

## **Part 10 - Examination orders**

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## Part 10 - Examination orders

## Executive summary

Key points to note:

- Examination orders are only to be used to investigate organised crime or serious financial crime.
- Only Police Inspectors or above can apply for an examination order.
- All applications **must** first be approved by a Deputy or Assistant Commissioner, or the District Commander (not an acting District Commander) of the applicant's Police district.
- Conditions for making (and applying for) orders vary depending on whether the application is made in a business or non-business context.
- Do not name a confidential informant in the application or include any information that could lead to their identification.
- The subject of an order must be given a reasonable opportunity to arrange for a lawyer to accompany them, before appearing for the examination.
- The judge making an examination order must be provided with a report following execution or expiry of the order.

## Overview

### Purpose

This part of the '[Search](#)' chapter provides information about examination orders including:

- who may apply
- whose authorisation is required before applying
- the conditions to be met before applications can be made
- procedures for applying
- the form and content of orders.

### Definitions

This table details the meanings of terms used in this chapter.

Term	Meaning
<b>Business context</b>	Business context, in relation to the acquisition of any information by a person, means the acquisition of the information in the person's capacity as: <ul style="list-style-type: none"><li>- a provider of professional services or advice in relation to a person who is being investigated, or one or more of whose transactions are being investigated, in respect of an offence; or</li><li>- a director, manager, officer, trustee, or employee of an entity that is being investigated, or one or more of whose transactions are being investigated, in respect of an offence.</li></ul>
<b>Non-business context</b>	Non-business context means a context other than a business context.
<b>Organised criminal group</b>	Organised criminal group in this section has the same meaning as in section <a href="#">98A</a> of the Crimes Act 1961.

### Related information

See also:

- [Offences relating to orders](#) in Search - Introduction
- Part 9 - [Production orders](#)

## About examination orders

### What are examination orders?

Examination orders are court orders made under section [38](#) requiring a person to answer questions when they have previously refused to do so.

Examination orders are only to be used to investigate organised crime or serious financial crime. An examination order allows professionals to assist Police without any risk of breaching professional standards or regulations.

Examination orders are one of the most contentious aspects of the Search and Surveillance Act 2012 due to public concerns that they remove an individual's right to silence and the privilege against self-incrimination.

### Duration of examination order

An examination order is in force for the period specified in the order (this cannot exceed 30 days after the date the order is made).

([s41](#))

## Applying for examination orders

### Who may apply for an examination order?

A constable of or above the position level of Inspector may, if given [approval](#), apply to a District or High Court judge for an examination order if satisfied that the [conditions](#) for making an order are met in respect of the person to be examined in a:

- [business context](#) (s33) or
- [non-business context](#) (s35).

### Approval to apply

All applications for an examination order **must** first be approved by:

- a Deputy Commissioner, or
- an Assistant Commissioner, or
- the District Commander (other than an acting District Commander) of the Police district in which the constable is stationed.

(s33(1) & 35(1))

### Conditions for making examination orders

The conditions for making (and applying for) an examination order vary depending on whether the application is made in a business or non-business context.

#### Conditions for making order in business context

The conditions for making an examination order in a [business context](#) against a person are that:

- there are reasonable grounds to suspect an offence punishable by imprisonment for a term of 5 years or more has been, is being, or will be committed, and
- there are reasonable grounds to believe the person sought to be examined:
  - has information that is evidential material in respect of the offence, and
  - acquired the information in respect of which the order is sought in a business context, and
- the person has been given a reasonable opportunity to provide that information and has not done so.

(s34)

#### Conditions for making order in non-business context

The conditions for making an examination order in a [non-business context](#) against a person are that:

- there are reasonable grounds to suspect that an offence punishable by imprisonment has been, is being, or will be committed, and the offence:
  - involves serious or complex fraud punishable by imprisonment for a term of 7 years or more, or
  - has been, is being, or will be committed wholly or partly by an organised criminal group (as defined in section 98A(2) of the Crimes Act 1961), and
- there are reasonable grounds to believe that the person sought to be examined:
  - has information that is evidential material in respect of the offence, and
  - acquired the information in respect of which the order is sought in a non-business context, and
- the person has been given a reasonable opportunity to provide that information and has not done so.

(s36)

### How to apply

You must apply for an examination order in writing along with a personal appearance before, or oral communication with, the judge unless it is impracticable to do so in the circumstances. In this situation you may apply to the judge to:

- make an application [orally](#), e.g. by telephone or personal appearance, or
- have your application considered without a personal appearance or oral communication

(ss37(2) and 100)

Applications must be made using the prescribed forms available in Police Forms > Search and Surveillance > Examination Orders.

## Oral applications for an examination order

A judge may allow an application for an examination order to be made orally (e.g. by telephone or by personal appearance) and excuse the applicant from putting all or part of the application in writing if satisfied that:

- requiring a written application would result in a delay that would compromise the effectiveness of the examination, **and**
- the question of whether the order should be issued can be properly determined on the basis of an oral communication or personal appearance, **and**
- all required information is supplied to them (orally, or partly orally and partly in writing).

(s100)

If an oral application is allowed:

- the judge must record the grounds for the application as soon as practicable
- the applicant must complete:
  - the application form capturing the information conveyed to the judge as soon as practicable and in any event within 24 hours, and
  - the order.

