillary To A Criminal Investigation Or Proceeding) Order 2019.
- Proceeds of Crime Act 2015 (External Requests and Orders under the Strasbourg Convention or Warsaw Convention) Order 2024.
- Proceeds of Crime 2015 (External Investigations in a Civil Context under the Strasbourg Convention or Warsaw Convention) Order 2024.
- Proceeds of Crime Act 2015 (Investigations Ancillary to a Criminal Investigation or Proceeding under the Strasbourg Convention or Warsaw Convention) Order 2024.

This Code is made by the Minister with responsibility for justice under section 166Y and applies to all actions undertaken by an enforcement authority in relation to sections 166A to 166X.

Where an enforcement authority fails to comply with any provision of this Code, it should not by reason only of that failure be liable to any criminal or civil proceedings, but the Code is admissible in such proceedings. A court may take account of any failure to comply with the Code in determining any question(s) in the proceedings.

The expectation is that the provisions of the Code will apply to the exercise of the functions of the enforcement authority under sections 166A to 166X. Any decision not to follow the Code should be carefully considered and noted.

The Code should be available for reference by an enforcement authority and members of the public. It should be available in particular at Royal Gibraltar Police (“RGP”) premises, HM Customs (“HMC”) premises, and any premises occupied by the Government Law Offices (“GLO”) and Office of Criminal Prosecutions and Litigation (“OCPL”)

UNEXPLAINED WEALTH ORDERS

Definition

A UWO is one of a number of investigation tools under Part VI of POCA intended to assist in building evidence. It is specifically designed to support the building of a case for civil recovery under Part V of POCA but can also be used for other reasons, both criminal and civil (provided there is a legal basis for using such information).

A UWO provides an enforcement authority with the ability to require an individual or company to provide specific documents or information² in order to establish whether the asset(s) in question have been legitimately obtained. As such, it provides an alternative means of obtaining information and allowing for the consideration of action against persons and their property about whom little information is available.

A further advantage is that a single UWO can be made in respect of more than one item of property.

Legal effects

The effect of making a UWO is that the respondent will have to provide a statement setting out the nature and extent of their interest in the property in respect of which the order is made and how the respondent obtained the property (including how any costs incurred in obtaining it were met).

Where the property is held by trustees of a settlement, the respondent must set out the details of the settlement as specified in the order and other information in connection with the property as may be specified in the order.

Failure without reasonable excuse to comply with the requirements imposed by a UWO will result in the property presumed to be recoverable property for the purpose of any proceedings taken in respect of the property under Part V of POCA (section 166C). It is a rebuttable presumption and therefore it is open to the respondent, or, if applicable, the specified responsible officer, to call evidence should they wish in any linked subsequent civil recovery proceedings. Additionally, the respondent may also face criminal liability given that it is an offence to knowingly or recklessly make a statement that is misleading to the court in response to an unexplained wealth order. Finally non-compliance also exposes a respondent to contempt of court proceedings.

Persons who can apply for a UWO

² see section 166A (4) to (6). Note that a statement in response to a UWO may be given in writing or by video recording, as may be stipulated in the UWO and the enforcement authority has discretion on what type of response is preferred.

An application for a UWO may be made to the Supreme Court by an enforcement authority. The application may be made without notice. It is not necessary for an investigation to be underway in order to apply for a UWO.

An application for a UWO is made by the enforcement authority, rather than an appropriate officer of that authority. The enforcement authority concerned should give consideration to implementing a suitable assurance and authorisation process that ensures appropriate applications will be made. The enforcement authority should also ensure that properly trained and qualified members of their staff are making applications in their name.

The person applying should be in a position to satisfy the judge that they have the legal basis to act on behalf (and in place) of an enforcement authority (see section 166A(10)).

Statutory requirements

An application for a UWO must be made to the Supreme Court (see Applicable Procedure below). The application must specify or describe the property in respect of which the order is sought, and specify the person whom the enforcement authority thinks holds the property (the respondent³). In a case where the respondent is not an individual, the application may also specify a person who is a responsible officer of the respondent.

Section 166A(8) specifies who are “responsible officers” of a respondent, and any responsible person specified in the order is a “specified responsible officer”. Each of the following are responsible officers:

- any director of the respondent, including any person occupying the position of a director, by whatever name called;
- any member of a body of the respondent equivalent to a board of directors;
- any other manager, secretary or similar officer of the respondent;
- where the respondent is a partnership, a partner or a member of the partnership; and
- any person in accordance with whose directions or instructions the board of directors or equivalent body of the respondent are accustomed to act.

The application should state that:

³ Section 166A(2) specifies what an application for an order must contain.

2015-22

Proceeds of Crime

2025/071

Code of Practice - Unexplained Wealth Orders and Interim Freezing Orders

- there is reasonable cause to believe that the respondent (or responsible officer) holds the specified property (sometimes referred to as the **'holding requirement'**);
- there is reasonable cause to believe that the aggregate value of that property is greater than £50,000 (sometimes referred to as the **'value requirement'**);
- there are reasonable grounds for suspecting that either:
 - (i) the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property (sometimes referred to as the **'insufficient income requirement'**); or
 - (ii) the specified property has been obtained through "unlawful conduct" within the meaning given by section 71 (sometimes referred to as the **'unlawful conduct requirement'** or **'section 71 requirement'**); and
- either:
 - (i) the respondent is a politically exposed person (as specifically defined in POCA)⁴ entrusted with prominent public functions by an international organisation or a state other than Gibraltar, United Kingdom or an EEA State (often referred to as the **'PEP requirement'**); or
 - (ii) there are reasonable grounds to suspect that the respondent (or a person connected with them) is, or has been, involved in serious crime⁵ (whether in a part of Gibraltar or elsewhere), and details as to the basis of that suspicion (often referred to as the **'serious crime requirement'**)

