



SEARCH OF BUSINESS PREMISES AND SEIZURE OF ITEMS

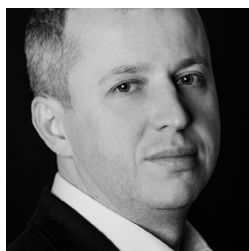
a guide for businesses

FOREWORD

Law enforcement agencies exist to detect crime and hold the perpetrators criminally responsible. To perform these tasks, they are afforded powers of enforcement enabling them to collect and secure evidence, and seize assets as security for possible future penalties. One of the powers afforded law enforcement agencies is the option of searching business premises and seizing the items found. Business premises can be searched when the business owner or employees are suspected of committing a crime or when the business owner has items that may be evidence in a criminal case. These might also be items that might serve as security for penalties imposed in a criminal case.

It is often reported in the media that law enforcement officers have entered a company's premises and have secured binders containing documents, computers, servers, or even money. This raises the issue of whether the search was necessary and permitted, and what a business can and should do to protect its rights.

A search is highly intrusive on civil rights and freedoms. For this reason, strict regulations apply with respect to searches (Criminal Procedure Code, the Polish Constitution, and the European Convention on Human Rights). Persons subjected to a search are given a range of guarantees. To exercise these guarantees effectively, a good knowledge is needed of when a law enforcement agency can conduct a search, how the search should be conducted, what items can be seized and according to what rules, and what a business can demand of law enforcement agencies. This document explains what rights a business has.



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SEARCH

What is a search?

A search is an institution under criminal law that gives a public prosecutor and certain officers the power to search a particular person or premises (house, company offices, premises used to run a business, such as a warehouse).

When can business premises be searched?

A search can be ordered in any criminal case, and in exceptional situations even before a case is opened, if there is concern that items might be lost, destroyed, or lose their original form.

A search can be ordered only to find items that may be evidence in a case (such as documents, data carriers, substances, goods) or items that can be seized as security for future penalties, penal remedies, asset forfeiture, or means of compensation (such as money, tender, valuables, works of art, motor vehicles, and other types of vehicle).

A decision ordering a search also has to comply with the principles of subsidiarity and proportionality. A search can only be ordered where it is vital to obtain certain evidence for a case, and that evidence cannot be obtained in a different, less inconvenient manner. The European Court of Human Rights (ECHR) has clarified that premises may only be searched where it is not possible to obtain proof of guilt of suspects by other means¹. In turn, proportionality when conducting a search means that law enforcement agencies should only conduct searches when necessary², in a manner measured in terms of the objective. During a search, the rights of the business must be observed. In other words, the search must be conducted in connection with lawfully instituted criminal proceedings. It is not permitted to conduct a search when that activity serves no purpose in light of the nature of the crime committed³.

Who makes a decision regarding a search?

A decision to conduct a search is made by the authority conducting criminal proceedings in a particular case or performing activities in advance of proceedings being instituted (usually the public prosecutor, but this might also be a court). To order a search, this authority must have legitimate grounds for suspecting that the items sought are in a particular place or with a particular person.

1) ECHR judgment of 28 April 2005, case *Buck v Niemcom*, no 41604/98.

2) ECHR judgment of 18 April 2013, case *Saint-Paul Luxembourg S.A. v Luxembourg*, no 26419/10. The ECHR stated that a warrant to search premises might be disproportionate if it is issued in order to ascertain the identity of a person who might be suspected of a crime, where that could have been ascertained by less intrusive means.

3) J. Grajewski, L.K. Paprzycki, *Commentary on the Criminal Procedure Code*, volumes I and II, Zakamycze 2003, Lex.

Because in fact searches are sometimes conducted rapidly, circumstances arise however in which the decision regarding what premises and areas are searched, or the kinds of documents to be collected, falls to an officer who initiates a search on the spot. The officer must bear in mind that their activities are monitored. This means that an officer cannot blindly secure all of the visible items “as a precaution”. Only items that might be relevant to the criminal case at hand may be secured.

Who conducts searches?

A search can be conducted by a public prosecutor in person, or by officers acting upon the prosecutor’s authority, in the Police, Border Guard, Military Police, Central Anti-Corruption Bureau, Internal Security Agency, the Military Counterintelligence Service, National Fiscal Authorities, and other institutions specified in law (Forest Ranger Service, etc.).

If a search entails tasks of a technical nature, for example taking measurements, making calculations, taking photographs, or making binary copies of data carriers, then the public prosecutor or officers should use the services of specialists, including external specialists. In such situations it is possible to demand that the external specialist swear an oath that they will perform their duties with the utmost diligence and impartially⁴.

