

Chapter 10: Procedures for Disclosure of Statements and Criminal History Records: Solemn Cases

10.1 Requesting Statements & Criminal History Records: What to Request

10.1.1 The same information will be requested regardless of whether the case has been provisionally identified as a High Court case or a Sheriff and Jury case.

10.1.2 Notwithstanding the disclosure duty on the Crown to disclose all statements of all witnesses on the Crown and defence lists, **all** statements held by the investigating agency should be requested. This includes **all** statements held by the investigating agency for a particular witness. The investigating agency should then provide **all** statements held by them in respect of the case.

10.1.3 Criminal history records will be requested for all civilian and professional, expert and official witnesses listed in the SPR or subsequently intimated to the Crown by the investigating agency, regardless of whether or not the witness is likely to be included as a witness in the indictment.

10.1.4 Full statements and criminal history records in summary and solemn cases should be ordered through the FOS link. Where a solemn case has been routed to SOS-R prior to the CHR being ordered then the reporting officer should be requested to submit CHRs for all witnesses. Full details of how to request full statements and criminal history records can be viewed in the Case Processing Manual.

10.2 Requesting Statements & Criminal History Records: When to Request

10.2.1 Custody Cases

10.2.1.1 Where the case is reported as a **custody** case and is marked as a petition, statements and witness criminal history records should be ordered at the time the custody case is prepared for court, i.e. before the accused appears in court. The timescales for submission will depend on whether bail is being opposed or not.

10.2.1.2 If bail is opposed, essential statements and criminal history records should be requested for submission within 5 calendar days of CFE with the remainder of all statements to be submitted within 21 days of CFE. Essential statements are those statements which are necessary to establish a sufficiency of evidence for full committal.

10.2.1.3 Currently there is no facility in FOS to automatically identify and request the submission of full statements and criminal history information for essential witnesses, within the specified timescales. Policy Division is working closely with ISD to achieve a long term solution which will enable deutes to insert details of essential witnesses within the Depute Instructions in FOS. That information will then be extracted automatically and included in the full statement request, for submission within 5 calendar days of CFE.

10.2.1.4 In the meantime, until a suitable solution is in place, it is the responsibility of the marking depute where a case is marked for petition proceedings and bail is opposed by the Crown, to identify what witness statements are essential for submission before full committal. A member of COPFS staff as determined locally must then send an ICJIS email to the Reporting Officer confirming details of those essential witnesses. The Reporting Officer will thereafter prioritise these statements and ensure that these and the relevant criminal history records are submitted within 5

calendar days of CFE. The remainder of statements and criminal history records will then be submitted within 21 days.

10.2.1.5 If bail is granted and no Crown Bail appeal is marked, the Custody Court Clerk should contact the Reporting Officer or Case Management, depending on local arrangements, and advise them that essential statements are no longer required within 5 days. In such a case **all** statements and criminal history records should be submitted within 21 days of CFE.

10.2.2 *Petition Warrants*

10.2.2.1 Where the case is marked as a **petition warrant**, statements and criminal history records should be requested immediately, i.e. at the time of marking. It is not necessary to wait for the accused to answer the warrant. All statements in the case should be requested at this stage. The reporting officer should be asked to submit these within 21 days in all such cases.

10.2.2.2 If the accused answers the petition warrant and the statements and criminal history records have not yet been submitted, a reminder should be sent immediately after court where the accused is remanded in custody. This is particularly important where the appearance is on a Friday. As with custody cases, essential statements should be requested for submission within 5 days of CFE, with the remainder being submitted within 21 days of CFE.

10.2.2.3 Where the accused is committed for further examination and remanded in custody, in a court that does not finish until after office hours, care should be taken to ensure that reminders for submission of the statements and criminal history records are ordered the following morning. Where this is a regular occurrence on a Friday, the Functional Lead for ICP should liaise with the relevant Divisional Commander to ensure procedures are in place for intimating requests at the earliest opportunity.