In addition to fulfilling the statutory requirements, the applicant must specify the property in respect of which the order is sought. In a case where the respondent is not an individual, the application may also specify a person who is a responsible officer of the respondent. It is immaterial whether or not other persons (in addition to the respondent or responsible officer) also hold the property, or whether the property was obtained by the respondent before or after the UWO provisions came into force. The information provided to the court should be sufficient to frame the requirements of the order, as the order places an obligation on the

⁴ S166B (7) and (8). Notably, this also includes family members of the PEP, close associates of the PEP or persons otherwise connected with the PEP.

⁵ section 166X as read with Schedule 10 sets out a person's involvement in serious crime for the purpose of section 166B.

respondent or responsible officer to explain the source or demonstrate the legitimacy of the specified asset(s) within a time period set by the court.

The order itself must specify:

- the form and manner in which the respondent's (or specified responsible officer's) statement is to be given, including whether it is to be given in writing or by video recording;
- the person to whom it is to be given; and
- the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.

Orders may also require production of documents of a kind specified or described in the order and in a form and manner specified in the order. This is intended to avoid 'data dumps' of huge volumes of information without any particular order or categorisation in order to conceal difficult documents and waste limited investigative time.

Applicable procedure

An enforcement authority should be aware of the legislation and the detail of the particular provisions under which they operate. They should seek legal advice/and or guidance where necessary in advance of using the powers, referring to relevant rules of court. This includes any relevant provisions in the Civil Procedure Rules made (and as amended from time to time) under the Civil Procedure Act 1997 in England and Wales ("CPR"), which apply in Gibraltar under section 38A of the Supreme Court Act, with such modifications (for example, in nomenclature) as the circumstances in Gibraltar may require.

An application for a UWO must be made to the Supreme Court in accordance with the CPR and the relevant Practice Direction issued thereunder, being the Practice Direction – Civil Recovery Proceedings (the "CR Practice Direction"). The CR Practice Direction will therefore apply with such modifications (for example, in nomenclature) as the circumstances in Gibraltar may require. For example, references to the "High Court" will be construed as references to the Supreme Court.

An application for a UWO is therefore not subject to any criminal procedural rules and practice directions, as the procedural rules are set out in the CR Practice Direction. However, information derived from compliance (or purported compliance) with UWOs may then be used for "enforcement or investigatory proceedings" in relation to property within the meaning of section 166D(8), and such proceedings include those under Part IV of POCA (confiscation of

2015-22

Proceeds of Crime

2025/071

**Code of Practice - Unexplained Wealth Orders and
Interim Freezing Orders**

the proceeds of criminal conduct), which are governed by criminal procedural rules and practice directions⁶.

Notwithstanding that UWOs provide this gateway for acquisition of information and progressing civil or criminal matters, section 166H provides that a statement made by a person in response to a requirement imposed by a UWO may not be used in evidence against that person in criminal proceedings (subject to certain exceptions- see below).

Particular action to be taken before making an application

The enforcement authority should carefully consider the value of evidence that may be obtained through a UWO. A UWO provides law enforcement with a tool to obtain information and documentation in relation to property that appears to be disproportionate to the known income of an individual or company. A fundamental aim of the power, therefore, is to access evidence that would otherwise not be available. Although not an absolute requirement, the applicant should consider whether alternative tools of investigation could be used in obtaining any relevant documents and information. However, this is not to say that an enforcement authority is not afforded a wide discretion in the use of its investigative tools. Whilst the enforcement authority may be required to justify its election of a UWO over investigative tools such as mutual legal assistance mechanisms, production orders or disclosure orders, the existence of other means of obtaining information should not preclude the opting for a UWO nor constrain the discretion conferred on an enforcement authority⁷.

Whether there are reasonable grounds for suspecting that there is insufficient lawfully obtained income to explain the wealth (i.e. holding of the property) will depend on the circumstances in each case and should be carefully considered. Likewise, whether there is reasonable cause to believe that the respondent holds the property and the value of the property is greater than £50,000 is something that will need to be carefully considered and justified in advance.

Applicants should be able to explain the basis for their suspicion or belief by reference to disclosable intelligence or information about, or some specific behaviour by, the individual or

⁶ Note section 4 of the Criminal Procedure and Evidence Act 2011, which provides that the Criminal Procedure Rules 2010 of England and Wales (S.I. 2010 No.60) made by the Criminal Rules Committee (as amended or replaced from time to time) apply in Gibraltar with such modifications (for example, in nomenclature) as the circumstances of Gibraltar may require and so far only as the circumstances of Gibraltar may permit. In addition, the Criminal Practice Directions issued by the Chief Justice of England and Wales (as modified) may be referred to for guidance as to criminal practice in Gibraltar.

⁷ the Court of Session has helpfully emphasised in *Avaaz Foundation v Scottish Ministers* [2022] SLT 334 at [67] that “decisions as to whether to apply for a UWO in any particular case, or to pursue one of the other investigatory mechanisms envisaged by POCA, or to take no relevant action, are actions for the Ministers in the exercise of a wide discretion”.

company concerned (including open source material from overseas where there may be public registers relating to property and public servants' income).

