Blogs
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In a controversial ruling, London's High Court has held that interview notes and other documents created by outside legal counsel and forensic accountants as part of an internal investigation into foreign bribery allegations are not protected by the legal professional privilege.

While the appeals process is already underway, the May 8th decision by the Honourable Mrs Justice Andrews is a noteworthy victory for the U.K.'s Serious Fraud Office (SFO), an agency akin to the U.S. Department of Justice (DOJ). Eurasian Natural Resources Corporation (ENRC), the U.K. division of a multinational mining conglomerate operating in the Middle East and Africa, is the subject of an ongoing SFO criminal investigation. At times, ENRC appears to have been in a cooperation posture with the SFO; but earlier this year, the SFO filed a petition seeking to force ENRC to produce documents the company claimed were privileged. The London

High Court agreed with the SFO, ruling that almost all of the documents at issue were not privileged and should be disclosed to the SFO. Under U.K. law, the High Court found neither the "litigation privilege," nor the "advice privilege," could attach to troves of documents created by ENRC's outside counsel and forensic accountants during the whistleblower-prompted internal investigation. The U.K.'s litigation privilege protects documents prepared for civil disputes and criminal prosecutions, or where such actions are "reasonably contemplated." However, Mrs Justice Andrews held that the litigation privilege did not apply, citing the fact that certain documents were created before ENRC was under investigation, and other documents were created while ENRC was cooperating with the SFO. In the words of Mrs Justice Andrews, a "fear of prosecution on a 'worst case scenario' is not good enough" to invoke the litigation privilege. Likewise, Mrs Justice Andrews held that the advice privilege was largely inapplicable. The U.K.'s legal advice privilege attaches to all confidential communications between attorneys and their clients (or their agents) for the purpose of giving or obtaining legal advice, even at a stage when litigation is not in contemplation. However, Mrs Justice Andrews noted that certain documents were formed merely as preparatory information gathering, and other documents, such as employee interview notes, did not constitute communications with the "client"—invoking a very narrow interpretation of that term as only applying to individuals who are expressly authorized to obtain legal advice on a company's behalf. ***Looking Ahead*** ENRC has indicated that it will seek permission to appeal the decision, after Mrs Justice Andrews declined the company's initial request to do so. Although the ENRC decision raises concerns for multinationals, the SFO has long maintained a strong stance against what it considers to be "spurious" claims of legal privilege. In the past, SFO director David Green has criticized privilege claims that "amount to a strategy of deliberate obstruction," and indicated that the SFO will scrutinize assertions of privilege over materials created during an internal investigation. Moreover, in the civil litigation context, U.K. courts have recently issued other decisions rejecting claims of privilege over outside counsel's employee interview notes and witness statements. In contrast to these developments in the U.K., the U.S. DOJ has generally not pushed for such narrow confines on attorney-client privilege, especially in the context of corporate internal investigations. Further, the DOJ's assessment of cooperation credit does not currently hinge on the disclosure of documents and communications protected by the privilege. Nonetheless, multinationals should remain vigilant to take proper steps during internal investigations to maximize privilege protections, while at the same time structuring cooperation with government authorities in a productive manner—wherever such investigations are based.

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