10.2.2.4 Where, on answering a petition warrant, the accused is admitted to bail and the statements and criminal history records have not yet been received, a reminder should be sent as soon as possible after court, and not later than 3 calendar days after the accused has been committed for further examination.

10.3 **Event Records**

10.3.1 When requesting full statements and criminal history records, an “Event Date” should be entered into the “Administrative Record” for 21 calendar days after the date of first appearance, where the accused is on bail. This will notify the date by which the investigating agency must submit full statements and criminal history records.

10.3.2 Where the accused is remanded in custody, the “Event Date” should be entered into the “Administrative Record” for 5 calendar days after first appearance.

10.4 **Submission of Statements & Criminal History Records**

10.4.1 The investigating agency will submit full statements, along with criminal history records (where they exist) for all civilian witnesses, within agreed timescales, depending on whether the case is a custody or bail case. The investigating agency should also submit, within the same timescales, any criminal history records for professional, expert or official witnesses.

10.4.2 Where the accused is remanded in custody, the investigating agency will submit essential statements and associated criminal history records within 5 calendar days of committal for further examination. The remainder of the statements and criminal history records will be submitted within 21 days of CFE.

10.4.3 Where the accused is at liberty, the investigating agency will submit statements and criminal history records within 21 calendar days of committal for further examination.

10.4.4 Where the accused is at liberty and, due to the nature of the case, it is to be reported to Crown Office within custody timescales, the investigating agency will submit statements and criminal history records in accordance with the custody timescales set out above. However, the marking depute (or other appropriate member of staff according to local arrangement) must advise the Reporting Officer that the case is a priority when sending notification of the essential witnesses whose statements and criminal history information should be submitted within 5 days of CFE. Therefore, the case is being treated as a custody case.

10.4.5 Policy Division and ISD are working to achieve a solution which will allow priority cases to be identified at the marking stage and thereafter any full statement requests to be made, in the usual way, but automatically within the custody timescales, without the need to notify the Reporting Officer that the case is a priority case.

10.5 List of Witnesses

10.5.1 Once it has been confirmed in writing that a defence solicitor acts for the accused, they should be provided with a provisional list of witnesses in the case. This list should include all the witnesses listed in the SPR, and should not be restricted to the witnesses that the Crown is citing for trial.

10.5.2 The provisional list of witnesses should be provided to the accused's representative within 14 calendar days of first appearance. Where no agent has intimated that they are acting for the accused, arrangements should be put in place for that witness list to be available within that time frame, so that it can be issued when defence solicitors have intimated in writing that they are engaged on behalf of the accused. Intimation is not required for preparation of the list but it is required before the list is issued.

10.5.3 It may be appropriate in certain cases to temporarily withhold the details of a witness. Guidance on the drafting of the provisional list of witnesses is contained in Chapter 12 of this Manual.

10.6 Consideration of Statements

10.6.1 Once statements have been submitted to the Crown, the Solemn Legal Manager should consider the statements and decide whether they should be withheld or disclosed to the defence in terms of the guidance set out in Chapters 4, 13 & 14 of this Manual. If the statement is to be disclosed or withheld meantime, it should then be considered for redaction purposes in terms of the guidance set out in Chapter 15 of this Manual.

10.6.2 Where the Solemn Legal Manager considers that it is appropriate to withhold a statement completely, which contains either irrelevant or relevant *and* immaterial information, the matter should be reported to the Director of Serious Casework, for Crown Counsel's instructions. If a statement is withheld on these

grounds, the witness may not be called to give evidence. (See Chapter 4, in particular paragraphs 4.2.3 – 4.2.5, and Chapter 13, paragraphs 13.3.1 – 13.3.4.)

