THE SUPREME COURT OF NORWAY

On 17 January 2018, the Supreme Court made an order in

HR-2018-104-A (case no. 2017/1907), criminal case, appeal against order

A	(Counsel Kim Ellertsen and Anders Brosveet)
v.	
The public prosecution authority	(Public prosecutor Katharina Rise)

V O T I N G :

(1) Justice **Bårdsen:** The case concerns the prohibition against seizing material that a client has "confided" to his lawyer, see the Criminal Procedure Act section 204 subsection 1, cf. section 119 subsection 1. The issue is whether this prohibition is lifted when the same material has been passed on to public authorities, including the courts and the police.

(2) A practiced as a lawyer. Suspected of having committed serious crimes, he was arrested on 16 June 2016. The preliminary charges of 6 February 2017 involved conspiracy to murder and illegal deprivation of liberty, illegal influencing of professionals within the judicial system, serious obstruction of the judicial system, corruption, document forgery, drug trafficking, economic mismanagement, breach of the Accounting Act and vandalism.

(3) In connection with the investigation of A, the police have secured a large amount of material associated with his legal practice – an excess of 650,000 digital files. The files have been submitted to Oslo District Court for a decision as to whether they may be surrendered to the police, see the Criminal Procedure Act section 205 subsection 3.

(4) The district court has appointed an assistant to review the material. The assistant has been asked to classify the files into four groups, see item 3 of the assistant's mandate of 5 December 2016:

"a. Information that is not confidential pursuant to the Criminal Procedure Act section 119.

b. Information that is confidential, and that may not be seized pursuant to the Criminal Procedure Act section 204 subsection 1, cf. section 119.

c. Information that is confidential, see b. above, but that may nevertheless be surrendered with the consent of the person entitled to the preservation of secrecy.

d. Information that is confidential, see b. above, but that may nevertheless be surrendered pursuant to the Criminal Procedure Act section 204 subsection 2 first sentence. When deciding on surrender on this basis, the expert must assess whether the information may be significant as evidence for the offences described in the indictment, the so-called 'relevance assessment', see the Criminal Procedure Act section 203 subsection 1 first sentence."

(5) In item 4 of the mandate, it is instructed that the category b material may not be surrendered to the police. The following is stated on the same place regarding the other material:

> **"The other material may be surrendered to the police for a decision as to whether it may be seized pursuant to the Criminal Procedure Act section 203, cf. section 205, after the court has given the order. The court will give further instructions regarding the procedure. It is assumed that such surrender may not take place until after the court's order has become legally binding."**

(6) The plan is to review the files in sections. Thus far, Oslo District Court has given 16 orders regarding surrender of secured material.

(7) The background for the case at hand is set out in Oslo District Court's order of 19 September 2017:

> **"This order concerns issues of a general nature, relevant for the work on classifying the secured files. Both the prosecution authority and the defence counsel want the court to clarify whether documents A has passed on to various public authorities are exempt from seizure pursuant to the Criminal Procedure Act section 204 subsection 1, cf. section 119.**
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> **The premise for the assessment is that the relevant documents contain confidential information exchanged between A and his clients, which as a starting point would be subject to secrecy, see the Criminal Procedure Act section 119, and thus exempt from seizure, see section 204. The question is whether the fact that information is processed and passed on to others, in this case in the form of letters or similar to the courts and the police, changes the nature of the information in terms of seizure assessment.**
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> **The court's expert assistant has pointed at examples disclosed during the review of the files. It concerns the following:**
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> - **Appointments of A as defence counsel or counsel**
> - **Detention orders and applications or prolongation of detention**
> - **Judgments or related court documents, such as notice of appeal, court fee invoices etc.**
> - **Communication between the lawyer and the court, such as e-mails regarding scheduling etc.**
> - **Communication between the lawyer and the police authority, normally in connection with ongoing cases.**
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> **The police have also mentioned medical certificates used as basis for postponement of court sessions or for witnesses' absence or similar."**

(8) The district court based its order on the principle that a lawyer's duty of secrecy also applies to information that the lawyer has passed on to public authorities. But the seizure

prohibition in the Criminal Procedure Act section 204 subsection 1 could not, in the district court' view, prevent documents having been passed on to public authorities from being surrendered to the police to the extent "the same documents could have been made available to the police otherwise". The district court's main view was that it would be "unnecessarily rigid if secured files that were nevertheless accessible to the police through other channels could not be surrendered".

