

Norwich Pharmacal Orders



AN INTRODUCTION TO UK LEGISLATION | MARCH 2021 | FIRST EDITION

Norwich Pharmacal Orders are a civil litigation tool available to help the victims of fraud to unlock investigations by compelling third parties to disclose evidence of wrongdoing or the identity of a wrongdoer that would otherwise remain confidential. This guide explains the purpose of these orders and when they can be used.

WHAT IS A NORWICH PHARMACAL ORDER?

A Norwich Pharmacal Order (or 'NPO') is a civil disclosure court order available in England and Wales which allows information to be obtained from third parties who have become 'mixed up' in wrongdoing to help victims to investigate, pursue those ultimately responsible and recover their losses.

NPOs are named after the House of Lords decision in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

WHY USE AN NPO?

NPOs (or their variant, 'Bankers Trust Orders') are often used where a victim of wrongdoing does not know the identity of the wrongdoer or the location of misappropriated assets but can point to a third party that does. NPOs can unlock crucial information needed by a victim to pursue a claim, which they would struggle to obtain through other investigative methods. However, NPOs are invasive orders and need to be navigated with care.

Organisations like banks, internet service providers and mobile phone networks often have considerable information about their users that will be highly relevant for investigations into wrongdoing. Often these organisations will not simply hand over this information because of concerns about customer confidentiality and data protection, but they will comply with a court order directing them to give a victim access to their information.

The third party from whom information is most often sought is a bank whose accounts have been used by a fraudster to receive or dissipate the proceeds of a fraud, and where the evidence sought is about the identity of the wrongdoer(s) and the details and holders of accounts to which funds have been diverted and those suspicious transactions.

NPOs can also be used in other types of case, such as obtaining IP address information from an internet service provider or website operator to help identify an individual who has engaged in illegal file-sharing or posted defamatory content.

WHO CAN APPLY FOR AN ORDER?

To obtain an NPO the victim must show the following.

There is a good arguable case that there has been wrongdoing

Although there is no need to show that the victim would have more than a 50% chance of winning at a trial against the wrongdoer.

The victim needs the order to take action against the wrongdoer

It must be a just, proportionate response for the respondent to provide the information, rather than requiring the applicant to obtain the information through other means (such as an application for pre-action disclosure from the wrongdoer under the **Civil Procedure Rules** or via an internal investigation).

The respondent has been 'mixed up' in the wrongdoing

An NPO can only be obtained against someone whose involvement in the wrongdoing goes beyond being a 'mere witness' to the wrongdoing.

The respondent is likely to have relevant documents or information

Granting the order is necessary and proportionate

The court has discretion to grant the order and will weigh up various factors, including but not limited to:

- the strength of the victim's potential claim;
- whether the information could be obtained from another source;

- the privacy and data protection rights of any individuals whose identity is to be disclosed; and
- how onerous complying with the order will be.

NPOs are a flexible and discretionary remedy that will be granted if necessary and proportionate in the circumstances. An individual's privacy rights will not necessarily prevent an NPO from being made.

APPLYING FOR AN ORDER

An NPO may be obtained either during existing proceedings or, often, as a precursor to further action. The applicant needs to prepare:

- a court application;
- a witness statement setting out the background and how the legal criteria for an NPO are satisfied; and
- a draft of the order the court is being asked to make.

The court application will be determined by the judge at a court hearing or 'on paper'.

A key strategic decision will be whether to make the court application 'on notice' to the respondent to give them an opportunity to confirm their position ahead of the court hearing, or whether to make the court application 'without notice'. Specialist advice is recommended on this point.

WHAT HAPPENS ONCE AN ORDER IS GRANTED

Once an NPO is made it must be served on the respondent. The court is flexible as to the method used for serving the order (for example permitting electronic methods of service in appropriate cases). Where the NPO has been made 'without notice', a full note of what was said at the hearing must also be served.

The party against whom the order is made must then comply with the terms of the order and provide

the information required within the timescales directed by the court – usually within 28 calendar days or less.

COSTS

The legal costs of making an application will vary from case to case and usually depend on the scale of the wrongdoing under investigation. The legal costs may include:

- the relevant court claim issue fee to commence the legal action (if a claim for money or recovery of assets is immediately issued or is to follow after the disclosure is obtained);
- solicitors' fees to prepare the application and evidence, advise the applicant and correspond with the respondent(s); and
- where necessary and where the court does not deal with the application 'on paper', barrister's fees to finalise the application and appear before the judge at the court hearing.

These costs can sometimes be recovered later against the wrongdoer in any subsequent proceedings.

The party applying for the NPO will normally provide an indemnity to the party against whom the order is made to cover their costs (including their legal costs) of complying with the NPO and providing the information requested.

KEY PRACTICAL CONSIDERATIONS

Confidentiality

It is common for the court to agree to include a gagging order within the terms of the NPO to avoid tipping off the suspected wrongdoer. This prohibits the party against whom the order is made from informing the suspected wrongdoer.

The applicant will also be prohibited from telling anyone else about the NPO except for the purposes of issuing a claim in relation to the application or to related subject matter. The applicant will need to seek the court's specific permission if they wish to use the disclosure for any other purpose.

In certain circumstances, the court application hearing may be held in private and the court file sealed so that third parties cannot access it. This also helps to maintain the secrecy of the process and therefore the integrity of the underlying covert investigation.

Suitable respondents

It is important to bear in mind that the respondents should be innocent parties caught up in the wrongdoing, and not targets for future legal proceedings.

Cross-undertaking in damages

The applicant is generally required to give a cross-undertaking in damages. This means that if it is later determined that the NPO should not have been made, the applicant will compensate the respondent and any innocent third parties who suffer loss (such as an individual whose confidential information becomes public).

The applicant will generally have to provide evidence that they have the means to comply with this undertaking.

This is not usually an onerous obligation: for example, the respondent will be complying with a court order in handing over information directed by the NPO, so is unlikely to be exposed to liability to third parties as a result. However, the risks need to be considered on a case-by-case basis with specialist legal advice.

Using the information

A party who obtains information using an NPO may generally use that information only in connection with the proceedings in question. It is a very serious matter to breach this undertaking to the court. If the information is needed for other purposes (for example to pursue related criminal proceedings) a further application must be made to the court asking for permission to use the NPO for the alternative purpose.

FURTHER INFORMATION

The Law Society to [find a solicitor](#).

See the [resources section](#) of our website.

This helpsheet was kindly prepared by Andrew Herring from Pinsent Masons LLP.

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