



District Courts (Financial Markets Authority Form of Search Warrant) Amendment Rules 2011

Anand Satyanand, Governor-General

Order in Council

At Wellington this 22nd day of August 2011

Present:

His Excellency the Governor-General in Council

Pursuant to section 122(1A) of the District Courts Act 1947 and section 29 and Schedule 2 of the Financial Markets Authority Act 2011, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following rules.

Contents

	Page
1 Title	2
2 Commencement	2
3 Principal rules amended	2
4 New Part 9A inserted	2
Part 9A	
Search warrants issued under Financial Markets Authority Act 2011	
9A.1 Form of search warrant	2
5 New form 34A inserted in Schedule 1	2

Schedule
New form inserted in Schedule 1

3

Rules

- 1 Title**
These rules are the District Courts (Financial Markets Authority Form of Search Warrant) Amendment Rules 2011.
 - 2 Commencement**
These rules come into force on 1 September 2011.
 - 3 Principal rules amended**
These rules amend the District Courts Rules 2009.
 - 4 New Part 9A inserted**
The following Part is inserted after Part 9:

“Part 9A
“Search warrants issued under Financial
Markets Authority Act 2011

“9A.1 Form of search warrant
A search warrant issued under section 29 of the Financial Markets Authority Act 2011 must be in form 34A.”
 - 5 New form 34A inserted in Schedule 1**
Schedule 1 is amended by inserting the form set out in the Schedule after form 34.
-

Schedule

r 5

New form inserted in Schedule 1

Form 34A

r 9A.1

Search warrant under section 29 of Financial
Markets Authority Act 2011**To** *[full name of person or persons authorised to execute the warrant]*1 I am satisfied on application made by *[full name of applicant]*
that there are reasonable grounds to—

- (a) suspect that *[full name of person]* has engaged in or is engaging in conduct that constitutes or may constitute a contravention of a provision or provisions of the financial markets legislation as defined in section 4 of the Financial Markets Authority Act 2011, namely, *[specify provision or provisions]*; and
- (b) believe that a search of *[address or description of place(s), vehicle(s), or thing(s) that may be entered and searched]* will find evidential material in or on or part of that place/those places/that vehicle/those vehicles/that thing/those things*.

*Select those that apply.

2 This warrant authorises you, in accordance with section 29 and Schedule 2 of the Financial Markets Authority Act 2011, to execute the warrant, and in particular—

- (a) to enter and search *[address or description of place(s), vehicle(s), or thing(s)]*;
- (b) to use any assistance that is reasonable in the circumstances in the execution of the warrant;
- (c) to use any force that is reasonable in the circumstances to enter or break open or access any area within that place/those places/that vehicle/those vehicles/that thing/those things* or a thing found in the course of carrying out the search;
- (d) to seize *[describe what may be seized]*.

*Select those that apply.

3 *Omit this paragraph if it does not apply*I am satisfied that *[specify access information that identifies a thing to be searched remotely]* is not located at a physical

Form 34A—*continued*

address that a person can enter and search, and I therefore authorise a remote access search of that thing.

- 4 This warrant may be executed within [*specify period in accordance with clause 6(4)(h) of Schedule 2 of the Financial Markets Authority Act 2011*] days from the date of issue of the warrant.
- 5 This warrant is subject to the following conditions: [*specify any conditions*].
- 6 This warrant may be executed on 1 occasion/[*number*] occasions*.

*Select one.

Date:

Signature:

Name of issuing officer:

(District Court Judge)

Notes

These notes set out an explanation of the availability of privileges recognised for the purposes of a search conducted under this warrant and an outline of how any of those privileges may be claimed.

The notes provide general information relating to these matters. For further details relating to these matters, *see* clauses 29 to 35 of Schedule 2 of the Financial Markets Authority Act 2011 and sections 53, 54, 56 to 59, 64, and 68 of the Evidence Act 2006. Those enactments contain in more detail provisions relating to the application of the privileges (including restrictions and limitations).

Important: If you do not understand this information or if you want further advice about the availability of privileges and how any of those privileges may be claimed, you should consider getting legal advice on the matter immediately.

Form 34A—*continued***Availability of privileges**

The following is an explanation of the privileges that are recognised for the purposes of a search conducted under this warrant.

Legal professional privilege referred to in section 53(5) of Evidence Act 2006

- 1 Legal professional privilege is recognised to the extent that (under section 53(5) of the Evidence Act 2006) it forms part of the general law. Generally speaking, this privilege relates to confidential communications between a client and a client's legal adviser, and certain communications between a client or a legal adviser and third parties.

Privilege for communications with legal advisers (as described in section 54 of Evidence Act 2006)

- 2 A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was intended to be confidential and was made in the course of and for the purpose of—
 - (a) the person obtaining professional legal services from the legal adviser; or
 - (b) the legal adviser giving such services to the person.This privilege is subject to clause 29(3) and (4) of Schedule 2 of the Financial Markets Authority Act 2011 in the case of books of account or accounting records kept by a solicitor and certain nominee companies.

Privilege for preparatory materials for proceedings (as described in section 56 of Evidence Act 2006)

- 3 This privilege applies to a communication or information that is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or apprehended proceeding. A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has the privilege in respect of—

Form 34A—*continued*

- (a) a communication between the party and any other person:
- (b) a communication between the party's legal adviser and any other person:
- (c) information compiled or prepared by the party or the party's legal adviser:
- (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

Privilege for settlement negotiations or mediation (as described in section 57 of Evidence Act 2006)

- 4 A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was intended to be confidential and was made in connection with an attempt to settle or mediate the dispute. In addition, a party to the dispute has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute. However, section 57(3) of the Evidence Act 2006 contains certain limitations on the application of the privilege.