(9) The district court summarised as follows:

> **"Against this background, the court finds that the type of documents mentioned in the introduction are eligible for surrender to the police. This includes appointments of defence counsel or counsel, judgments, orders or decisions, and documents (including e-mails) sent to or received by the court or the police and the prosecution authority from A in connection with ongoing cases. Included in the latter are also medical certificates sent to the court in connection with possible postponement of court sessions or similar. Documents may also be surrendered concerning correspondence with or appointments of other lawyers, mostly from the law firm B, of which there are a few examples, as the court understands. Whether such documents may have significance as evidence is for the police to consider when deciding on whether to seize them, see the Criminal Procedure Act section 205 cf. section 203.**
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> **Note that material that falls within the scope of the Criminal Procedure Act section 118, such as communication with the child welfare service, may not be surrendered without the consent of the relevant ministry or anyone authorised to give such consent. If the said material is found in the seized material, it must be identified and described in a manner that does not disclose information about anyone's personal affairs, but which at the same time makes it possible for the police to justify the surrender. After that, consent must be obtained.**
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> **The decision is general although it lists examples. If disagreement arises regarding surrender of certain documents, the court will give a special order for submission of such documents."**

(10) The conclusion of the district court's order reads:

> **"The following types of documents in the secured material may be submitted to the police for them to decide whether they should be seized:**
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> - **Appointments as defence counsel or counsel.**
> - **Court rulings (judgments, orders and decisions).**
> - **Correspondence between A or other lawyers and the courts, including case files.**
> - **Correspondence between A or other lawyers and police and prosecution authority, including case files/police records.**
> - **Correspondence between A or other lawyers and public authorities provided consent is given by the relevant ministry, see the Criminal Procedure Act section 118."**

(11) A appealed the district court's order. The appeal does not concern the second indent of the conclusion.

(12) In its order of 18 October 2017, Borgarting Court of Appeal mainly supported the district court's order and the interpretation of the law on which it was based. Also in the court of appeal's view, appointments as defence counsel or counsel were eligible for submission to the police, in addition to all correspondence in criminal cases between the lawyer "or other lawyers and the court, including case files", see the first and second indent of the district court's conclusion. Furthermore, *all* correspondence between A or other lawyers and the police and the prosecution authority was to be surrendered, including case files and police records, see the fourth indent. The court of appeal moreover agreed with the district court that all correspondence between lawyers and the public authorities was to be

surrendered if the relevant ministry gives its consent pursuant to the provision in the Criminal Procedure Act section 118, see the fifth indent of the district court's conclusion.

(13) The court of appeal found it necessary to make the change that the *general admission* to surrender documents that the lawyer has submitted to the court in civil cases had to be limited to the documents comprised by the general right of access in the Dispute Act section 14-2, cf. sections 14-3 and 14-4. In addition, a specific assessment must be made to determine whether the documents "are of such a nature that the client and the lawyer could reasonably expect that they would be kept confidential by the counterparty in connection with the submission."

(14) The court of appeal's order concludes as follows:

> **"The third indent of the district court's conclusion is changed so that documents may only be surrendered in criminal cases, and in civil cases comprised by the Dispute Act section 14-2, cf. sections 14-3 and 14-4.**
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> **In all other respects, the appeal is dismissed."**

(15) A has appealed the court of appeal's order. On 22 November 2017, the Supreme Court's Appeals Selection Committee decided that the appeal in its entirety was to be heard in chambers with a panel of five justices, see the Courts of Justice Act section 5 subsection 1 second sentence. The case has been heard together with case no. 2017/1940, which will be decided later today.

(16) *I have concluded* that the appeal must succeed.

(17) This is a second-tier appeal, thus the Supreme Court's jurisdiction is limited. The appeal relates to the court of appeal's *interpretation of a statutory provision*, which may be decided by the Supreme Court also in a second-tier appeal, see the Criminal Procedure Act section 388 subsection 1 no. 3. For the Norwegian Constitution and incorporated conventions on human rights, the Supreme Court may also review the *application of rules to a fact*, see the Supreme Court ruling Rt-2015-155 para 29 and the Supreme Court ruling Rt-2015-844.

