

## **Chapter 22: Requesting & Disclosing Productions**

### **22.1 General Practice**

22.1.1 The general practice to be adopted by the Crown in relation to the provision of productions to the accused's representatives is set out in Chapters 6, 22 and 29 of this Manual.

22.1.2 The guidance set down in this chapter relates to disclosure of productions to the accused's legal representative. For guidance in relation to disclosure to an unrepresented accused, you should refer to Chapter 23 of this Manual.

22.1.3 Unless expressly stated otherwise, any references to productions should be interpreted as including both documentary and label productions.

### **22.2 General Obligations**

22.2.1 Chapter 6 of this manual sets out the Crown's general legal obligations in respect of disclosure of productions and emphasises that the Crown's disclosure duty applies to all material information and thus includes all productions.

22.2.2 All productions listed in the Crown list and other items submitted by the police which are not listed as productions must be considered for the purpose of disclosure in terms 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 to determine whether the information is disclosable.

22.2.3 In particular, in High Court cases, the Crown Practice Statement on Disclosure in High Court Cases commits the Crown to disclosure to the defence of copies of important documents as soon as practicable.

22.2.4 In solemn proceedings, it is the responsibility of the Case Preparer, in consultation with, and as supervised by, the Solemn Legal Manager, to determine:

- (i) What productions seized or generated in the course of the investigation require to be disclosed to the defence; i.e. all productions that form part of the Crown case or otherwise form information that might materially weaken the Crown case or strengthen the defence case;
- (ii) The method of disclosure of the productions, i.e. whether by provision of copies or by access; and
- (iii) To what extent, if any, productions require to be redacted prior to disclosure/lodging as a production – the final decision on redaction should be taken by a legal member of staff

22.2.5 Depending on local practices, the Case Preparer should then carry out or instruct the necessary disclosure. It is essential that there is a clear audit trail in relation to the disclosure of all productions. Accordingly, the production record for each production disclosed must be updated at the stage of disclosure. In addition, any decision to disclose by access should be recorded on the Disclosure Page.

22.2.6 Where it is not clear what information meets the disclosure test or the extent of redaction required is not clear, this should first be discussed with the Solemn Legal

Manager. If further guidance is required, then a report should be submitted to Crown Counsel for instruction.

22.2.7 In summary proceedings, the depute preparing the intermediate diet should confirm that all productions that require to be disclosed in terms 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) have been or will be disclosed. Thereafter, the trial depute should confirm that this has been done prior to trial. Staff are reminded that the timescales for disclosure of productions in summary proceedings are set down in the Best Practice Guide for Summary Cases.

### **22.3 Reporting of Cases**

22.3.1 In normal practice, all relevant productions should be fully listed in the SPR. This will allow the Crown to make an informed decision about what items require to be disclosed or at least brought to the attention of the defence, and to take an early decision about whether any items should be returned to the owner. (The obligation of the police and investigating agencies to submit relevant information to the Crown is covered in Chapter 3 of this Manual.)

22.3.2 Where the police or other investigating agency identify any subsequent relevant productions, they should intimate this to the Crown in writing as soon as reasonably practicable, e.g. by means of a subject report.

### **22.4 Decision Making by Procurators Fiscal**

22.4.1 Where proceedings are raised, the Crown will decide which productions are required, assessing which productions are essential to prove the charge(s) libelled or are otherwise necessary for the proper presentation of the case, and what items require to be disclosed to the defence.

22.4.2 It is essential to note that the Crown's obligation goes beyond only disclosing those productions listed on the indictment or the Crown intends to refer to at trial. The duty of disclosure, as with all information held, extends to disclosure of information that meets the materiality test.

22.4.3 Particularly in summary cases (but not exclusively), the Crown will consider whether or not any items can be returned to their owner or otherwise disposed of. In deciding this, a factor to be considered is whether the return or disposal of the item will prejudice the accused in any way. Any potential for prejudice may be removed if the defence is given an opportunity to examine the item.

22.4.4 Like statements, productions can contain sensitive information that requires redaction prior to disclosure, e.g. medical records. Careful consideration must be given to redaction issues prior to disclosure as specified in Chapter 29 of this Manual. 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.

### **Solemn Cases**

22.4.4 In all solemn cases, the Case Preparer must decide, in close consultation with the relevant Solemn Legal Manager, what productions should be disclosed to the defence and whether it should be by provision of a copy or by access. Where it is not clear whether a production should be disclosed, then this should be included in the Disclosure Page of the precognition and a recommendation on disclosure should be sought from Crown Counsel.

22.4.5 Any decision not to disclose a production must be carefully recorded in the Disclosure Page of the precognition in order that the decision not to disclose can be properly kept under review.

22.4.6 If, following discussions with the relevant Solemn Legal Manager, a production seized by the investigating agency is deemed to be relevant and material **but** it is considered sensitive and not in the public interest to disclose it, this should immediately be brought to the attention of the functional lead (PF/Assistant PF High Court/Sheriff and Jury) and the Federation Head in order that a report can be prepared for the Director of Serious Casework seeking Crown Counsel's Instructions.

### Summary Cases

22.4.7 In summary cases, the Crown will also consider which productions it is necessary to request from the investigating agency in the event of a plea of not guilty, in order to facilitate early disclosure to the defence. (See paragraph 22.5.) Normally the Crown will only request submission of productions which can easily be copied and provided to the defence, e.g. documents and video or digital recordings. (N.B. Some productions may have already been provided by the police at an earlier stage prior to any plea, e.g. to assist the marking depute.)

22.4.8 Where upon examining productions in a case (either on the basis of information in the SPR or following receipt and/or examination of the items themselves) the view is taken that certain items need not be further retained, the police must be instructed to this effect as soon as practicable.