Applicants should take reasonable steps to liaise with other authorities or agencies in order to:

- establish whether they already own material that explains a person's wealth; and
- ensure appropriate action, thereby avoiding duplicating enquiries that may already be underway.

In considering whether to apply for a UWO, the enforcement authority should have made reasonable attempts to:

- establish the identity of the beneficial owner, for example in cases where a property is held in trust⁸;
- identify either:
 - (i) the politically exposed person or associate of such; or
 - (ii) the type of serious crime in which the respondent, or person associated with the respondent, is suspected of being involved

In drafting the proposed terms of the UWO in the application, care should be taken to list strict requests for information. The applicant should consider what precise information they require and categorise this in a structured fashion. The requested format of the return should also be specified. This will assist in avoiding receiving responses that comply with the UWO but are vague or minimal.

Further information on the "reasonable grounds" requirements are referred to below.

Further pre-application considerations

The right to respect for private and family life and the peaceful enjoyment of property is safeguarded under the Constitution of Gibraltar, as annexed to the Gibraltar Constitution Order 2006. The powers under sections 166A to 166X of POCA may involve significant interference with the privacy and property of those on whom personal information is obtained or whose personal information, material or documents are seen. The powers therefore need to be fully and clearly justified before they are used.

⁸ For property held in trust, see also section 166J.

The use of the powers which impact upon individuals' rights should be proportionate to the outcome being sought. In particular, those exercising the powers should consider at every stage whether the necessary objectives can be achieved by less intrusive means – this may be by approaching the potential respondent to ascertain whether they will provide the required information without the need for a court order or to give them prior notice that an application is to be made where this would not be expected to prejudice an investigation. The giving of prior notice of an application may mean that the respondent is ready to comply and allows them the opportunity to make representations about the detail of the order or notice due to the nature of the investigation or what they will be required to produce. Of course, in many cases, prior notice will not be possible in the context of UWOs, which can be made to a judge in chambers without notice (i.e. as *ex parte* applications) to the respondent. In deciding whether an application should be made without notice, the enforcement authority should consider the benefit of not holding the proceedings after giving notice. An obvious and common reason would be so as not to alert the individual(s) connected to an investigation that it is ongoing. On notice proceedings might enable the person to move material or information and thereby frustrate the investigation. Accordingly, cases which include (but may not necessarily be limited to) a perceived risk of dissipation of assets and/or potential for evidential tampering will be more suitable for *ex parte* applications.

In all cases, those exercising the powers should exercise them fairly, courteously and responsibly, respectfully without unlawful discrimination, harassment or victimisation and in accordance with any statutory duties on them.

The Children Act 2009, section 4, also requires the court to ensure that in the discharge of their functions regarding, *inter alia*, the administration of property or application of income arising from it, they have regard to the need to safeguard and promote the welfare of all persons under the age of 18.

When exercising its powers, an enforcement authority should be aware of the definition and scope of any relevant investigation it is carrying out (section 146 sets out the relevant types of investigation), and must be satisfied that the statutory requirements are fulfilled and the limits to some of their powers. Importantly, UWOs are one of a number of relevant investigative tools in Part VI of POCA. Some of these tools (e.g. production orders and disclosure orders) require that an applicant show that (i) a person specified in the application is subject to a confiscation investigation, a civil recovery investigation or a money laundering investigation; or (ii) property specified in the application is subject to a civil recovery investigation or detained cash investigation. However, UWOs do not share this requirement to show that the order is sought for the purposes of a specific type of investigation, and can therefore be an important pre-investigative step.

Importance of relevant and accurate information

An enforcement authority should recognise that an investigation under Part VI of POCA is more likely to be effective and legitimate and more likely to secure public confidence when their reasonable grounds for suspicion are based on a range of objective factors. The overall use of these powers is more likely to be effective when up-to-date and accurate intelligence or information is communicated to officers and they are well informed about local and international crime patterns. For RGP and HMC in particular, senior officers have a duty to ensure that those under their command who exercise search powers have access to such information, and the officers exercising the powers have a duty to acquaint themselves with that information. Applicants for UWOs should therefore be able to explain the basis for their suspicion by reference to intelligence or information about, or some specific behaviour by, the person concerned. The enforcement authority should also be aware that their application and any information and evidence produced in its support will be subject to scrutiny by the judge, and therefore seek to limit the scope of information requested (in connection with the property that is the subject of the UWO application) to what is required.

Where information appears to justify an application, the applicant should take reasonable steps to check the information is accurate, recent, and not provided maliciously or irresponsibly. An application may not be made on the basis of information from an anonymous source if corroboration has not been sought.

Where there is any sensitive information and there are concerns that disclosure would create a real risk of serious prejudice to an important public interest, legal advice should be sought about the need for disclosure of that information. There may be the possibility of a public interest immunity application to the court so that the sensitive information need not be disclosed. The applicant should be in a position to deal with any questions the judge may have about the accuracy of the information provided or any other related matters.

Reasonable grounds for suspicion and reasonable cause to believe

In the context of UWOs, section 166B requires an applicant to show that there are reasonable grounds for suspecting:

- that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property⁹; or
- that the property has been or represents property obtained through unlawful conduct within the meaning given by section 71¹⁰.

⁹ already noted above as the 'insufficient income requirement'.

¹⁰ already noted above as the 'unlawful conduct requirement' or 'section 71 requirement'.