On what grounds can a search be conducted?

A search is formalised activity that requires an authorisation document. A document of this kind constitutes an officer’s authorisation and gives them the power to give instructions during the search. However, it also places obligations on the officer, such as the obligation to properly caution the individuals concerned about their rights.

Prior to a search, a law enforcement officer is required, as a rule, to produce an order issued by a public prosecutor or court, commonly known as a “warrant”. An order of this kind requires the persons named to surrender items voluntarily, and stipulates that failure to comply will result in a search. An order of this kind is often issued together with an order for “detention and involuntary transportation of a suspect” to a specified location (such as the public prosecutor’s office or a police station). In such a case, following the search, that individual is handed over to the competent authority, where the individual is served an indictment.

A search can be conducted without producing a public prosecutor or court order. This requires special circumstances, i.e. “matters not enduring delay”. These are situations in which a delay due to waiting for an order to be issued could result in loss of evidence, or the suspect fleeing or going into hiding. In urgent cases of this kind, an officer is required to produce, for a business owner, an order issued by the head of their unit, or a valid official identification document.

It is very common for a search of premises to be conducted on the basis of a court or public prosecutor order, and an officer to decide during the search that additional areas need to be

4) Art. 205 § 1 of the Criminal Procedure Code.

searched (for example a garage). This is known as a “badge search”. At the request of the individuals concerned this has to be sanctioned by a public prosecutor or court within seven days.

What aspects are important in documents authorising searches?

Documents that an officer produces before commencing a search are official documents and are subject to specific legal requirements. The most formalised of these is a search order. It must contain a series of elements that render it a document constituting true authorisation to conduct a search.

Element of a search order	Comment
Name of the authority that issued, stamped and signed the document (public prosecutor or judge), and the date and place of issue and case number with respect to which it is produced	The document must state this in great detail and can leave no doubt for example as to whether in fact the entities named as the issuing authorities truly exist. This information cannot be misleading, (for example the phrase “PR in ...” makes it unclear whether the order was issued by the district, or regional public prosecutor).
Information identifying the authorised body if the search is conducted by somebody other than the party issuing the order, and stating whether specialists need to be present during the search	This usually states the police unit or local office of a service, but does not identify the officers that are to conduct the search by name.
Information stating the type of activity that can be conducted on the basis of the order	The ruling must state explicitly whether it encompasses only a search or also seizure of items and detention of a suspect, for example.
The date on which the search is conducted, if this is something over which the public prosecutor or court has control	These orders state that a search must be conducted on a particular day or promptly. It is important to note the date because sometimes the search is conducted at a much later time. If there is a long interval between the moment of issue of the order and execution (for example more than 14 days, a month, a few months) there might be grounds for questioning whether the search is necessary and serves any purpose.

Precise information as to the purpose of the search, in particular listing items to be found and seized	It is not possible to state in a vague and superficial manner for example that the purpose of the search is to “find other items that may be evidence in the case”. The European Court of Human Rights has found describing the scope of a search in this way to be a violation of rights laid down in the European Convention on Human Rights ⁵ . A person whose premises are searched must be aware which rooms will be searched and which items will be seized ⁶ .
Precise description of how the search is to be conducted (if the search concerns computers and data carriers)	In this respect, the order must state above all that the search is to be conducted and data secured for specific purposes relating to a case, for example data concerning a particular business relationship or transaction, etc. European Court of Human Rights case law recommends stating specific keywords for a search ⁷ . Therefore the order cannot state that all data on computers or on other devices or data carriers must be surrendered.
Precise information as to the addressee of the order	It is stated in rulings that this can be a business owner or an individual representing a business (member of a managing body, director). The addressee of a ruling cannot be defined as “a person who has the sought items in their possession”. Also, the order cannot be issued against an employee not authorised to represent the business (not holding power of attorney or authorised to surrender documentation).
Statement of reasons	This must state the scope of the search and that the search is necessary, and the subject matter of the case (for example specifying the crime and the suspects). The statement of reasons may not be vague and in particular cannot only be a citation from the applicable search regulations.

5) ECHR judgment of 15 July 2003, *Ernst and others v Belgium*, no 33400/96. The scope of the search was specified as follows “any document or object that might assist the investigation”.

6) ECHR judgment of 3 June 2012, *Robathin v Austria*, no 30457/06.

7) ECHR judgment of 3 September 2015, *Servulo & Associados – Sociedade de Advogados, RI v Portugal*, no 27013/10. The stipulation that computers in a law firm should be searched using the keywords “financial contribution” or “financing” was found to be correct.

