You have the right to remain silent… Or do you?

At a glance:

- What is the meaning of "interview"?
- Does a company/company director have the right to decline an "invitation" to an interview?
- Can the risk of arrest for declining an invitation to an interview be minimised?
- Can adverse inferences always be drawn from silence?
- Who can speak on behalf of a corporate defendant?
- Is pre-interview disclosure obligatory?
- Are officers required to observe Code C of the *Police and Criminal Evidence Act 1984* (PACE) during site visits?

In what circumstances can the right to self-incrimination be abrogated?

This well-known phrase (thanks to Inspector Morse, Bergerac and Monsieur Hercule Poirot!) is part of the 'caution' which is read to suspects before interviews under caution commence. Companies and directors who are being interviewed by the regulator often think that this is a 'get-out clause', and that they do not need to answer the regulators' questions. Of course, they don't, but there is the risk of adverse inferences being drawn and there are other methods for the regulator to obtain information. This article explores the methods available to the regulator to investigate potential environmental offences, and the associated issues.

What is the meaning of "interview"?

"Interview" is not defined in the *Criminal Justice and Public Order Act 1994* (CJPOA) and was not defined in the first version of Code C of the Codes of Practice under PACE. It is now defined in Code C11.1A as "*the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences which, by virtue of paragraph 10.1 of code C, is required to be carried out under caution".*

Any questioning (formal or informal: see *R v Sparks* [1991] Crim LR 128) of a person regarding his involvement or suspected involvement in an offence, by virtue of Code C10.1, should be under caution. "*Any questioning"* means what it says and therefore even one question may be an interview. A conversation will constitute an interview if a suspect is being asked to incriminate himself.

A voluntary statement made by an operator cannot amount to an interview but if the regulator puts any questions as a result of such statement, what follows will be an interview and should be under caution. If a suspect makes additional comments following an interview, the officer should caution again and make a contemporaneous record of the conversation.

The fact that questions are put out of curiosity or with a view to eliminating a suspect from enquiries does not stop the questioning from being an interview.

Does a company/company director have the right to decline an

"invitation" to an interview?

As the Environment Agency (EA) has no powers of arrest, the most customary route to obtaining information from a suspect is to "*invite"* them to attend a voluntary interview *"to give their side of the story"*.

Such an invitation falls within the investigators' obligation to pursue all reasonable lines of inquiry, whether these point towards or away from a suspect,[1] but it also seems on some occasions to be used as a fishing expedition. This is not the purpose of an interview under caution, and suspects have the right not to self-incriminate; in other words they cannot be compelled to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence. Regulators are often found asking questions outside of their remit, and in relation to other potential offences to which the interview, and pre-provided disclosure, did not relate. Ensuring the rights of the suspect are protected is one of the many reasons why a suspect should be legally represented at interview.

But is this really an "*invitation*" and one a suspect can afford to decline? Two possible consequences flow: (i) dawn arrests by the police, and (ii) drawing of an adverse inference at trial.

Can the risk of arrest for declining an invitation to an interview be minimised?

All offences are now arrestable but the lawfulness of an arrest by a police constable for an offence is dependent on the constable having reasonable grounds for believing it is necessary to arrest the person. Although the *Interpretation Act 1978* defines 'person' to include corporations, the police cannot arrest a corporation and therefore it is only directors/shareholders/staff who are at risk.

Paragraph 2.9 of the revised Code G under PACE sets out the statutory criteria for what may constitute necessity.

G:1.3 states the use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means i.e. to attend an interview by invitation.

The authors are familiar with two cases where the EA has sought to enlist the muscle of the police making allegations of acquiring and concealing the Proceeds of the Crime pursuant to ss 327-329 of the *Proceeds of Crime Act 2002* (POCA) without evidence to support the commission of any of these three separate and distinct offences under POCA.

The necessity criteria relied upon has been "*(e) to allow the prompt and effective investigation of the offence or the conduct of the person in question"*. This may arise when it is thought that unless the suspect is arrested, they will not attend the voluntary interview.

In both cases, the EA was quick to allege lack of willingness on the part of the suspect to attend. In one case, the suspect and the company solicitor had been in protracted correspondence with the EA over lack of adequate disclosure. In the other, the EA was notified the suspect was ill in hospital and unable to attend.