Given there are two possible application limbs, the section 71 requirement enables a UWO to be made even where there where the insufficient income ground is not advanced by an enforcement authority.

Further under section 166B(4), if the respondent to a UWO is not (or has not been) a politically exposed person¹¹, then the applicant will also need to show that there are reasonable grounds for suspecting that:

- the respondent is, or has been, involved in serious crime (whether in Gibraltar or elsewhere)¹²; or
- a person connected¹³ with the respondent is, or has been, so involved.

Note that a person's involvement in serious crime (whether in Gibraltar or elsewhere) only needs to be suspected on reasonable grounds, and not proven.

Also note that the question under section 166B(4)(a) as to whether a person is a politically exposed person is not subject to reasonable grounds for suspicion, but the court must still be "satisfied" that this is the case. It is important to read this also with section 166B(7)(a) which also includes a person who is "or has been" (i.e. previously) entrusted with a prominent public functions by an international organisation or by a State other than the UK, Gibraltar, or an EEA State. In addition, section 20A also applies for the purposes of determining:

- whether a person has been entrusted with prominent public functions;
- whether a person is a "family member"; and
- whether a person is known to be a close associate of another

Section 20B (which compels a relevant financial business to take into account the continuing risk posed by a PEP for at least 12 months after the person is no longer entrusted with a prominent public function) however does not apply in the context of the UWO provisions, and therefore historic PEPs would be subjected to the PEP requirement.

¹¹ already noted above as the 'PEP requirement'.

¹² already noted above as the 'serious crime' requirement. Note that section 166X applies in determining whether a person is involved in serious crime in Gibraltar or elsewhere.

¹³ paragraph 9 of Schedule 4 to the Income Tax Act 2010 ("connected" persons) applies in determining whether a person is connected with another.

Importantly however, the PEP requirement is an international one, and does not apply to persons entrusted with prominent public functions in Gibraltar, the UK or an EEA state¹⁴. This is not to say that such PEPs (or their family members, close associates or connected persons) cannot be the subject of a UWO; it is just that the serious crime requirement will have to be relied on instead of the PEP requirement when proceeding against Gibraltar, UK or EEA PEPs. Gibraltar law mirrors the position in England & Wales in this respect, with the legal effect that the serious crime requirement need not be relied on when the respondent is a person entrusted with prominent public functions by an international organisation or a state other than Gibraltar, the UK or an EEA state (or is a family member, close associate or otherwise connected to that person). In practical terms, this is advantageous as an enforcement authority is likely to face greater challenge in satisfying the serious crime requirement¹⁵ when seeking evidence from territories other than the UK or an EEA state (e.g. via lengthy mutual legal assistance processes which may not yield results from non-cooperative jurisdictions outside the UK and EEA) in order to satisfy the ‘reasonable grounds for suspecting test’ in section 166B(4)(b). In such cases, the enforcement authority can therefore rely on the PEP requirement¹⁶ in section 166B(4)(a) which merely requires the court to be satisfied and does not require the enforcement authority to show there are reasonable grounds for suspecting someone (or certain persons connected to that person) is or has been a PEP outside Gibraltar, the UK or an EEA state.

Whether there are reasonable grounds for suspicion (required to be shown if proceeding under either of the two sub-limbs of the serious crime requirement) will depend on the circumstances in each case. There should be some objective basis for that suspicion based on facts, information and/or intelligence. The enforcement authority should take into account such factors as how the individual or premises were identified, previous intelligence regarding the person or premises, previous law enforcement involvement with the person or premises, and suspected links with criminal activities, whether in Gibraltar or overseas.

Importantly, in the context of the section 71 requirement, section 71(2)(b) provides that it is not necessary to show that property was obtained through a particular kind of unlawful conduct, so long as it can be shown to have been obtained through unlawful conduct of one kind or another. So it will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, money laundering, brothel-keeping or other unlawful activities, provided it can be shown that they are attributable to one or other of these in the alternative, or perhaps some combination. Further, it is also important to note the breadth of

¹⁴ see section 166B(7)(a).

¹⁵ Under section 166B(9)(a), section 166X applies in determining whether a person is involved in serious crime in Gibraltar or elsewhere.

¹⁶ Provided of course that the respondent satisfies the legal definitions of a PEP, family member, close associate or is otherwise connected with the PEP.

the section 71 requirement as laid out in section 166B(3)(b), which covers property that “has been” or “represents” property obtained through unlawful conduct.

Reasonable grounds for suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific conduct in the handling of property or behaviour that is associated with serious crime or likely to facilitate the commission of serious crime by the UWO target or by others, and that provides an objective basis for that suspicion. For example, a person’s race religion or age could not be used, alone or in combination with other factors as the reason for establishing suspicion. Reasonable suspicion could not be based on generalisations or stereotypical images or categories of people being more likely to be involved in serious crime.

Reasonable suspicion should normally be linked to accurate and current intelligence or information. It can sometimes exist without specific information or intelligence and on the basis of some generalisation stemming from the behaviour of a person, particularly in the context of how the property which is the target of the UWO has been acquired, used, or previously disposed of, or where the respondent is suspected to be or have been involved in serious crime (whether in Gibraltar or elsewhere). However, reasonable suspicion could not be founded retrospectively. Therefore, an enforcement authority should be able to explain the basis for their suspicion by reference to intelligence or information about, or specific behaviour by, the person concerned. The court will consider what information was reasonably ascertainable by the applicant at the time of making the application.