Caution regarding the right to file a complaint concerning the search	Unfortunately a caution is often given by quoting the applicable regulations word for word, for instance “a person whose rights have been violated is entitled to file a complaint”.
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A warrant issued by the head of a unit is slightly less formal, and must only state:

- the purpose of the search, and the items or computer data that are to be found or seized,
- the details of the person who is to be detained or transported involuntarily,
- the details of the person or institution on whose premises the search is to be conducted.

If a search can only be conducted once **identification** has been shown, the identification must be issued according to the current template defined by law. Templates for identification documents only apply for a certain period and are regularly modified among other things due to reports of fake identification documents being produced (for example police identification cards change every four years).



(Source: Polish Ministry of the Interior and Administration)

Is it possible to object to a search if there are shortcomings in the authorisation document (for example a signature is missing or the purpose of the search is not stated clearly)?

There are frequent media reports of attempts to impersonate law enforcement officers. The question is therefore whether it is possible to refuse entry to a person who wishes to conduct a search on the premises.

A person present on premises that are to be searched cannot refuse entry to an officer who produces a document authorising a search if there are no concerns as to its validity.

If however a signature or stamp of a court, public prosecutor or head of a unit is missing, or the address is written incorrectly, it is possible to request that the matter be resolved and the search not be executed.

PROCESS OF CONDUCTING A SEARCH

On what days and at what times can a search be conducted?

Searches can be conducted both on business days and on days which are holidays. Searches must be conducted during the daytime (between the hours of 600 and 2200), and it is better for a search to be conducted when individuals who can be present during the search are on the premises. If the search is commenced during the daytime it can continue through the night. Only in the case of searches of residential premises do regulations require that searches be conducted at night solely in exceptional circumstances. At the same time, the regulations do not limit the duration of a search. The duration of a search must be proportionate to the purpose of the search, and excessively lengthy searches are grounds for contesting the legitimacy of the search in court⁸.

Can a search be conducted without the persons concerned being present?

Searches are activities for which law enforcement agencies do not give advance notice. In practice, therefore, situations may arise in which officers come to business premises or other premises when persons with authorisation to make decisions on the business' behalf are not present (management board or supervisory board members, holders of power of attorney and commercial proxy, directors, accountants). Searches should not be conducted, but may be conducted, without those persons being present. If however they are not at the location at the time the officers arrive, an officer is required to make a real attempt to contact them (determine their phone number and advise them of the search).

If that person cannot be contacted or cannot attend promptly (for example because that would take several hours) the person whose premises are searched can select a person to attend the search (for example an employee or attorney). This can also be a person who is familiar with the premises and other rooms and is connected with the business in some way. In exceptional circumstances, an officer can also select other persons, for example incidental persons (a person administering the premises, security officer, adult occupier of the premises, neighbour).

It has to be borne in mind however that incidental persons often do not know what kind of documents relate to a business' operations or contain information that is confidential under the law. Thus they are unable to guarantee that the rights of the business owner, and

8) ECHR judgment of 4 October 2018, *Leotsakos v Greece*, no 30958/13. A search of a law firm that lasted 11 days was found to be unjustified and a breach of the European Convention on Human Rights.

sometimes the rights of other persons whose matters are dealt with by the business, will be respected⁹.

What is an officer required to do before commencing a search?

An officer has numerous obligations that have to be fulfilled before proceeding with a search. This is because there are procedures and guarantees in place due to the intrusive nature of a search. The regulations specify step by step the procedure an officer is required to follow.

Firstly, when arriving at the location of the search and finding persons present at that location, the officer is required to produce their official identification document and advise them of the purpose of the search. The identification must be shown without the person concerned requesting it, and in a manner enabling it to be read and the officer's particulars to be noted down. If the premises are locked and some individuals are on the premises, the officer is required to request that the door be opened voluntarily. If there is no reaction, then entry by force is permitted.

Secondly, the officer is required to determine who the people on the premises are, and in particular whether the search concerns them and whether they can represent the business. If the people present on the premises cannot exercise those rights (they are incidental individuals, low-level employees, service providers to the business) the officer is required to contact the appropriate persons (such as the business' managing bodies) to inform them of the search and determine whether they can be present at the search and when. As circumstances dictate, the officer can determine who should be selected to attend the search. If persons authorised to make decisions on a company's behalf cannot attend in person or cannot be contacted, the officer is required to select a different person to be present during the search. If the appointed person (holder of power of attorney) does not arrive at the location until the search is in progress, the officer must allow that person to participate. Attempts to contact decision-makers must be real and not fictitious.

