

Chapter 17: Criminal History Records: General

17.1 General Obligations & Timing of Disclosure

17.1.1 The general practice adopted by the Crown in relation to the provision of criminal history records (previous convictions and outstanding charges) to the accused's representatives is set out in this Manual.

17.1.2 In law, the Crown is only obliged to disclose those parts of a criminal history record that fall within the parameters of 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,

A generous approach to assessing materiality should be adopted, and only those parts of the record which are immaterial and sensitive will be withheld. Section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010 defines sensitive information as that which if it were to be disclosed would constitute a risk of (a) causing serious injury, or death, to any person; (b) obstructing or preventing the prevention, detection, investigation or prosecution of crime; or (c) causing serious prejudice to the public interest. Guidance in relation to redaction of criminal history records to remove immaterial and sensitive parts of the record is contained in Chapter 19 of this Manual.

Timing

17.1.3 In all summary cases, the Crown should obtain criminal history records, i.e. details of previous convictions and outstanding charges (PCOCs), in respect of all civilian and professional, expert or official witnesses cited for trial. Where the accused is on bail or ordained to appear, the Crown should provide the defence with copies of all material criminal history records as are then in the possession of the Crown not less than 28 days before the Intermediate Diet.

17.1.4 In all summary cases where the accused is remanded, the Crown should provide the defence with copies of criminal history records (subject to redaction of immaterial and sensitive information) as are then in the possession of the Crown and are suitable for disclosure, not less than 7 days before the Intermediate Diet.

17.1.5 In all solemn cases, the Crown should obtain criminal history records in respect of all civilian and professional, expert or official witnesses listed on the provisional list of witnesses. The Crown should provide the defence with copies of criminal history records (subject to redaction of immaterial and sensitive information) in respect of all civilian witnesses listed on the indictment as are then in the possession of the Crown, when the indictment is served on the accused.

Content of Disclosure

17.1.6 The Crown should provide the defence with copies of criminal history records (subject to redaction of immaterial and sensitive information) of all civilian witnesses that the Crown are citing for trial in summary cases or are listed on the indictment in solemn cases. Full guidance on the considerations to apply when redacting criminal history records is contained in Chapter 19 of this Manual.

17.1.7 Criminal history information should be obtained at the same time as statements in order that it can be considered during the precognition process. There is no requirement to obtain a more up-to-date criminal history record at the stage of disclosure, but should any new information in respect of a witness's criminal history come to the attention of the Crown during the proceedings, this should be disclosed.

17.1.7 For the purpose of this Manual, there is no distinction to be made between previous convictions, outstanding charges, direct measures and police fixed penalties (**Murtagh v HMA**, ([2009] U.K.P.C. 35)).

17.1.8 The Crown will provide details of the information recorded on the Criminal History System (CHS) at the beginning of the prosecution. There is no requirement to provide information held on any other criminal database such as PNC (Police National Computer) unless this has been specifically brought to the Crown's attention. Nor is there any requirement to seek further information from the CHS or to carry out regular checks on the COPFS National Database against witnesses, unless the defence specifically requests this and that request provides reasonable grounds for believing that the position may have changed significantly since the original disclosure.

17.1.9 Guidance on the considerations to apply when redacting criminal history information is contained in Chapter 19 of this Manual.

17.2 When to obtain and when to Disclose

17.2.1 The extent to which criminal history records are to be obtained and disclosed depends on the nature of the witness and the evidence he or she is likely to give.

17.2.2 Witnesses will fall into one of two categories in the police report:

- Civilian
- Police

The action to be taken on obtaining and disclosing criminal history records will depend into which particular category the witness falls.

17.3 Civilian Witnesses

17.3.1 Details of criminal history information should be obtained in respect of all civilian witnesses either:

- a) listed on the provisional list of witnesses in solemn cases; or
- b) marked for citing in a summary case.

17.3.2 The general rule is that all convictions, outstanding charges and direct measures should be disclosed unless the information (a) is immaterial and sensitive or (b) should be withheld in the public interest.

17.3.3 Where the witness is a victim of a crime to which **section 288(C) of the Criminal Procedure (Scotland) Act 1995** applies, details of previous convictions and/or outstanding charges should be routinely obtained and considered for disclosure in the usual way. Taking into account the terms of section 274 of the

Criminal Procedure (Scotland) 1995 Act, the defence would need to make an appropriate application to the court under section 275 of the same Act to allow the material to be used in the course of the trial.

17.3.3 Guidance on the materiality considerations to apply is contained in Chapter 19 of this Manual.

17.4 Police Witnesses

17.4.1 Particular guidance on criminal history records for on-duty police officers is contained in Chapter 20 of this manual.

17.4.2 Where a police officer is a witness to an offence and is off-duty at the time, he/she should be classified as a civilian witness, e.g. victim of housebreaking, vandalism, assault etc. Where, however, an off-duty police officer witnesses an offence and intervenes in his or her capacity as a police officer, i.e. placing himself or herself on duty in order to apprehend an accused who has just assaulted someone, then they should be classified as a police witness.

17.5 Cases Submitted by Specialist Reporting Agencies

17.5.1 Where the case is one reported by a specialist reporting agency, e.g. HMRC, DWP, TV Licensing Authority, Health & Safety Executive etc, 'S' (CHS) numbers for civilian, professional, expert and official witnesses should be requested from the police case management divisions.

17.6 Recording of CHRS on Schedules

17.6.1 In terms of Section 2 of the Data Protection Act 1998, sensitive personal data includes information about (i) the commission or alleged commission by that person of any offence and (ii) proceedings for any offence committed or alleged to have been committed by a person, the disposal of such proceedings or the sentence in such proceedings.