In addition to the reasonable grounds for suspicion, section 166B(2) requires the applicant to show that there is reasonable cause to believe that:

- the respondent holds the property¹⁷; and
- the value of the property is greater than £50,000¹⁸

As noted in relevant case law¹⁹, the “reasonable grounds” test is concerned not with proof but the existence of grounds (reasons) for believing (thinking something is so) or suspecting (thinking something might be so) something, and with the reasonableness of those grounds; it

¹⁷ However, note that under section 166B(5) It does not matter for the purposes of subsection (2)(a)-

- whether or not there are other persons who also hold the property;
- whether the property was obtained by the respondent before or after the coming into force of section 166B.

¹⁸ Note that where the property in respect of which the order is sought comprises more than one item of property, the reference in section 166B(2)(b) to the “value” of the property is to the total value of those items: section 166B(10).

¹⁹ see *Re ARA (Jamaica)* (2015) 85 W.I.R. 440 at [19].

only asks for the applicant to show that something or some fact is believed or suspected to exist, and that there are objectively reasonable grounds for that belief or suspicion. Belief therefore does not require knowledge, but has been said to be “*a more positive frame of mind than suspicion*”²⁰.

Given the UWO provisions apply the “reasonable grounds to suspect”²¹ and “reasonable cause to believe” tests, an enforcement authority must be prepared to deal with these concepts in its application for a UWO.

Other points to note on reasonable grounds

In coming to a decision as to whether there are reasonable grounds to suspect that the respondent’s lawfully obtained income would have been insufficient to obtain the property, or whether the specified property has been obtained through unlawful conduct the court will, in accordance with section 166B(6):

- have regard to any mortgage, charge, or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purposes of obtaining the property;
- assume that the respondent obtained the property for a price equivalent to its market value;
- consider income to be “lawfully obtained” if it is obtained lawfully under the laws of the country from where the income arises;
- interpret “known” sources of the respondent’s income to mean the sources of income that are reasonably ascertainable from available information at the time of making an application. This will include open-source material, including from other jurisdictions as noted above such as information on the income of public officials, as well as reasonably ascertainable local and foreign intelligence. In certain cases, the court may be tasked with considering whether a formal information gathering channel such as a mutual legal assistance process would (or would not) be reasonably ascertainable,

²⁰ As identified in *A and Others v SSHD* [2004] EWCA Civ 1123 at [229]: “*Belief and suspicion are not the same, though both are less than knowledge. Belief is a state of mind by which the person thinks that X is the case. Suspicion is a statement of mind by which the person in question thinks that X may be the case*”.

²¹ Note that in *Hussien v Chong Fook Kam* [1970] AC 942, Lord Devlin identified at p.948: “*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’.* *Suspicion arises at or near the starting-point of an investigation of which the obtaining the prima facie proof is the end*”.

particularly in cases where the target jurisdiction is known to be non-cooperative, or where there are time constraints due to the risk of dissipation of assets; and

- consider the other lawful financial benefits available to the respondent aside from income, such as capital gains. Although not an express requirement, it is reasonable to expect the court to assess the full financial circumstances when considering an application.

It is therefore important for an enforcement authority to consider these statutory presumptions in advance of making an application.

Action to be taken in serving an order

Service of documents overseas should be dealt with according to the usual Civil Procedure Rules or rules of court for service outside the jurisdiction. Powers should be exercised fairly, courteously, responsibly, with respect for the persons and property of those concerned without discrimination.

In deciding the method of service of the order, the enforcement authority should take into account all the circumstances of the investigation, including the possible need to prove that service was effective, and the person or body on whom the order is served.

When serving the order, a covering letter should be provided which includes the following information:

- the name of the person who is the subject of the order;
- a warning in plain language that failure without reasonable excuse to comply with the requirement could result in civil recovery proceedings and/or contempt of court proceedings;
- a further warning on the criminal consequences of making a false or misleading statement with reference to section 166G;
- a statement that, where there has been a failure to comply with a UWO, a presumption that the property to which the order relates is recoverable will arise and can be used in future civil recovery proceedings;
- a statement that the warning given does not constitute a criminal caution, nor has the consequences of one;

- that the subject of the order should seek legal advice or for guidance on complying with the order; and
- the right to apply for a variation or discharge of the order.

Where it appears to the enforcement authority that the recipient of the order has difficulty reading or understanding English, they should attempt to serve a copy of the order on a person known to the recipient who, in the view of the enforcement authority, can explain or translate it. If that is not practical, the enforcement authority should serve the order and attempt to ensure that the person understands what has occurred (for example by serving a multi-lingual explanation or engaging an interpreter or translator).

The statutory presumption and the concept of reasonable excuse

Under section 166C, in any case where the respondent and the specified responsible officer (if any), between them, fail, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period, property is assumed to be recoverable property for the purposes of any proceedings taken in respect of the property under Part V of POCA, unless the contrary is shown. The statutory presumption under section 166C is subject to qualifications in terms of it only extending to the respondent's interest in the property where it is over the sum of £50,000 specified in section 166B(2)(b). What in law amounts to a reasonable excuse will depend on the facts of each particular case and will be a matter for decision by a court. But the fact that a person has already been questioned in connection with the same or a connected investigation, that the question relates to activities outside the jurisdiction or that a truthful answer to a question would tend to incriminate the interviewee or some other person is unlikely, in itself, to amount to a reasonable excuse.