Thirdly, the officer must produce a document authorising the search and provide accurate information as to the purpose of the search. The officer is required to serve a copy of the document and obtain the signature of the attending person to confirm this. The person concerned must be given an appropriate amount of time to review the document and have any questions or concerns addressed.

Fourthly, the officer is required to advise, in an accurate manner, of the right to have the search sanctioned if it is not conducted on the basis of an order issued by a court or public prosecutor. The officer also has to state that the search will be documented in a report, and that comments and objections can be recorded in that report.

⁹) The ECHR is highly restrictive in examining whether a person attended and who attended during a search. See ECHR judgment of 4 October 2018, *Leotsakos v Greece*, no 30958/13. In this case a neighbour was appointed to attend a search in the absence of the complainant.

At the moment before the search is about to begin, the officer is required to request that the sought items be surrendered, or the location of these items, or as applicable the whereabouts of suspects, be disclosed voluntarily. The officer may proceed with the search if the documents are not surrendered or those locations are not disclosed.

Frequently, individuals on the premises (their clothing, bags) are searched prior to the search of the premises. This is to ensure that they do not have prohibited or dangerous items on their person that pose a hazard to their life or health or that of the officers. This search can also be conducted to determine whether those persons have any money that can be seized as security for future fines, penal remedies, or asset forfeiture. As a rule, a search of this kind must be conducted by a person of the same sex as the subject.

What kind of premises can be searched?

Premises and rooms belonging to, occupied by, or used by a business can be searched. These can be either the real or virtual registered office of businesses or their managing bodies, or a place in which business activity is conducted in practice – stores and production halls, including those rented or used jointly with other entities. They can also be places of residence of former and current managing body members and shareholders, and garages, basements, storage areas, vaults, server rooms, and warehouses. Often, law enforcement agencies search multiple properties at the same time, including premises belonging to business counterparties (such as accounting firms). Of course a separate authorisation document is required for each search.

Authorities that order a search are required to name specific premises and the addresses (such as a business' main place of business located at X). On the other hand, in practice the location being searched is sometimes stated in a vague way, for example “units and premises occupied by the business”. It is not permitted to state the location of the search in this way as it is unclear which premises are to be searched, and whether this applies to the main place of business, or other properties in which the business operates (warehouses, workshops, stores, included those rented). However, doubts of this kind cannot prevent officers searching all of the units occupied by the business. This objection can be raised in a complaint filed regarding the search.

In practice, there are also cases in which the authority ordering the search specifies a particular location, and in the course of the search officers decide to search other premises belonging to the business that are not explicitly named in the authorisation document. There are no valid legal grounds for a search of this kind and therefore it is not permitted. If however officers decide to conduct a search of that kind, it can be contested as being unlawful. Above all, a business should be served a document sanctioning a search of additional premises.

Along with premises, searches of vehicles and other forms of transport (yachts, boats, motorboats, tractors, machinery, aircraft) and places in which they are kept (docks, hangars) are common. An IT system used by a business can also be searched.

If devices (computers, mobile devices) are password-protected, is a business required to give the password to officers conducting a search?

During a search, doubts may arise about whether the business being searched has an obligation to disclose to an officer usernames and passwords to an IT system or telephone, and if not, how this should be viewed under the currently applicable regulations.

A person whose premises are searched may refuse to answer questions on this subject if giving an answer could result in criminal liability for that person or someone close to that person¹⁰. An officer is required to state this by cautioning the person.

Can a search be conducted on data saved on servers accessible from devices located at a business' offices if they are kept outside of Poland?

Today, businesses often use cloud storage and also cloud services. In such situations, the physical computer units are only a part of communication, while the software and files are kept on external servers, for example in Ireland or the US. Even a small firm can make use of the popular text editing programme Microsoft Office provided as a cloud service. At the same time, it can store documents on the servers of Microsoft or other providers such as Amazon. These providers' servers may be located anywhere in the world, so the question is whether a search of that kind can be conducted.

The US Supreme Court ruled on a similar issue in 2018 (*Microsoft Corp. vs United States*)¹¹. Ultimately, the court did not rule on the issue due to a change in regulations. A special act, the Cloud Act, was passed, requiring firms storing data abroad to allow access for a search even of data stored on foreign servers.

Under the Polish regulations, if cloud data are located on servers in Poland, two conditions have to be met. The first is that authorisation specifying a new location, or, as the case may be, an order issued by the head of a unit, or identification, has to be shown. Any additional search has to be sanctioned by a public prosecutor or court. The second is that the search has to be conducted in the presence of the person concerned, and this is highly problematic¹².