(18) The issue in the case as hand is the following:

(19) As part of the investigation of the previous lawyer A, the police have secured a large amount of digital files from his legal practice – in the excess of 650,000 files. Since it is likely that much of this material is covered by the seizure prohibition in the Criminal Procedure Act section 204 subsection 1, cf. section 119 subsection 1, it is first reviewed by the district court to extract confidential files as instructed in section 205 subsection 3, cf. the Supreme Court ruling Rt-2008-645 para 45, the Supreme Court ruling Rt-2011-296 para 37–39 and the Supreme Court ruling Rt-2013-968. In that respect, the district court will not assess whether the material is relevant for the investigation. The defendant is allowed to make a statement before the court decides whether or not to surrender the files. Then it is up to the police to decide whether or not to seize them, cf. the Criminal Procedure Act sections 203 and 205. The person affected by the seizure has a right to have this decision brought before the court, see section 208 subsection 1.

(20) In connection with the district court's review and classification of the files in the confiscated material, the parties have requested clarification of the following legal issue:

Will the seizure prohibition in the Criminal Procedure Act section 204 subsection 1, cf. section 119 subsection 1 be lifted if the police, based on the nature of the documents, are assumed to have access to their contents, or if the lawyer has sent the document to a public authority, including a court, and the police may be able to access the document there? If this is the case, such material may be surrendered to the police.

(21) As I have already explained, both the district court and the court of appeal concluded that the seizure prohibition does not apply in these cases. I do not share this view.

(22) I will recapitulate the following starting points: Securing of digital files with the aim of subsequent seizure requires a basis in *law*. This follows from the general legality principle in the Constitution article 113, see the Supreme Court rulings Rt-2014-1105 para 25–26 and para 30 and HR-2016-1833-A para 14–19.

(23) Because the material in the case at hand to a large extent can be counted as *correspondence*, guidance can also be found in the Constitution article 102 and the European Convention of Human Rights (ECHR) article 8. These rules too require a basis in law, see, for illustration purposes, the ruling of the European Court of Human Rights (ECtHR) 27 September 2005 *Petri Sallinen and others v. Finland*, paras 76 and 90. This material may moreover only be secured or seized to the extent necessary in a democratic society: In the individual case, the measure must be *suited, necessary and proportionate*. I refer to the ECtHR ruling 28 April 2005 *Buck v. Germany* paras 44–45 and the ruling 2 April 2015 *Vinci Construction and GTM Génie Civil et Services v. France* para 79.

(24) I will not elaborate on the scope of the right of seizure set out in the Constitution and in ECtHR. For the interpretation of the law in the case at hand, however, it is important that the requirement for a basis in law leaves room for limiting the reach of the seizure prohibition in the Criminal Procedure Act section 204 subsection 1, cf. section 119 subsection 1 beyond what is consistent with a natural linguistic understanding of the wording of the law. The requirement for a basis in law also suggests that the system for deciding whether or not a document is covered by the seizure prohibition must, in aggregate, provide sufficient guarantees that the police do not access information from the secured material which they have no legal right to access.

(25) I will now turn to the relevant law provisions.

(26) The Criminal Procedure Act section 203 subsection 1 authorises the police to seize material that is "deemed to be significant as evidence". This includes documents and digital files. However, pursuant to section 204 subsection 1, "[d]ocuments or anything else whose contents a witness may refuse to testify about" pursuant to certain provisions may not be seized. One of these is section 119, according to which the court may not receive any statement from lawyers about "anything that has been confided to them in their professional capacity". The rules are generally meant to prevent that someone gets the chance to access the client's affairs, see the Supreme Court ruling Rt-2014-297 para 26 and the Supreme Court ruling HR-2017-467-A para 48. In order to avoid undermining the seizure prohibition, its reach must be wide, see the Supreme Court ruling Rt-2013-1336 para 30.

(27) The wording "anything that has been confided to them in their professional capacity" comprises, according to Supreme Court case law anything that "the lawyer in his or her professional capacity and in connection with a client relationship procures or receives

access to on behalf of the client", see the Supreme Court ruling Rt-2006-1071 paras 21–22. This also applies to the fact that a client-lawyer relationship exists, to the client's identity, time sheets and to other material that directly or indirectly may give basis for drawing conclusions about the lawyer's contact with his client and others in connection with the assignment. I refer to Supreme Court rulings Rt-2010-1638, Rt-2012-868, Rt-2012-1601, Rt-2013-92, Rt-2013-1206 and Rt-2013-1336. The Supreme Court's case law is also based on the general assumption that also documents regarding the lawyer's own processing of the material, his deliberations related to the completion of the assignment and the advice he gives to his client are covered by the seizure prohibition, see the Supreme Court rulings Rt-2000-2167 and Rt-2010-740 para 31.