10.6.3 However, if a particular witness statement contains information which falls within the materiality test i.e. information which is likely to

- materially weaken or undermine the evidence that is likely to be led by the prosecutor;
- materially strengthen the defence case; or
- form part of the evidence to be led by the prosecutor in the proceedings against the accused

and there is a compelling reason why it should not be disclosed, e.g. it contains material covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, the matter should be referred initially to the functional lead for High Court / Sheriff & Jury (depending on the forum of the case), the Federation Head or other appropriately vetted member of COPFS staff. Thereafter the matter should be reported, including an appropriate recommendation, by that person to the Director of Serious Casework for the onward attention of Crown Counsel. Crown Counsel will issue a final decision as to how the issue should be addressed. However, non disclosure should be the last option after all other possibilities have been considered. (See Chapter 4, paragraph 4.2.6, and Chapter 13, paragraphs 13.3.5 – 13.3.9.)

10.6.4 **All** witness statements should be checked for redaction purposes prior to disclosure unless there are no civilian witnesses in the case. (In summary cases, where the only witnesses in the case are investigating agency witnesses, their statements do not routinely require to be checked for redaction purposes prior to disclosure.) In solemn cases, investigating agency statements should be routinely checked to ensure that no sensitive information is disclosed, e.g. references to a CHIS, ongoing confidential operations, details of where police took observations of the accused from etc. Sensitive information is defined in section 122 of the Criminal Justice and Licensing (Scotland) Act 2010.

10.7 Consideration of Criminal History Records

10.7.1 Once criminal history records have been obtained, they should be checked to ascertain whether, and to what extent, they should be disclosed in accordance with the materiality test i.e. do they contain information which is likely to

- materially weaken or undermine the evidence that is likely to be led by the prosecutor;
- materially strengthen the defence case; or
- form part of the evidence to be led by the prosecutor in the proceedings against the accused

10.7.2 When a witness attends for precognition, the precognoscer should advise the witness that it will be necessary to disclose details of their previous convictions and/or outstanding charges where the Crown intends to disclose this information. They should also canvass with the witness if there are any grounds for non-disclosure, as set out in Chapter 17 of this Manual.

10.7.3 Any decision or recommendation not to disclose criminal history information should be recorded in the Disclosure Page. Where appropriate, the 'PCOCs' column in the Witness Precognition Record should be completed with a general indication of "yes" or "no" in terms of a recommendation on whether or not the previous convictions and/or outstanding charges of a witness should be disclosed. Where appropriate, for example, where the recommendation is that only part of a witness's record should be disclosed, and part should be withheld, further details of the

recommendation should be included in the relevant section of the Disclosure Page in the precognition. (**See Chapter 19, paragraphs 19.2.2 and 19.2.3 on the different recommendations required in High Court cases and Sheriff and Jury Cases.**)

10.7.4 In all solemn cases, a witness's criminal history information should be inserted into the precognition behind the witnesses' precognition and investigating agency statements. Where a civilian or professional, expert and official witness has **no** criminal history record this should be highlighted at the top of the precognition or the first page of the witness statement.

10.8 Disclosure to the Accused's Legal Representative

10.8.1 Once the statements and criminal history records have been checked, and where appropriate redacted, they should be disclosed, at the stages detailed below, to the accused's representative. This should only be done where it has been confirmed in writing that the defence solicitor is acting for the accused. **Please note that in solemn cases, the criminal history records are disclosed at a later stage than the statements.**

10.8.2 The Crown will also provide the defence with copies of all civilian, police and "professional/expert/official" witness statements that are in its possession, within 28 days of first appearance in all cases that are likely to be indicted in the Sheriff and Jury and High courts.

10.8.3 In all cases that are being indicted, either in the High Court or in the Sheriff and Jury Courts, the defence should be provided, at the time the indictment is served, with copies of criminal history records against those witnesses listed on the indictment.

10.8.4 Where witnesses are added by a notice served under the terms of section 67 of the Criminal Procedure (Scotland) Act 1995, copies of the statements of the relevant witnesses should be given to the defence at the time of service, if they are available, along with copies of their criminal history records, if applicable, subject to the materiality test.