If a cloud containing files is located on foreign servers, Polish law enforcement agencies cannot operate and therefore cannot impose obligations on an entity located outside Poland.

Can an officer record events during a search?

Not only can the events of the search be documented in a report, the proceedings can also be recorded. A recording and photographs taken during the search will be important if allegations are made of unprofessional behaviour on the part of officers (seizing items that are not necessary, causing damage to premises). Essentially, video and audio documentation

10) Art. 183(1) of the Criminal Procedure Code.

11) <https://www.nytimes.com/2018/04/17/us/politics/supreme-court-tosses-out-case-on-digital-data-a-broad.html> (accessed on 13 January 2019).

12) A. Lach, Remote search of an IT system, *Prokuratura i Prawo*, 9/2011.

can be, but does not have to be kept during a search. Meanwhile, this depends solely on the wishes and technical capacity of the officers. It is only compulsory to record a search when officers enter premises by force (by forcing locks and breaking down doors). In such cases, the recording or photographs are added to the search report. If the search is recorded, the officer has to advise the persons concerned beforehand, note this in the report, and state the devices used.

Can a business record events during a search?

Under current regulations, a person involved in a search is not prohibited from recording it. The recording of the search by this person is not a crime (in particular under Art. 267 of the Criminal Code, of gaining unauthorised access to information by making a recording). Recording the events might also be useful in the event of concerns as to whether the search was conducted properly.

Are there any rules on how to conduct a search?

The regulations do not state explicitly how a search should proceed. This would be difficult to define explicitly because the way in which the search is conducted should be appropriate for the circumstances. The law says that a search should be conducted or items seized as suitable for the purpose of the search, in moderation and within the limits necessary to achieve the purpose of the search while exercising due diligence. This must also be done with respect for privacy and dignity of the persons concerned and without unnecessary damage and inconvenience¹³.

There are specific suggestions in case law as to types of conduct that are not permitted. For example, the European Court of Human Rights has stated that an excessive number of officers conducting a search may create an oppressive atmosphere, which is a violation of Art. 8 of the European Convention on Human Rights¹⁴.

If the search is not conducted in accordance with these rules, it is possible to submit objections to the public prosecutor or officers conducting the search. This can affect how the search proceeds. Regardless of this, it is however worth making sure that the objections regarding how the search proceeded are noted in the report documenting the search. A failure to observe moderation in the search can be grounds for professional or criminal liability of an officer. It is also grounds for civil liability of the state for breach of personality rights (privacy, integrity of premises) or damage.

13) Art. 227 of the Criminal Procedure Code.

14) ECHR judgment of 30 March 1989, *Chappel v the United Kingdom*, no 10461/83.

CONCLUDING THE SEARCH

How is a search concluded?

A search must be concluded by drawing up a report documenting the search¹⁵. If the authorities seized items during the search, a list and descriptions of the items have to be drawn up. The authorities can decide to take away the seized items, in which case a signature has to be collected to confirm this. The authorities can also decide to hand over the seized items for safekeeping, even to the business whose premises were searched.

The report documenting the search and the list and description of seized items must be signed by the officer in charge of the search, the person whose premises were searched (or their appointee) and all persons involved in the search.

What are the important aspects of the report documenting the search?

Before the report documenting the search is signed, it should be reviewed to ensure that it has been drawn up properly and reflects the true course of events. A person involved in the search can request that their statements be recorded in the report, for example:

- That the items in question include confidential information, and despite this an officer reviewed the contents,
- That the right to refuse to give usernames and passwords to disks or computer systems was exercised,
- That the examination of items and listing of the seized items was not conducted properly,
- That certain items or objects were seized without good reason.

An officer cannot disregard remarks of this kind in the report if the remarks are precise.

It is worth making sure that all of the people present during the search (and their functions) are recorded in the report. It is also worth checking the dates and times recorded in the report regarding the beginning and end of the search. If the search continues for an excessively long time (for example a number of days) this can be grounds for claiming that the search was not conducted properly in court.

At the same time, an officer cannot force a business owner to sign the report documenting the search using coercion or persuasion. There are cases in which the persons involved in the search refuse to sign the report, thereby drawing attention to the fact that the search was not conducted lawfully and properly. This is done in particular to demonstrate that their objections and remarks regarding the report were not recorded. The fact that the report was signed or signature was refused might be considered by the court reviewing a complaint about a search. When reviewing complaints about searches not being conducted properly,

15) Art. 143(1)(6) of the Criminal Procedure Code.

courts frequently state that if the report is signed and no remarks are recorded in the report at the time of the search, this is treated as confirmation that the search was conducted properly¹⁶.