(28) The prohibition in the Criminal Procedure Act section 119 subsection 1 is lifted if the client *consents* to the lawyer giving evidence. The client's consent will also lift the seizure prohibition according to section 204 subsection 1. However, it does not entail that the *court*, based on a wider assessment, may order the lawyer to disclose what the client has confided to him, see section 118. The court may also not, on a more discretionary basis, allow seizure of such material without the client's consent. In this regard, the seizure prohibition is absolute, see the Supreme Court ruling HR-2017-111-A para 22.

(29) The prohibition against seizure and evidence in procedural law is related to the Penal Code section 211 on penal liability for lawyers, among others, who breach their duty of secrecy by disclosing "confidential information confided to them or their superiors in connection with the position or the assignment". The lawyer's duty of secrecy is rooted in the Constitution article 95 subsection 1 and in the ECHR article 6, see the ECtHR ruling 10 May 2007 *Modarca v. Moldova* para 87. I also refer to the UN's *Basic Principles on the Role of Lawyers* from 1990 article 22, which reads:

> **"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."**

(30) When our legal system lets the duty of secrecy prevail and thus substantially limits the police's possibility of accessing material that clearly would be relevant to the investigation and prosecution of serious crimes, it is primarily to maintain the *confidentiality between client and lawyer*, see the Supreme Court rulings Rt-2010-1638 para 33 and Rt-2014-297 para 18. For lawyers to be able to protect the interests of their clients, it is essential that anyone seeking advice can trust that nothing confided to the lawyer is passed on, see the Supreme Court ruling Rt-2012-608 para 37. A strong protection of the client-lawyer relationship is also crucial for the lawyer to be able to fulfil his role under the rule of law, most of all by contributing to ensuring a fair trial for the parties. I refer to the statements on these superior contexts in the Supreme Court ruling HR-2017-467-A para 48 and in the ECtHR rulings 16 December 1992 *Niemietz v. Germany* para 37 and onwards, 24 July 2008 *André and others v. France* para 41 and 6 December 2012 *Michaud v. France* para 118. I also refer to Norwegian Official Report 2009: 15 *Skjult informasjon – åpen kontroll* [Hidden information – open control] page 341, where the Method Control Committee writes the following:

> **"In addition to accommodating general privacy concerns, a central purpose of the rules on lawyers' duty of secrecy is that they ensure confidentiality between the client and the lawyer. When such a confidential relationship exists, the lawyer may receive the information necessary and thus the necessary drive to protect the client's interests in the best possible manner. Lawyers' duty of secrecy is undoubtedly an important guarantee for the rule of law."**

(31) In Norwegian Official Report 2015: 3 The lawyer in society page 190, the client's right to seek legal advice in confidence is referred to as "fundamental under the rule of law and for our administration of justice." The confidentiality between the client and the lawyer is a condition for "being able to decide how the client's interests can be maintained in the best possible manner", and thus secures "access to relevant legal assistance" for the client. The Committee preparing the Lawyers Act also emphasises that "other participants in society such as the courts of justice, the public administration and private counterparties benefit from the right of the citizens to seek legal advice in confidence."

(32) I add that even though the rules on seizure prohibition in the Criminal Procedure Act are provided to protect the clients and society, they may also *in effect* protect a lawyer who, himself, is indicted for criminal offences. The lawmaker has made a distinction for cases where the lawyer and the client are suspected of being accomplices. Pursuant to the Criminal Procedure Act section 204 subsection 2, the seizure prohibition does not apply in such cases. The scope of this provision is not an issue in the case at hand.

(33) With this in mind, I will say the following on the issue of interpretation that the parties wish to have clarified:

(34) It is clear that the wording in the Criminal Procedure Act section 204 subsection 1, cf. section 119 subsection 1 does not suggest that the seizure prohibition will generally be lifted when the police, based on the contents of the document, are assumed to have access to it, or when the lawyer has sent the document to a public body at which the police may access the document. The wording describes a general rule. In line with that, the Supreme Court has ruled that a situational relativisation of the seizure prohibition is not permissible, see the Supreme Court ruling Rt-2012-608 para 41. This also applies when it is clear that the document does not contain any information with which the police are not already familiar, see the Supreme Court ruling Rt-2014-297 para 26.