Legal privilege and excluded material

Section 166I provides that UWOs have effect in spite of any restriction on the disclosure of information (however imposed), but that they are subject to the same restrictions contained in subsections (1) to (5) of section 165 concerning legally privileged material in the context of disclosure orders. Accordingly, neither a disclosure order or UWO confer the right to require a person to answer any privileged question, provide any privileged information or produce any privileged document²² (except that a lawyer may be required to provide the name and address

²² under section 165(2) to (4): a 'privileged question' is a question which the person would be entitled to refuse to answer on grounds of legal professional privilege in proceedings; 'Privileged information' is any information which the person would be entitled to refuse to provide on grounds of legal professional privilege in

of a client of his) or excluded material²³. This should rarely arise as it is unlikely that material and information sought by way of a UWO will include information which is privileged. The Supreme Court will consider this issue, when relevant, both in considering the application and in proceedings that use information gathered in response to a UWO.

Given that no information may be sought which is subject to legal professional privilege, a respondent has the right to withhold material and information sought which is subject to legal professional privilege. The definition of legal professional privilege evolves through case law, and legal advice should be sought where required on the scope of legal privilege. The current case law broadly defines two categories of legal privilege:

- The first is legal advice privilege which attaches to communications passing between lawyer and client created for the purpose of giving and receiving legal advice.
- The second is litigation privilege which attaches to communications and documents which come into existence for the sole or dominant purpose of either giving or obtaining legal advice with regard to contemplated litigation or collecting evidence for use in litigation.

However, such communications made in the furtherance of a criminal purpose are not privileged.

Aside from the legal privilege and excluded material provision, requirements for information made take precedence in spite of any restriction on the disclosure of information, however imposed. They therefore take precedence over any contractual duties of confidentiality and the common law duty of confidentiality.²⁴

Although not a statutory requirement, it recommended that applications for UWOs include confirmation that none of the material or information sought is subject to legal professional privilege or excluded material (with the exception that a lawyer may be required to provide the name and address of their client under a disclosure order).

Providing of information and production of documents

Reference to a respondent in this section include responsible officers.

proceedings; 'Privileged material' is any material which the person would be entitled to refuse to produce on grounds of legal professional privilege in proceedings.

²³ under section 181, unless the context otherwise requires, "document" and "excluded material" have the same meanings in Part VI of POCA as in the Criminal Procedure and Evidence Act 2011.

²⁴ Section 166I of POCA.

Where a respondent fails to comply with an order

A respondent must respond to an order within a certain time specified by the court. This period is known as the ‘response period’, but different time periods may be specified in respect of different requirements made by the order.

If the respondent fails to comply with the requirements imposed by the UWO within the relevant response period for that requirement, the property concerned is presumed to be “recoverable property”.²⁵ In this case, the enforcement authority can consider whether to take further action against the property. This may include recovering the property using the civil recovery powers provided by Part V of POCA. If civil recovery proceedings are commenced, the respondent can provide evidence to rebut the presumption that their property is recoverable in those proceedings.

A respondent will be treated as having failed to comply with a UWO if, without reasonable excuse, they fail to comply with all of the requirements imposed by the order. It is important to note that where a response is provided to a particular requirement in the UWO, but that response is considered to be unsatisfactory, this does not necessarily mean that the respondent has failed to comply with the UWO. If the individual has genuinely and fully engaged with the process and attempted to provide a response to each requirement of the order, and has not sought to withhold information or otherwise mislead the agency, then this would amount to ‘purported compliance’ under section 166D. Conversely, where the respondent is aware of the falsity of the response and so a deliberately fabricates a response, this would not be purported compliance, and instead constitute an offence.

It is however recognised that there may be attempts at compliance which have no element of falsity or attempts at misleading the applicant, but nevertheless still lack the character of purported compliance because of overly narrow interpretations of the UWO requirements. An example of this might be where an individual provides nothing more than the bare minimum of information necessary to address each requirement of the order, and as a result the authority is not satisfied by his explanation as to the derivation of the property. In those circumstances, the rebuttable presumption that the property is recoverable does not arise, but the enforcement authority may elect to take further civil recovery action against the property in light of the evidence (or lack of evidence) provided by the individual.

Where a respondent complies, or purports to comply, with an order

If, within the response period, the respondent complies or purports to comply with the requirements imposed by an order, and there is no interim freezing order the appropriate

²⁵ Section 136 of POCA: recoverable property is property obtained through unlawful conduct.

enforcement authority may (at any time) determine what enforcement or investigatory proceedings, if any, ought to be taken in respect of the property. This will include considering whether to refer any evidence to the agency that has discretion over commencing criminal proceedings. If it is determined that no further proceedings are necessary, this does not prevent such proceedings being taken subsequently, or other investigative orders being applied for.

Section 166G provides that it is a criminal offence to knowingly or recklessly make a false or misleading statement in purported compliance with a UWO, and the maximum penalty on conviction on indictment is imprisonment for a term not exceeding 2 years, with or without an additional fine. As discussed above, the phrase ‘purported compliance’ applies in cases where a person has provided a response to each of the requirements of a UWO but the recipient is not wholly satisfied with the response because of the nature of the responses and a perceived narrow interpretation of the requirements preferred over a genuine attempt at compliance with the UWO. Careful consideration should be given to information sought under the terms of an order. The phrase is required to ensure clarity in the circumstances in which the presumption that the property is recoverable will arise; in cases of non-compliance, this presumption will arise automatically.