SEIZURE

What is seizure?

When business premises are searched, it is common for items to be seized, as this is usually the purpose of the search. In general, items can be seized that serve as evidence in a case or might be security for future penalties and other remedies. Seizing items does not mean taking them away, because they can be taken by law enforcement agencies, but also handed to a trustworthy person for safekeeping, and this includes the business itself.

What kind of items can be seized?

Various kinds of objects and items useful for the proceedings being conducted can be seized. These are primarily individual official, corporate, or private documents, or collections of documents of this kind. Products and product samples, a stored product range, raw materials, and substances can also be seized. Objects used in premises and rooms (video cameras, video surveillance recordings) can be seized.

Digital data can also be seized. If an authority decides to seize data and it does not need the data carriers on which the data are saved (servers, hard disks, CDs, DVDs, pendrives) it must copy the seized data. Copying means making the appropriate binary copies of the data carrier. Authorities cannot seize data carriers or entire devices where this is not necessary, because this can cause major disruption of the business' operations¹⁷.

Seizure can also apply to money and other forms of tender (bills of exchange, cheques, certificates, policies, securities, and commodities – gold, silver, and platinum).

Items found during the search that are not relevant to the case being investigated, but might be evidence of a different crime, be subject to forfeit, or be items it is illegal to possess (such as weapons or dangerous tools) can also be seized.

Is a person conducting a search required to issue a slip confirming that the items have been seized?

If items are seized, a list and descriptions are drawn up and added to the report documenting the search. The list and descriptions should state and describe the seized items precisely, and specify who they belong to (i.e. whether they are owned privately or belong to people close

16) Dzierżonów District Court ruling of 16 December 2015, II Kp 141/2015 and II Kp 365/2015, available at orzeczenia.ms.gov.pl (accessed on 22 January 2019).

17) A. Lach, Collecting evidence in electronic form following amendment of the Criminal Procedure Code, *Prokuratura i Prawo*, 10/2003.

to them, to incidental people). In some cases, it is worth photocopying them (money and tender, valuables, and works of art).

Item	Way in which it should be described
IT equipment (computers, telephones, tablets, disks, servers, routers)	The manufacturer and model, device serial numbers, IMEI numbers, and where applicable identifying marks should be noted.
Documents (work-related, private)	It should be ensured that the following are described individually (not collectively): the amount, appearance, markings enabling identification of the addressee or author (notary who drew up the document, author of a valuation, expert issuing an opinion, physician handling treatment or therapy) and the nature (original / copy certified as true representation of the original / photocopy / scan).
Money (other tender)	The number of notes and coins, currency, denomination, and serial numbers have to be noted. In the case of raw materials the type and mass have to be recorded.
Valuables and works of art	The list and description must state the type, title, author, date it was created, and certificates and permits, if any.
Motor vehicles and other vehicles	The mark, model, registration number, and VIN must be noted.
IT data	The filenames, date files were saved, format, and location (path) have to be noted.

If the seized objects have any special characteristics (damage, markings, seals, mechanical safeguards) this must be noted on the list and descriptions of the items. This may prove especially important if the items or objects are returned in worse condition.

Three copies of the list of seized items must be produced. One is for the person involved in the search and is confirmation that the items have been taken or secured.

What happens to items that have been seized?

The items seized can be taken away by the persons conducting the search, or handed over to a trustworthy person, often the business owner whose premises have been searched.

Seized items are mostly stored by the court or public prosecutor that ordered that the search be conducted or items seized.

Often, however, the seized objects are handed over to a specific person for safekeeping, and that person is required to hand them over whenever requested (for example to a police station that has an evidence storage facility). In order to save money, seized and secured items may be stored with the person from whom they were taken, which can happen for instance in the case of vehicles. Finally, some seized objects (works of art, valuables) may be stored by cultural institutions (museums, art galleries). Objects and substances that pose a hazard to life or health (weapons, ammunition, explosives, or chargeable or radioactive materials, toxic, intoxicating, or irritant substances, alcohol or tobacco products) are stored in locations in which they can be kept sufficiently secure (warehouses equipped for this purpose).

Money or other tender are usually paid into a deposit account. Seized objects that decline in value rapidly or that are too expensive to maintain can also be sold, and then the amount received is paid into a deposit account.

Can seized documents or IT data be copied at the place of the search?