Privilege for communications with ministers of religion (as described in section 58 of Evidence Act 2006)

- 5 A person has a privilege in respect of any communication between the person and a minister of religion if the communication was made in confidence to or by the minister in the minister's capacity as a minister of religion and made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit, or comfort.

Form 34A—*continued**Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists (as described in section 59 of Evidence Act 2006)*

- 6 A person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct (**relevant condition or behaviour**) has, in certain circumstances, a privilege in criminal proceedings in respect of communications to, or information obtained by, the practitioner or psychologist. For example, the person has the privilege in respect of—
- (a) a communication made by the person to the medical practitioner or clinical psychologist that the person believes is necessary to enable the practitioner or psychologist to examine, treat, or care for the person for drug dependency or any other relevant condition or behaviour;
 - (b) information obtained by the medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the practitioner or psychologist to examine, treat, or care for the person for drug dependency or any other relevant condition or behaviour;
 - (c) prescriptions, or notes of a prescription, for treatment prescribed by the medical practitioner or clinical psychologist as a result of such a consultation or examination.

Privilege for informers (as described in section 64 of Evidence Act 2006)

- 7 An informer (as defined in section 64 of the Evidence Act 2006) has a privilege in respect of information that would disclose, or is likely to disclose, the informer's identity.

Form 34A—*continued**Rights conferred on journalists under section 68 of Evidence Act 2006 to protect certain sources*

- 8 If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered (unless a High Court Judge orders that the provision conferring the right does not apply).

No privilege in case of dishonest purpose, etc

No privilege applies in respect of any communication or information if there is a prima facie case that the communication or information is made or received, or compiled or prepared,—

- (a) for a dishonest purpose; or
- (b) to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

How privileges may be claimed

The following is an explanation of how the privileges described above may be claimed.

Effect of privilege

- 1 A person who makes a claim of privilege in respect of any thing that is seized or sought to be seized has the right, in accordance with clauses 31 to 35 of Schedule 2 of the Financial Markets Authority Act 2011,—
- (a) to prevent the search of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding, pending determination of the claim to privilege, and subsequently if the claim to privilege is upheld:
 - (b) to require the return of a copy of, or access to, any such communication or information to the person if it is seized or secured by a person exercising the search power, pending determination of the claim to privilege.

Form 34A—*continued**Search warrants that extend to lawyers' premises or material held by lawyers*

- 2 If the execution of the search warrant authorises the search of materials held by a lawyer relating to a client, the warrant may not be executed unless the lawyer, or a representative of the lawyer, is present. If the person who is to execute the search warrant is unable to contact the lawyer or his or her representative, the person must instead contact the New Zealand Law Society (which may appoint a person to represent the interests of the clients of the lawyer). The lawyer, his or her representative, or the person appointed by that society must be given the opportunity to claim privilege on behalf of the lawyer's client or, if instructions have not been obtained, to make an interim claim of privilege.

Searches otherwise affecting privileged materials

- 3 If the person who is to execute the search warrant has reasonable grounds to believe that any thing discovered in the search may be the subject of a privilege, he or she—
- (a) must provide to any person who he or she believes may be able to claim a privilege a reasonable opportunity to claim it; and
 - (b) may, if he or she is unable to identify or contact a person who may be able to claim a privilege, or that person's lawyer, within a reasonable period, apply to a District Court for a determination as to the status of the thing.

Interim steps pending resolution of privilege claim

- 4 If the person who is to execute the search warrant is unable, under clause 30, 31, or 32 of Schedule 2 of the Financial Markets Authority Act 2011, to search a thing (whether as a result of the requirements of any of those provisions, or because of a claim of privilege made in respect of the thing, or for any other reason), the person—
- (a) may secure the thing (including, if the thing is intangible, by making a forensic copy) and deliver the thing, or a copy of it, to the District Court to enable the determination of a claim to privilege; and

Form 34A—*continued*

- (b) must supply to the lawyer or other person who may or does claim privilege a copy of, or access to, the secured thing; and
- (c) must not search the thing secured, unless no claim of privilege is made, or a claim of privilege is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege.

Claims for privilege for things seized or sought to be seized

5 A person who wishes to claim privilege in respect of any thing seized or sought to be seized by a person executing a search warrant—

- (a) must provide to the person responsible for executing the search warrant a particularised list of the things in respect of which the privilege is claimed, as soon as practicable after being provided with the opportunity to claim privilege or being advised that a search is to be, or is being, or has been conducted, as the case requires:
- (b) if the thing or things in respect of which the privilege is claimed cannot be adequately particularised in accordance with paragraph (a), may apply to a District Court for directions or relief (with a copy of the thing provided as referred to in clause 4(b)).

Admission of evidence

6 If a court upholds a claim to privilege in respect of any communication or information, the communication or information to which the privilege applies is not admissible in any proceedings arising from, or related to, the execution of the search warrant.

Rebecca Kitteridge,
Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which come into force on 1 September 2011, amend the District Courts Rules 2009 in order to provide a form of search warrant to be used where the warrant is issued under section 29 of the Financial Markets Authority Act 2011 by a District Court Judge.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 25 August 2011.
These rules are administered by the Ministry of Justice.