The provision is also intended to protect the individual in instances where there has been a genuine attempt to comply with the requirements of the order. It is not, however, intended to excuse a poor or limited response and the respondent is expected to provide full and genuine information; failure to do so could still amount to non-compliance with the order. It should also be noted that an agency would be entitled to rely on any information provided in any further action against the respondent or their property. It is therefore incumbent on the applicant to ensure that the terms of the order are specific and clear in order to minimise the likelihood of an unsatisfactory response being provided.

However, if an interim freezing order (see paragraphs below) is in effect, the enforcement authority must make this determination within 60 days starting with the day of compliance²⁶ or purported compliance, unless the enforcement authority applies to the Supreme Court to have this time limit extended in accordance with section 166E or 166F.

Subject to certain exceptions, a statement made by a person in response to a requirement imposed by a UWO may not be used in evidence against that person in criminal proceedings. Exceptions are:

- in case of proceedings under Part IV of POCA;

²⁶ Section 166D(3). Where the requirements are complied with at different times, this means the last date upon which action to comply with the order is taken.

- on a prosecution for an offence under section 166G;
- on a prosecution for an offence for perjury or false statements; or
- on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement made in response to a requirement imposed by a UWO.

If the enforcement authority considers that investigatory or enforcement proceedings could be appropriately taken by another authority, agency or supervisory body, they need to be satisfied that there is a legal basis for sharing the information or evidence. It is also important to note that they are only passing the information or evidence to the other authority, agency or supervisory body for them to take their own independent operational decision to pursue appropriate investigations or proceedings. The enforcement authority is not tasking the recipient of the information.

The enforcement authority may take copies of any documents produced by the respondent in response to the requirements of an order. Such documents (which may be originals) may be retained for as long as it is necessary to retain them in connection with an investigation of the type specified in section 146²⁷. Documents may also be retained if the enforcement authority has reasonable grounds to believe that they may need to be produced for the purposes of any legal proceedings (and would otherwise be unavailable). In such circumstances, they may be retained until the proceedings are concluded.

Action to be taken on receiving an application for an extension of the response period

A UWO will specify a “response period” as determined by the court under section 166A(7) during which any specified responsible officer must comply with the requirements imposed by the UWO. Different periods may be specified in relation to different requirements, and in such cases the period ending the latest will be the relevant response period. Under section 166K(3), an application to discharge or vary an unexplained wealth order may be made by the enforcement authority or the respondent (or any specified responsible officer). The variation may sought in respect of the response period.

Time limits should be reasonable in the circumstances of the case. The response period(s) will be expressly set out in the order²⁸. Therefore, it is incumbent on the respondent (or any specified responsible officer) to make the application to the court for a variation of the order

²⁷ Section 146 makes provision for civil recovery investigations, money laundering investigations, confiscation investigations and detained cash investigations.

²⁸ see section 166A(7).

in the event it considers the period set by the court is inappropriate. If the enforcement authority receives a request for an extension of the response period, they should direct the person making the request to issue that request to the court. To avoid the court having to deal with unnecessary applications to vary the response period, the enforcement authority should request a reasonable response period when making their application for a UWO in the first place.

Where the respondent or any specified responsible officer asks for more time to comply, the court will carefully consider the request. If the enforcement authority objects to the request, it will need to provide its reasons to the court. The circumstances in which it would be suitable for the court to consider an extension will vary from case to case but may include the need to obtain legal or other professional advice, difficulty in retrieving the requested information and/or documents and unavailability.

Other variation and discharge applications

Where the enforcement authority applies to the court to vary or discharge a UWO order under s.166K(3)(a) it should, as far as practicable, follow the same procedure as for the original application. The enforcement authority and any respondent should also be mindful that a UWO may include a requirement that any application to discharge the order must be made by a specified date – see section s166K(5). This allows an enforcement authority to avoid a situation where a discharge application is made just before the deadline for compliance with the UWO by the respondent. By analogy, where an application has been made without notice, CPR Part 23.10 provides that any application to vary or discharge the order must be made within 7 days of service. It is unlikely that such a short timeframe for the applicant to make a discharge application would be suitable in the context of a UWO, but nevertheless those who wish to discharge *ex parte* orders should get on with doing so without delay and both the applicant and the court should be mindful of this in setting a suitable period.

There is no requirement for the same appropriate officer from an enforcement authority to make the variation or discharge application but if it is a different officer, that officer should be in a position to explain the genuine change of circumstances.

In certain cases, the respondent should be notified of an application to vary or discharge an order and be given the opportunity to be represented at the hearing.

Note that an application to vary or discharge a UWO (or an interim freezing order) may be made by “any person affected by the order” as per paragraph 12.1A of the CR Practice Direction, but this is to be interpreted in line with section 166K(3) which provides that an application to discharge or vary an unexplained wealth order may only be made by (a) the enforcement authority; or (b) the respondent or any specified responsible officer.

Court decisions

Appropriate officers should seek reasons (if not already given) from the judge for the grounds on which a decision is made, and whether or not an application for a UWO is approved or rejected.

Record of Proceedings

The enforcement authority should keep or cause to be kept a written record of the exercise of the powers conferred by the UWO provisions. The written record should include:

- a copy of the order;
- a copy of the application for the order;
- the date on which the order was served together with any proof of service;
- the date of receipt of, and reason for, any request for an extension of the time allowed to comply with the order;
- the decision in respect of any such request and the date on which it was notified to the respondent or specified responsible officer, or their solicitor; and
- the date and place that the information or documents were received in response to the order.