Conducting a search and seizure of items cannot be excessively burdensome for a business. In particular, these activities cannot prevent or hamper in a disproportionate manner ongoing business operations. For this reason, the person concerned can demand to be allowed to copy, at the location being searched, documentation vital for the business to function (accounting, financial, legal, human resources, medical documentation, etc.).

The same applies to data. Law enforcement agencies are required to make binary copies at the location being searched or, as applicable, take away a data carrier, but not the entire computer equipment. In practice, because an IT technician is not present during the search, the persons conducting the search do not make binary copies or remove disks from computers, and often take away the entire equipment. The same applies to tablets and mobile phones.

What happens to items when they are found to have been taken away without good reason or unlawfully? Can the authorities use them?

Items that are seized without good reason (unnecessarily) must be returned to the rightful holder promptly. If it is unclear to whom they should be returned, they must be placed in a court depository or in safekeeping.

Items that are obtained unlawfully due to breach of regulations (for example if business premises were searched that were not listed in the search order) can be used in criminal proceedings. In particular, under current regulations, evidence of that kind cannot be excluded solely due to being obtained in breach of the respective procedures. In general, there is no exclusionary rule in the Polish legal system.

How long can a public prosecutor or court store items seized in a search?

The law does not specify a maximum period for storage of items seized in a search, but this does not mean that there is complete freedom in this respect. The objects must be released

to the rightful holder as of the moment storing them no longer serves any purpose. Documents must be released after being copied and certified as being a true representation of the original by a competent officer. Data carriers must be released once they have been copied or a binary copy has been made¹⁸. An object or data carriers may be returned both during proceedings and when the proceedings have been concluded due to issuance of a final and binding judgment.

Is it possible to dispose of seized items that have been taken away or put into safekeeping (by sale or pledge)?

Generally, it is not prohibited to trade in items of this kind. It is permitted to sell or pledge a seized item. Disposal in this way will not however be effective towards the state. This means that the new owner or holder of title of some other kind cannot demand that they be released unless a ruling is issued stating that there is no need to retain the items. In practice, it will be difficult to dispose of the seized items. A buyer may be unwilling to purchase items if possession cannot be transferred to the buyer.

What is the procedure for returning the items?

Items seized in a search which are not relevant to a criminal case and will not be used in the case can be released upon a decision being issued by a public prosecutor or court, in the form of the appropriate ruling.

Sometimes it is unclear or there is a dispute about whom a seized item should be released to. In such circumstances, the authorities will place that item in the court depository or hand it over to a trustworthy person until the question of the right to collect it is resolved. If a public prosecutor or court place the item in the court depository, the rightholder can apply to a civil court to have the item released.

What can be done if returned items have been destroyed or damaged?

If seized items are returned in worse condition or have been destroyed, the state can be sued for compensation.

CONFIDENTIAL, PRIVATE, AND THIRD-PARTY MATERIAL

Can material that must be kept confidential by law also be seized?

During a search, documents concerning ongoing business operations, but also documents that are confidential, private, or personal might be found.

18) Judgment of 3 September 2015, *Servulo & Associados – Sociedade de Advogados, RI v Portugal*, no 27013/10. The ECHR sanctioned the practice of return of originals without return to the person concerned of copies of documents and data carriers, saying that these can be kept in the case files until a final and binding judgment is issued.

Documents and objects (such as data carriers) that contain information covered by legal and professional privilege (applicable to lawyers, notaries, tax advisers, journalists, physicians, General Counsel to the Republic of Poland, mediators, and psychologists) and information that is legally confidential (banking, telecommunications, insurance, and statistical information) should be treated in a special way during searches.

Special treatment means that an officer cannot review the contents of items that have been found. The officer is required to duly secure such items, which in practice means placing them in specially marked envelopes or on separate data carriers¹⁹. They are then submitted directly to a court or public prosecutor. Only those authorities can decide to retain or release and return the items to the person from whom they were taken. If it is decided that they are to be retained, they have to apply to a court for permission to use them in a particular criminal case. An officer draws up a separate report on seizure of documents that are subject to the kind of confidentiality described above. For this special procedure to be applicable, the officer has to be informed that the documents found contain confidential information of this kind. This procedure does not apply if the holder of the document is a person of interest or a suspect. The same applies to private documents (diaries, letters) and psychiatric records.

If documents concern legal defence, an officer may not learn the contents or appearance. If the officer has any doubts in this regard, they are required to secure the documents and submit them to the public prosecutor or court for a decision to be made as to how they are to be used.

Can officers search and seize third-party documents?

Wielu Many businesses have third-party documents in their possession. An accounting firm may have financial documents belonging to other firms. Cloud service providers may have data belonging to other businesses on their servers.