10.8.5 Guidance on the method by which information should be disclosed to the accused's legal representative is contained within Chapter 11 of this Manual.

10.9 Disclosure to Solicitors from England, Wales & Northern Ireland

10.9.1 In cases where the accused instructs agents who are solicitors based in England, Wales or Northern Ireland, or the agent is an in-house solicitor it should be ascertained whether they hold a practising certificate for Scotland prior to handing over any information for disclosure purposes. Larger solicitor firms in England, Wales or Northern Ireland may have employees who are dual qualified but where they do not they should be advised that disclosure will only be made to a local agent instructed to act on their behalf. Similar principles will apply where the accused person is assisted by a "McKenzie friend"¹.

10.9.2 Solicitors who are not members of the Law Society of Scotland are not governed by the provisions of Articles 11 and 12 of the Law Society Code of Conduct

¹ The role of a McKenzie friend was set out in McKenzie v McKenzie [1970] 3 All ER 1034, which provided that litigants are entitled to have assistance, lay or professional, unless there are exceptional circumstances. A McKenzie friend assists a litigant in person in a common law court and need not be legally qualified.

for Criminal Work and as such there is no safeguard on what they do with information that they receive from COPFS.

10.9.3 All criminal defence solicitors practising in Scotland require to sign an undertaking prior to COPFS handing information over. This is routinely covered by letters of engagement, which require to be submitted prior to any disclosure being made. These letters include the signed undertaking, in respect of the information disclosed in the particular case, that:

- (a) such material, or any information contained in it, will not be used or disclosed other than for the purpose of the preparation and conduct of any trial or any appeal in the case referred to;
- (b) such material will not be made available to the accused or to any other party without the express agreement in writing of the Procurator Fiscal; and
- (c) in the event of the accused becoming unrepresented, any such material will be returned to the Crown

10.9.4 The main purpose of this undertaking is to ensure that COPFS as data controller at the time of the handover of that data complies with the seventh data protection principle namely; that appropriate technical and organisational measures are taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. The Information Commissioner has confirmed that when data is handed over to defence agents for the purpose of disclosure the agent becomes the data controller. Additionally this undertaking reminds the defence agents of their legal obligations surrounding the use and sharing of such information, in terms of Articles 11 and 12 of the Law Society Code of Conduct for Criminal Work. The Information Commissioner has confirmed that defence agents require to be registered as data controllers. The agents "process" the data once in receipt of this from COPFS and the responsibility for compliance with the terms of the Data Protection Act 1998 transfers to them at this point.

10.9.5 The general rule therefore when dealing with agents from outside Scotland is that disclosure will only be made to a local Scottish agent instructed to act on their behalf.

10.9.6 However there is provision for disclosure direct to agents in England, Wales and Northern Ireland upon request in certain circumstances and upon the acceptance by them of conditions akin to those specified in the undertaking.

10.9.7 For instance, due to the unique nature of some Health and Safety cases, disclosure can be made to solicitors who do not hold a practising certificate in Scotland prior to a complaint being served, in order that proper consideration can be given to the issues prior to being called to plead. In such circumstances, however, the solicitor must be asked to sign an undertaking to the effect that the information is provided on the basis that:

- i) The information disclosed will not be used or further disclosed other than:-
 - (a) For the purposes of the proper preparation and presentation of the accused's case in the original proceedings;
 - (b) With a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;

- (c) For the purposes of the proper preparation and presentation of the accused's case in any such appeal
- ii) The documents provided will not be made available to the accused or to any other party without the express agreement in writing of the Procurator Fiscal;
- iii) In the event of the accused being unrepresented, any such information will be returned to the Procurator Fiscal.

10.9.8 It is important to remember, and to remind agents when appropriate, that it is a criminal offence under section 163 and 164 of the Criminal Justice and Licensing (Scotland) Act 2010 for any person to knowingly use or disclose information, or anything recorded in it, for any purpose other than those detailed.