But despite the lack of particularity/evidence of POCA offences and any real evidence of unwillingness to attend, the police were ready to oblige the request from the EA without probing further, resulting in heavy criticism in the first case mentioned as recorded in the concluding remarks in *Sweeney v Westminster Magistrates Court, London RART & EA* [2014] EWHC 2068.

Given the risk of arrest for the individual, operators are well advised to accept the invitation to attend the voluntary interview even if to exercise their right to silence or at the very least, make contact with the regulator demonstrating a willingness to co-operate with the investigation, for example, by offering to answer questions in writing making it difficult to justify use of the power of arrest.

Can adverse inferences always be drawn from silence?

Adverse inferences may be drawn if a suspect fails to mention something known at the time, which he or she later wishes to rely on in evidence. Sections 34, 36, and 37 of the CJPAO as amended by the *Youth Justice and Criminal Evidence Act 1999* (YHCEA), s 58 describes the conditions under which adverse inferences may be drawn from a person's failure or refusal to say anything about their involvement in the offence when interviewed, after being charged or informed they may be prosecuted.

These provisions are subject to an overriding restriction on the ability of a court or jury to draw adverse inferences from a person's silence. For example, if a suspect is effectively ambushed by an inspector on site, cautioned and asked questions without the opportunity to consult a solicitor not only would there be an argument about the admissibility of the interview conducted in breach of the Codes of Practice but also an adverse inference could not be drawn from the silence.

There are times when silence is the best response, despite the threat of adverse inference. For example, when inadequate pre-interview disclosure is provided, making advising the client difficult. Remaining silent upon legal advice does not automatically avoid the application of section 34; it will be a question for the jury whether it was reasonable in all the circumstances to rely upon such advice.

The language of section 34 indicates adverse inferences cannot be drawn if the defendant faces trial on a different offence from that which he was charged or given warning of prosecution e.g. if questioned about a permit breach but subsequently charged with a duty of care offence. The complexity of the case can be another factor militating against drawing adverse inferences.

If the situation "calls out" for an explanation, the companies/its directors are advised to consider giving written answers to interview questions or a prepared statement to avoid the drawing of an adverse inference from silence in interview. It is essential

this document is carefully considered and prepared on full instructions for a number of reasons, as follows:

(1) an adverse inference can be drawn if the defendant gives evidence that is inconsistent with the statement or mentions a fact which at the time of the interview, it would have been reasonable to include in the statement;

(2) it might be the only explanation provided by the corporate defendant if the company decides not to call any evidence (corporate defendant is not liable to an adverse inference/direction under s 35 CJPOA if it chooses not to call evidence because the s 35 adverse direction penalizes a failure to give evidence not a failure to call evidence);

(3) You do not want the prepared statement to be the reason for subsequently being charged or used as a weapon against the defendant in cross-examination if the accused departs from its contents.

Who can speak on behalf of a corporate defendant?

The regulator must exercise care when determining the proper subject of enforcement action i.e. company, company director or an individual. When cautioning a company, it is important to issue the caution to somebody within the company who is sufficiently senior to accept responsibility for the company's act – often the controlling mind of the company as opposed to the operational body.

As an adviser, it is important to establish which person is being interviewed as advice might differ depending on whether it is the company, the director or both under suspicion. Further, it is necessary to check that the person authorised to speak on behalf of the company is not conflicted if under investigation personally.

It is not permissible for the regulator to carry out a "joint" interview of company and company director, nor to interview more than one director at the same time. Arguably, the company should be interviewed first because the actions of the company will be a relevant factor when considering a director's liability under Regulation 41 of the *Environmental Permitting (England and Wales) Regulations 2010* (EPR).

When a company has a sole director/shareholder it is obvious who is the controlling mind of the company and able to answer questions. But it is problematic when the regulator wishes to question a company, which has a number of directors, staff and/or shareholders, by asking one representative of the company questions, regarding incidents often involving decisions made by the operational body of the company under delegated authority.

Requests for these interviews to be in writing so the company can try and accurately answer questions have been met with inconsistent responses across the country. Some regulators are happy to oblige, others flatly refuse, sometimes using the excuse that interviews must be tape-recorded. While ideally they should, it is not a legal requirement, (the interviewer has a discretion to switch off the tape recording facilities if faced with an objection from a suspect) provided a written record is

made. A response in the form of a letter to written questions under caution was ruled admissible in *Direct Holidays PLC v Wirral Magistrates Borough Council* [1998] EWHC Adm 456

A refusal leaves the company in a difficult situation where one director can be sitting in a hot, stuffy interview room, trying to remember events from months or even years ago, much of which he or she may not have been personally involved with, without the benefit of access to company records or the ability to consult with the relevant staff.