## Information required in applications

Applications for an examination order must include:

- the applicant's name
- a description of the offence that it is suspected has been, is being or will be committed
- the facts relied on to show reasonable grounds to suspect that an offence has been, is being or will be committed
- a description of the information sought to be obtained by the examination order
- the facts relied on to show reasonable grounds to believe that the person against whom the order is sought has the information
- the facts that indicate that the person against whom the order is sought:
  - acquired the information in respect of which the order is sought in a business or non-business context
  - has been given a reasonable opportunity by a constable to provide the information but has not done so.

(ss33(2) and 35(2))

The application must also specify and confirm that all the [conditions required](#) for making an examination order in the business or non-business context are met.

## Using hearsay evidence

Hearsay evidence can be used to outline the grounds on which the application is made, if it is highly reliable. Indicate its reliability by stating:

- the informant's credibility
- the informant's reliability and whether they have given reliable information in the past. An appropriate way to say this is: "In the past, Informant A has supplied Police with information that has proved to be reliable."
- whether the information has been confirmed by other means.

## If further information about an informant is required

Follow these steps relating to informant information if you are required to supply further information concerning the grounds on which the order is sought.

Step	Action
1	Do not name a confidential informant in the application or include any information that could lead to their identification.
2	Explain to the judge that you do not want the identity of the informant revealed.
3	While a judge may require you to supply further information concerning the grounds on which the order is sought, they must <b>not</b> , in any circumstances, require you to disclose the name, address, or other identifying detail of an informant <b>unless</b> , and only to the extent, that such information is necessary for them to assess: <ul style="list-style-type: none"><li>- the credibility of the informant, and/or</li><li>- whether there is a proper basis for issuing the order.</li></ul>
4	Note current Police guidance on providing sufficient information to judges issuing warrants about informants is contained in Law Notes issued in respect of R v Williams [2007] NZCA 52 (see <a href="#">Law Notes - 30 May 2007</a> ) and R v Dunedin District Court, so the warrant issuer can assess reliability.
5	Be prepared to withdraw any examination order application if the judge demands details that identify the informant.

### Which Court should you approach with your application?

It is recommended that your selection of a Judge from a District or High Court should be decided on where resultant proceedings are likely to be heard.

## Making examination orders

### When can an examination order be made?

A District or High Court Judge may make an examination order if they are satisfied:

- the [conditions](#) for making an order are met, **and**
- it is reasonable to subject the person to compulsory examination having regard to:
  - the nature and seriousness of the suspected offending
  - the nature of the information sought
  - the relationship between the person to be examined and the suspect, and
  - any alternative ways of obtaining the information.

([s38](#))

### Form and content of examination orders

An examination order made must be in the prescribed form and must require the person against whom it is made:

- to attend before the Commissioner or the Commissioner's delegate, and
- to answer any questions relevant to the information in respect of which the order was made.

The examination order must set out:

- the name of the person required to comply with the order
- the grounds on which the order is made
- the nature of the questions that the person is to be asked (questions must be relevant to the information in respect of which the order was made)
- if the examination is to be conducted by a delegate of the Commissioner, the delegate's name
- a condition that, in accordance with [section 43](#), an examination order report must be provided within 1 month after the completion of the examination conducted under the order to the judge who made the order or, if that judge is unable to act, to another judge of the same court
- any requirement that the judge making the order considers reasonable for inclusion of specified information in the examination order report provided under [section 43](#):
  - where the examination is to take place
  - when it is to take place or how a time for it is to be fixed.

([s39](#))

Note: The Judge issuing the order must be named.

## Executing examination orders

### Presence of lawyer

A person subject to an examination order must be given a reasonable opportunity to arrange for a lawyer to accompany them, before being required to appear before the Commissioner or the Commissioner's delegate.

(s40)

### Examination orders involving media organisations

Follow the guidance on **Search warrants, production orders and examination orders involving media organisations** in "[Carrying out search powers with or without a warrant](#)".

### Execution without being in possession of the order

If it is not possible or practicable to have the examination order in your possession when executing the order, one of these may be executed instead:

- a facsimile or a printout of an electronically generated copy of the order
- a copy made by the person to whom the order is directed, at the direction of the judge and endorsed to that effect.

(ss42, and 105)

### Responding to an assertion of privilege

See [Privilege relating to production and examination orders](#) in the "Search - Privilege and immunities under the Act" chapter.

### When are orders invalid?

An examination order is invalid if:

- having regard to the information in the application, the grounds or conditions for lawful issue of the order were not satisfied at the time of issue
- the order contains a defect, irregularity, omission, or want of form that is likely to mislead anyone executing or affected by the order as to its purpose or scope.

If an order is invalid, neither section 204 of the Summary Proceedings Act 1957 nor section 379 of the Criminal Procedure Act 2011 applies to that order.

(s107)

## Document retention and reporting

### Retention of documents

When an examination order is made **the applicant**:

must retain...	until the later of the following...
whether in electronic form or otherwise: <ul style="list-style-type: none"><li>- the order</li><li>- a copy of the application (if made in written form)</li><li>- copies all documents tendered in support of the application</li></ul>	<ul style="list-style-type: none"><li>- the date of completion of any proceedings in which the validity of the order may be in issue,</li></ul> <b>or</b> <ul style="list-style-type: none"><li>- the date of destruction or transfer of the order and other documents under the <a href="#">Public Records Act 2005</a> or any other enactment or rule of law.</li></ul>

### Reporting of examination orders

Examination orders give Police significant powers over individuals and because of this the Act provides a robust legislative oversight process. For information about reporting requirements for examination orders see **Production and examination orders** in the ['Reporting'](#) chapter.

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