(35) Limitations of the seizure prohibition in accordance with the submissions of the prosecution authority, must thus – if at all – be rooted in the fact that the information is no longer "confided" to anyone when it has been passed on, or based on the existence of a "consent" from the client.

(36) To "confide" means according to *Bokmålsordboken* [Norwegian dictionary] to "hand over" or "tell someone in confidence". The expression has a strong touch of trust to it - an implicit assumption of loyal handling – which exists even if the information is assumed to be disclosed to others, including public authorities, at a later point in time. Even after the assignment is completed, the lawyer must handle the information loyally and within the scope of the assignment – the information is not "released" in his possession. It may – under the circumstances – still contain "secrets" which the lawyer is "not entitled" to disclose, see the Penal Code section 211.

(37) The prohibition against giving evidence in the Criminal Procedure Act section 119 subsection 1, and the related seizure prohibition in section 204 subsection 1, does not apply if "the person entitled to the preservation of secrecy" has given his or her consent. Consent does not need to be given expressly. It may follow from the context and from *an act of quasi ex contractu* – i.e. be implicit: A person instructing his or her lawyer to submit a writ of summons in a civil case is *presumed to* have given his consent to the lawyer disclosing the information necessary. The client has thus also accepted that third parties may access the writ and its contents, provided that the court's access policy allows

it. In general, the lawyer cannot be deemed to have breached his duty of secrecy as long as he only discloses the information that the assignment requires. Moreover, by entrusting the lawyer with the relevant assignment, the client has implicitly accepted that any information the lawyer passes on may be disclosed to someone other than the recipient body, in accordance with the access policy at the recipient body.

(38) However, the issue in the case at hand is whether the client, implicitly, has also accepted that the police may access the information passed on by the lawyer *from the lawyer's files*. Since such access is neither factually nor legally a precondition for the lawyer to carry out the assignment for the client, it seems odd to construct an implicit consent from this. As I have previously mentioned, consents to an exemption from the duty of secrecy "cannot be interpreted extensively", see the Supreme Court ruling HR-2017-2262-A para 30.

(39) I find that the two options in the law that I have mentioned – that the material is no longer "confided" and the implicit consent – are not adequate for making a general exemption from the seizure prohibition in accordance with the submissions of the prosecution authority. To me, it is essential that there is a difference between requesting the police to find the information at the recipient bodies and allowing them a direct and overall access to the digital files on which the communication with the public authorities is based:

(40) *First*, a direct access to the lawyer's files would give the police a unique *collection* of clients and cases. I repeat that the court, in its classification, is not to consider whether the material is relevant for the investigation in question.

(41) *Second*, a direct access to the lawyer's files might give the police insight into how the lawyer has *organised* his material, in terms of relations between clients and cases and of the individual client and the individual case.

(42) *Third*, the digital files on which the communication with the public authorities is based may contain *metadata* that are not passed on to the recipient, including information on who has worked on the file and when, and on the changes made. The files may also have been processed in other ways that are significant to the case.

(43) A great deal of the *additional information* the police might find in the lawyer's digital files, compared to what they would find at the relevant recipient, will probably already be protected by the seizure prohibition in the Criminal Procedure Act section 204 subsection 1, cf. section 119 subsection 1. Not to mention, there are practical challenges in subtracting from a substantial number of digital files only the documents containing information that the police could have accessed otherwise.

(44) The case at hand concerns, in technical terms, the district court's preliminary classification of the secured material. The defendant will have the chance to dispute the release of specific files before the police get access to them. It will also be possible to require a potential seizure order to be brought before a court, see the Criminal Procedure Act section 208 subsection 1. These procedural rules reduce my reluctance to some extent. However, they do not mitigate the risk that the system applied has the result that the police may access information they are prohibited by law from accessing by seizing the lawyer's files. In that respect, I mention that the defendant's previous clients no longer have a lawyer to protect their interests in the decision whether the material is to be surrendered to the police.

(45) Against this background, I have concluded that the appeal must succeed.

(46) I vote for this

O R D E R :

The order of the court of appeal is set aside.

(47) Justice **Bull:** I agree with the justice delivering the leading opinion in all material aspects and with his conclusion

(48) Justice **Arntzen:** Likewise.

(49) Justice **Kallerud:** Likewise.

(50) Justice **Tønder:** Likewise.

(51) Following the voting, the Supreme Court gave this

O R D E R :

The order of the court of appeal is set aside.