The EA's investigation manual provides, you may think, the real reason why the EA decline written interviews – "*it does not allow for flexibility during the interview as a result of responses made that a verbal interview would and it allows for the creation of credible but false evidence".*

If the regulator decides that written answers is not so critical to the investigation that it can afford to decline the offer for written answers, the company may be best advised to attend for interview, exercise its right to silence, listen to the questions with a view to subsequently answering the questions in writing following proper consultation with other directors, staff members and company records. It is difficult to see how any adverse inference could be drawn in such circumstances.

When there are multiple directors/shareholders, it is in the interests of the company to put in place a structure to deal with the management of, and the co-operation with, an investigation and prosecution. A larger company is best advised to appoint a sub-committee to specifically deal with the investigation and prosecution, with authority to act and make decisions on behalf of the company including appointing solicitors. This will have the effect of ensuring that privilege is maintained since the sub-committee members will be readily identifiable as the client should any legal professional privilege (LPP) issues arise.

Is pre-interview disclosure obligatory?

Pre-interview requests from the regulator for disclosure are met with differing responses, depending on the individual regulator/investigating officer. Under *the Criminal Procedures and Investigations Act 1996* (CPIA), there is no obligation to make disclosure. However, the regulator must disclose sufficient information to enable the suspect to understand the nature/circumstances of the offence to meet the questions fairly and answer them honestly.

In the authors' experience, full disclosure at the outset is the most helpful and generally leads to the operator being able to provide a fuller, more accurate response.

In contrast, skeletal disclosure which is drip-fed to the accused makes it difficult to give cogent advice. The authors are also aware of instances where no disclosure was provided at all, and clients have been told: *'you should know what the interview is about'*. This puts both the client and their lawyer in a difficult position, as while they may have some idea of what it is the regulator wishes to investigate, it is hard to try and guess what they need to be advised upon.

The Court of Appeal held in *R v Argent* [1997] 2 Cr App R 27, *R v Imran & Hussain* [1997] Crim LR 754 and *R v Noble* [1997] CLR 346 that if the interviewer discloses little or nothing of the case against the suspect so that a legal adviser cannot usefully provide advice to their client, this may be good reason for the solicitor to advise the suspect to remain silent.

Request for disclosure has also been met with the response: *"the operator has been served with the CAR forms – it's all in there* (Compliance Assessment Reports)". In the absence of an explanation as to what use the reports are to be put to/what offences are alleged, arguably insufficient disclosure has been made. It is also worth asking the question – 'Have you any information that you have not disclosed to me?' In the words of one Attorney General, officers are very reluctant to tell direct lies as opposed to being economical with the truth.

It is always worth remembering that if company records have been seized from the operator during a dawn raid, that under B7.17 of Codes of Practice, the owner of the records or their representative must be allowed supervised access to the property to examine it or have it photographed or copied, or must be provided with a photograph or copy, in either case within a reasonable time of any request unless the investigating officer has reasonable grounds for believing it will prejudice the investigation.

Are officers required to observe Code C of PACE during site visits?

EA officers are obliged when investigating offences or charging suspects to have regard to the Codes of Practice under PACE. Routine inspections of regulated facilities made pursuant to regulation 34 EPR are excluded, however, from the provisions of Code B *unless* there are grounds for suspecting that an offence has been committed. The same principle must apply in respect of Code C.

In the authors' experience, officers often ignore the Codes of Practice. It is therefore advisable to have clear company guidance for employees to follow about how they must handle regulators and what their legal obligations and rights are. It is important to ensure the company's rights and the limits of the regulators powers are respected.

Some waste operators are finding that the regulators arrive on site for a routine inspection, and then caution staff members on site with a view to asking questions regarding potential offences. As members of staff are unlikely to be authorised to speak on behalf of the company, this practice is unacceptable. Best practice dictates employees notify a company director of the arrival of a regulator and the director should manage the visit. Employees should remain silent. If a caution is administered to the director, the director is best advised to exercise his or her right to seek legal advice before answering any questions of the regulator. Failure to allow the director an opportunity to consult with a solicitor is a breach of Article 6 of the *European Convention for the Protection of Human Rights* and Codes of Practice.