17.6.2 On that basis, where a witness (civilian incl. professional, expert or official, or police) has a criminal history record, the existence of that record will be recorded in the sensitive schedule.

17.6.3 However, as criminal history records for witnesses who are cited as witnesses will *always* be relevant and *potentially* material, it is essential that the defence are advised of the existence of a criminal history record where the witness is listed on the indictment and the record is considered to be wholly *immaterial* as stated in paragraph 17.8.3 below.

17.7 What should be disclosed as part of the Criminal History Record

17.7.1 The criminal history record that is received from CHS contains a number of different sections. The format of the criminal history record and guidance on what should be included in the disclosure copy is contained in Chapter 18 of this Manual.

17.7.2 Where a witness has a criminal history record and redaction is appropriate for one or more of the convictions/charges/direct measures, it **must** be obvious on the face of the record that something has been redacted.

17.7.3 Where redaction is necessary and the result is that the entire record is redacted, there is no value in providing the defence with a redacted copy. Instead, the defence should be advised that the Crown have considered the information about the witness but have decided that this information has no relevance and accordingly it will not be provided to the defence.

17.7.4 Guidance on the considerations to apply when redacting criminal history records is contained in Chapter 19 of this Manual.

17.8 Checking Accuracy of Criminal History Record with the witness

17.8.1 It is not necessary routinely to check with witnesses, prior to disclosure, that their record is accurate.

17.8.2 If, at the time of carrying out the CHS search, the police locate a 'S' (CHS) number for a witness and they have concerns that this might not be accurate, the police should provide the 'S' (CHS) number in **Section 4** of the National Standard Statement and should state in **Section 6** of the NSS that they have concerns regarding the accuracy of the record. Section 6 should also contain the reasons for these concerns.

17.8.3 Where the police have highlighted concerns regarding the accuracy of the 'S' (CHS) number, the record **must** be checked with the witness. **The record should not be disclosed to the defence until this has been done.**

17.8.4 This should be done by sending a copy of the schedule to the witness with covering letter WITPCOCSLET . If the witness does not respond within 21 days, then the record should be deemed to be accepted.

17.8.5 If the witness replies disputing that the record, or any part of it, is theirs, then the Reporting Officer should be instructed to take this up with CHS. In the meantime the disputed part of the record should **not** be disclosed. For the avoidance of doubt, the non-disputed part of the record can be disclosed.

17.8.6 In such circumstances, the police should be advised of the need to carry out checks with CHS at the earliest opportunity so as to minimise any delay to the trial.

17.9 Multiple Accused

17.9.1 Where there are multiple accused in a case, it is not necessary to determine whether or not a witness is only giving evidence against one of the accused, prior to disclosure. Where a witness's record is to be disclosed, it should be disclosed to the representatives of **all** the accused in the case.

17.10 Co-accused as a Witness

17.10.1 Where there are multiple accused in a case, and a plea is accepted from an accused, and that accused is to be called as a witness, consideration must be given to disclosing his/her criminal history record.

17.10.2 Criminal history information of a former accused should be disclosed on request subject to the redaction principles set out in Chapter 19 of this Manual. However, it will not be sufficient to provide the remaining accused's representatives with a copy of the schedule prepared for the court as this will (a) not include pending cases and (b) not have been considered in terms of the redaction principles.

17.11 Criminal History Records for Defence Witnesses

17.11.1 It is standard policy, where the Crown has obtained details of defence witnesses, to advise the investigating agency to obtain statements from and criminal history records for these witnesses.

17.11.2 Where the Crown obtains a defence witness's record, it **must** be disclosed to the defence in the same way as that of a Crown witness. Prior to disclosure, the criminal history record must be considered, and redacted, if appropriate in terms of the principles set down in Chapter 16 of this Manual. This approach was fully endorsed by the Privy Council in **HMA v Murtagh** in which Lord Rodger stated at paragraph 70 that the "*spontaneous disclosure [of records for defence witnesses] was fully justified on the basis that it ensures equality of basic relevant information and, hence, of arms between the Crown and the defence*".

17.11.3 Where a statement and criminal history record are being requested for a defence witness, the statement will be submitted along with the 'S' (CHS) number for that person. The CHS record should then be obtained from CHS using the electronic link between CHS and FOS. Where, however, only the record is requested or the case is no longer in FOS, the investigating agency should be asked to submit the actual criminal history record for the defence witness and not just the 'S' (CHS) number.

17.12 Release of Material

17.12.1 Where any disclosure of criminal history records is to be made, it should be conditional on the information only being used for the limited purpose of the proper preparation and presentation of the case in which disclosure is made. This is clearly specified in the Article 11 of the Code of Conduct in Criminal Work. The guidance note attached to Article 11 states that "*solicitors are reminded that, in receiving documentation, material or recordings from the COPFS, or other third parties, that they are accepting an implied undertaking to comply with the terms of this Article*".

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

17.13 Advising Witnesses that Criminal History Records may be disclosed

17.13.1 When a witness is cited for trial, they will receive a leaflet setting out what is involved in being a witness. There are leaflets for Justice of the Peace Court, Sheriff Court, Sheriff & Jury Court and High Court. Each of these leaflets advises the witness that the accused's representative is usually entitled to receive details of any previous convictions or pending cases that the witness might have. The leaflets also confirm that the court will not always allow such information to be referred to at trial but may do so if it considers that it is relevant to the evidence that the witness will be giving.