Retention of documents

If documents, material or information are provided which were not required to be provided under the terms of the UWO, the document, material or information should not be taken into account for the purposes of any future investigation and it should be returned to the person who provided it. Similarly, any copies made of such information or material which were not required to be provided, should be returned or destroyed, and a record made of any return or destruction.

Enforcement authorities should follow their own established procedures on the retention and return of documents, material and information. Intelligence that arises may be passed to the Gibraltar Financial Intelligence Unit, as well as between enforcement authorities (provided the enforcement authority is satisfied that there is a legal basis in place either in statute or common law for the passing of information between those bodies for that purpose).

Costs of Proceedings

In respect of UWO proceedings, the court may not make an order that any costs are payable by an enforcement authority, unless the applicant enforcement authority seeking the UWO has acted dishonestly, unreasonably or improperly, in accordance with section 166W. However, to mitigate any risk of a court holding that the enforcement authority has acted unreasonably, cost-capping and budgeting provisions in CPR 3.12 to 3.18 may be referred to and put forward for the Supreme Court’s consideration by the applicant, given that under those rules budgeting can apply to “any other proceedings” (including applications) where the court so orders.

INTERIM FREEZING ORDERS

Definition

An interim freezing order is an order that allows for the freezing of property identified in a UWO. It is intended to prevent property being dissipated while it is subject to the order.

Legal and practical effect

It is important to note that an interim freezing order is an interim measure. It must be discharged by the Supreme Court where it receives a section 166D(4) notification from enforcement authority of no further proceedings, or where a relevant application is not made within expiry of the period of 48 hours beginning with:

- (where the respondent fails to comply with the UWO) the day after the day with which the response period ends; or
- (where the respondent complies or purports to comply) the day after the day with which the 60 day determination period (see section 166D) ends, or where the determination period is extended, when the extended period ends.

A “relevant application” means an application for- (a) a restraint order under section 59; (b) a property freezing order; or (c) an interim receiving order.

In cases where a relevant application is made, then the interim freezing order will remain in place until that application is determined.

Enforcement authorities should therefore be mindful that they will only have a 48 hour window to present a relevant application in certain cases, and in practical terms should use either the response period or the determination period (as the case may be) to ensure they are in a position to make a decision on how to proceed where they consider there is a continued risk of dissipation of assets.

Persons who can apply for an interim freezing order

An application for an interim freezing order can only be made by the enforcement authority that applied for the UWO to which the interim freezing order relates²⁹.

Particular action to be taken in making an application

An application for an interim freezing order may be made to the Supreme Court as part of a UWO hearing, and it should be made at the same time as a UWO. The application must be made in the same proceedings as those in which the UWO is made. The UWO and interim freezing order may be combined in one document. If an application for an unexplained wealth order in respect of any property is made without notice, an application for an interim freezing order in respect of the property must also be made without notice.

An interim freezing order cannot be made in advance of a UWO, nor can it be applied for as an alternative to freezing orders under other provisions. Under section 166L(1) the prerequisite for making an interim freezing order is that the Supreme Court has first made a UWO in respect of any property.

An enforcement authority should consider whether to apply for an interim freezing order on the basis that it is necessary. This should be considered on the individual facts of the case, but could include the following factors:

- the likelihood, based on available evidence or the nature of the case, that the property may be dissipated;
- the value of the property;
- other interests in the property. This may include the complexity of the ownership arrangements of the property;
- the location of the respondent or responsible officer, in particular if he/she is, or is normally, overseas;
- the ability to monitor the property by other means; by way of the Land Titles Register;
- in relation to residential property, that there is no likelihood of the property being disposed of in the time period of the UWO; and/or

²⁹ section 166L(4)(a).

2015-22

Proceeds of Crime

2025/071

Code of Practice - Unexplained Wealth Orders and Interim Freezing Orders

- a realisation that a case will be expected to progress more quickly if relevant property is frozen.

It is important to note that the only test for the court when considering an application for an interim freezing order is whether making the order would avoid the risk of frustrating any civil recovery order that might be subsequently made.

In applying for an interim freezing order, the enforcement authority should also consider the possible need for a receiver. A receiver may not be necessary if the property does not require active management or if this can be achieved in another manner.

The enforcement authority or any person affected by an interim freezing order can apply for the order to be varied or discharged at any time. The power to vary an interim freezing order includes the power to exclude property from the order and to make exclusions from the prohibition on dealing with the property to which the order applies. An exclusion may (amongst other things) make provision to allow for a person to meet their reasonable living or legal expenses or to carry on any trade, business, profession or occupation.

The enforcement authority can also apply to extend the initial 60-day interim freezing order time limit, in order to review material provided to them in response to a UWO before the time limit expires. The time limit can be extended in intervals of up to 63 days, totalling a review period of no more than 186 days if the Supreme Court is satisfied that:

- the enforcement authority is working diligently and expeditiously towards making a determination about what enforcement or investigatory proceedings, if any, ought to be taken in respect of the property
- further time is needed for the authority to make that determination; and
- it is reasonable in all circumstances for the period to be extended

Further requirements are found at paragraph 18 of the CR Practice Direction. These relate to *inter alia*, the content of applications, requirements of the order itself, how the court will consider setting a suitable period, and how the order may make initial exclusions for the respondent's reasonable legal costs.