If documents in the possession of a person whose premises are searched might be important for a criminal case, the fact that they concern third parties is irrelevant. The individual is required to surrender them or disclose their location to the person conducting the search. If they are confidential, the person conducting the search may not review them, and must submit them to a court or public prosecutor. A third party may contest an order for search and seizure of items.

19) Judgment of 3 June 2012, *Robathin v Austria*, no 30457/06. The ECHR reviewed circumstances in which confidential and private data, and other data, were seized during a search of data carriers.

RIGHTS OF A PERSON WHOSE PREMISES HAVE BEEN SEARCHED

Where can regulations be found on the rights of a business whose premises have been searched?

The rights of businesses in that situation are provided for in the Criminal Procedure Code. Guarantees against searches being conducted without good reason are provided for in the Polish Constitution and the European Convention on Human Rights²⁰.

If a “badge search” is conducted, can a document sanctioning the search be requested?

If no order has been issued by a court or public prosecutor, this does not stop the search. A search can be conducted on the basis of a produced warrant or identification document. In such a case, a person involved in a search can only make a statement to be recorded in the report documenting the search that a document sanctioning the search from a public prosecutor or court was requested. In such a situation, the person conducting the search must provide the document sanctioning the search within seven days. The person can contest the search in court only after the document sanctioning the search has been served.

What happens to the seized items if a document sanctioning the search is not issued?

If the search is not sanctioned within seven days, a public prosecutor or court have an obligation to return the seized items promptly to the rightful holder unless they have been released voluntarily and the rightful holder has not requested a ruling confirming this.

Can a decision to conduct a search and seize items be contested?

A person whose rights are violated due to a search (owner of premises or items, tenant) or seizure of items can file a complaint with a court for up to seven days from the moment the order for the search or seizure of items, or document sanctioning the search, is issued. This is the court in whose jurisdiction the criminal proceedings are conducted. According to ECHR case law, a court is required to verify this promptly²¹.

A complaint can state that the search was not conducted in accordance with the purpose stated in the order, was unnecessary, and was not conducted properly (proportionately). In practice, the allegations amount to a complaint that the purpose of the search or scope of

20) The ECHR confirmed in a judgment of 16 December 1992, *Niemietz v Germany*, no 13710/88, that guarantees under Art. 8 of the European Convention on Human Rights of the right to privacy and protection of a “home” apply equally to a search of business premises

21) ECHR judgment of 16 March 2017, *Modestou v Greece*, no 51693/13. A period of two years from the moment of the search was found to be a violation of this requirement

seized documents and data carriers was stated too broadly and too generally (inappropriate for the purpose²²) and that the search was unnecessary due to there being no information that suspects or documents were on the premises. The search can also be contested due to not being conducted properly (the person concerned was not given notice saying that they could attend, other persons were not selected to be present, no caution was given of rights and obligations).

Also, a search is an invasion of privacy, which is a personality right not only of an individual but also of a company. For this reason, units that issue the order and conduct the search can be sued for infringement of personality rights and seek compensation and other remedies.

What can be gained from contesting a decision ordering a search once the search has been conducted?

A filing with a court contesting a decision ordering a search should result in criminal or disciplinary proceedings being instituted against an officer, if a court finds the complaint to be justified. If a court finds that a search was not conducted properly, this makes it easier to raise potential claims for infringement of personality rights or damage caused during a search.

What can be gained from contesting a decision ordering seizure of items once that has occurred?

A filing with a court contesting a decision ordering seizure of items should result in criminal or disciplinary proceedings being instituted against an officer, if a court finds the complaint to be justified. If a court finds that this was not done properly, this makes it easier to raise potential claims for damage caused due to the seizure and items being taken away. In addition, a ruling acknowledging the complaint should result in the items being returned.

Can a business make preparations for a search?

At times, a search of premises can disrupt a business' operations. During a search, items or documents that are useful or essential for business activity can be seized. This can also happen to honest businesses that have come into contact with criminal activity of other firms in the course of their business activity.

Some institutions introduce internal "dawn raid procedures". One of the elements of these procedures is appointment of persons responsible for working with the authorities during a search. These procedures also specify the way in which particular kinds of items and documents are surrendered and how the conducting of the search is documented. They specify the persons to be notified of the search and how employees of the institution being searched should act in such circumstances.

22) ECHR judgment of 4 October 2018, *Leotsakos v Greece*, no 30958/13. Seizure of documents on the premises of an attorney concerning all clients, and not only those connected with the conducted criminal proceedings, was found to be unlawful.

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