In what circumstances can the right to self-incrimination be abrogated?

In order to abrogate any part of the self-incrimination protection, of which the right

to silence is a discrete but closely related right, clear statutory words are required in order to comply with Article 6.

It is essential when drawing up an effective internal strategy for managing visits from the regulator to remember that under section 108(4)(j) of the *Environment Act 1995* (1995 Act) a regulator has power to require 'any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation … to answer … such questions as the authorised person thinks fit to ask and to sign a declaration of the truth of his answers'. In effect, this is a compelled interview. As this is not an interview governed by PACE, it is not necessary to issue a caution.

Under section 110 of the 1995 Act, it is a criminal offence if a person without reasonable excuse (i) fails to comply with any requirement imposed under section 108, (ii) fails or refuses to provide facilities, assistance or information or fails or refuses to permit any inspection reasonably required by an authorised person or (iii) prevents another person from appearing before an authorised person or from answering questions.

Company policy needs to stress therefore that it is important for all company officers and employees to co-operate with the regulator. But it should also stress that answers should only be provided, which are reliable and accurate because although the answers are not admissible in evidence in any criminal proceedings against the person being interviewed, they are admissible against any other person including the company. This is why it is important for employees not to speculate and to say if the answers to the questions are outside their knowledge. Given this special protection afforded to the person subject to compulsory interview, the right to self-incrimination does not come into play.

There is no reason why an employee should not insist on the interview being tape-recorded to ensure that an accurate record is kept of the answers given. Employees can also request the attendance of a legal representative, but as it is not a PACE interview there is no requirement to wait until a solicitor arrives and no obligation to allow a solicitor to be present.

Similarly, consideration should be given to information notices under regulation 60 of EPR/section 71 of the *Environment Protection Act 1990* (EPA) and should not be ignored because under regulation 38(4)/section 71 EPA it is an offence for a person to fail to comply with a notice under regulation 60/section 71. This carries a maximum sentence of two years' custody.

Information notices are akin to disclosure notices under section 62 of the Seri*ous Organised Crime and Police Act* (SOCPA). Although not required by SOCPA, CPS guidance in respect of disclosure notices indicates that in many cases it is good practice to pre-warn individuals that a notice is about to be issued and explore a convenient time for interview or production of documents. Where there is a concern that it might prejudice the investigation there is no requirement to do so. An operator would be on strong grounds to argue the principles in the CPS guidance should apply to information notices.

The House of Lords ruled in *Hertfordshire County Council Ex Parte Green Environment Industries Ltd* [2000] UKHL 11 that a person served with an information notice, which requests factual information as opposed to any admission of wrongdoing, is obliged to answer the request even though his answer may incriminate him or lead to the discovery of evidence which might be used against him in a criminal prosecution. The alleged possibility of self-incrimination does not provide the recipient of the notice with reasonable excuse for failing to comply with the notice. A person is bound to comply but could successfully contend in any subsequent prosecution that his answers could not be put in evidence against him. In the absence of the express provision that answers are to be admissible (a la s 108(12) 1995 Act), the discretion under s 78 of PACE to exclude evidence is unimpaired. A judge in a criminal trial at which an answer to a request under regulation 60 EPR is tendered in evidence, will have to consider whether Article 6(1), as interpreted in *Saunders v United Kingdom* (1996) 23 EHRR 313, requires him to exercise the discretion to exclude the evidence. Given that this is left to chance, a company or company director served with a notice should seek legal advice.

Concluding observations

- A request to attend a "voluntary" interview should never be ignored, particularly if addressed to a company director or sole trader because it could result in a knock at the door at 6am from DCI Jack Meadows!

- Always seek advance disclosure before answering any questions in interview.

- When a company has multiple directors, request interview questions in writing.

- Never be interviewed without consulting a solicitor who will be able to assist in balancing the right to silence against the risk of an adverse inference/the merits of a pre-prepared statement.

- Ensure the company has in place a structure for the management and co-operation of an investigation and ensure all employees are familiar with their rights and know how to handle the regulator.

- Always co-operate with a request for information but seek legal advice first especially given the lack of protection against self-incrimination.

- Lastly remember: A casual conversation about suspected offences during a site visit amounts to an interview and the operator should be entitled to the safeguard enshrined in PACE!

Samantha Riggs, 25 Bedford Row
Dr Anna Willetts, Dentons