22.4.9 In Summary cases, the Summary Legal Manager must ensure that local arrangements are in place to identify the appropriate person within the team with responsibility for deciding in each case what productions should be disclosed, e.g. the depute carrying out the intermediate diet preparation etc.

## **22.5 Early Disclosure of Productions**

22.5.1 Early disclosure of material productions is likely to assist the defence, not only in preparation for trial, but also in assessing whether or not evidence can be agreed. It may also facilitate early consideration of a plea. As the timing of a plea of guilty is a matter which requires consideration by the Court in every case, and in the High Court the Crown will be expected to provide full information about those circumstances, the Crown should do what it can to facilitate the possibility of early disposal. The Crown should avoid being put in a position where the defence may argue that a plea of guilty has been delayed significantly because of lack of access, for example, to a critical document which was in the Crown's possession for some time before it was disclosed.

22.5.2 Potentially important documents, should be disclosed as soon as reasonably practicable, for example, forensic science reports (see paragraph 22.13), medical records, photographs, surveillance logs, search warrants and transcripts of taped police interviews. Such documents may, however, require to be redacted prior to

disclosure, e.g. medical records to remove immaterial sensitive and non-sensitive information.

## **22.6 Timing of Commencement of Disclosure Obligations in a Prosecution**

22.6.1 In summary cases, from the stage of deciding to raise proceedings, the Crown will identify items suitable for disclosure which are likely to assist plea negotiation and possible early resolution of cases, for example audio tapes or DVDs of police interviews, and, as far as possible, provide these items to the defence as soon as reasonably practicable, and thus before a plea of not guilty has been tendered. As stated at paragraph 22.4.9, the Summary Legal Manager must ensure that an appropriate person is identified to do this work.

22.6.2 The Crown will request such items from the investigating agency at an early stage, before any plea has been tendered, and, on occasion, such items will be required prior to the case being marked for proceedings, e.g. in order to assess whether there is a sufficiency of evidence.

22.6.3 In general, the Crown will request such items where they are required to demonstrate a sufficiency of evidence, and particularly where there is an indication from the defence that a case is likely to be resolved on the disclosure of those items, and the defence is not being unreasonable in this approach.

22.6.4 The Crown will seek submission of such items within 7 calendar days of the date of their request to the investigating agency.

## **22.7 Access by Defence to Disclosure of Crown Productions in Summary Cases**

22.7.1 In summary cases, the Crown will consider all productions and provide, where they are material:

- i) Copies of documentary evidence in the case, having considered redaction of non-disclosable information and in so far as it can be readily copied; and
- ii) Either copies of audio, video or digital recordings, or provide details of these items to the defence, in order to allow the defence to make arrangements to listen to, or view them; and
- iii) Details of any other productions, in the case which it is not possible or impractical to copy.

22.7.2 In relation to documents and articles, seized and retained by the investigating agency, that are not productions in the case because they are considered immaterial, it is good practice to advise the defence of their existence so that consideration can be given by the defence to viewing or examining such items.

22.7.3 Where such information exists, the Crown should invite the defence no later than within 21 calendar days of the date, on which details of items listed at paragraph 22.7.2 are provided, to notify the Crown if the defence wishes any item to be retained and whether or not the defence wishes to examine any item. Items may be returned to their owner or otherwise disposed of if no notification is received.

22.7.4 Where the defence gives notice of an interest in any item(s), the Crown will respond advising of the location of the item(s), in order to allow the defence to make arrangements to view or examine it.

## **22.8 Access by Defence to Disclosure of Crown Productions in Solemn Cases**

22.8.1 In solemn cases, as soon as practicable **prior to the service of the indictment**, the Crown will provide to the defence, only where it is material evidence:

- i) Copies of documentary evidence in the case, having considered any need for redaction and in so far as it can be readily copied; and
- ii) Where practicable, either copies of audio, video or digital recordings or details of these items and their location, in order to allow the defence to make arrangements to listen to, or view them; and
- iii) Where practicable, details, and the location of any other productions in the case, including any label productions, in order to allow the defence to make arrangements to view or examine them.

22.8.2 In determining what is “practicable” the Crown will as a matter of best practice aim to provide disclosure of productions no later than 28 days after first appearance on petition.

22.8.3 The Crown will provide to the defence, **upon service of the indictment**:

- i) A courtesy copy indictment;
- ii) Copies of any previously undisclosed listed productions (so far as they can be copied readily); and
- iii) Details and the location of any other listed productions in the case in order to allow the defence to make arrangements to view or examine them.

22.8.4 In accordance with the Crown Practice Statement on Disclosure in High Court Cases, the Crown will provide items under (ii) and (iii) above to the defence no later than 7 days after service of the indictment.

22.8.5 In relation to documents and articles, seized and retained by the investigating agency, that are not listed as productions on the indictment because they are considered immaterial, it is good practice to advise the defence of their existence so that consideration can be given by the defence to viewing or examining such items.

## **22.9 Procedures and Timelines in Summary Cases**

### *22.9.1 Summary Custody / Priority Cases*

22.9.1.1 Where the accused pleads not guilty and is remanded in custody, or the case is to be treated as a priority, all necessary productions should be ordered from the police or investigating agency immediately after court (i.e. on the same day - this is particularly important where the plea is tendered on a Friday).

22.9.1.2 Where the plea of not guilty is tendered in a court that does not finish until after office hours, care should be taken to ensure that all necessary productions are

ordered the following morning. Local arrangements should be put in place to deal with courts that overrun on a Friday to ensure that the investigating agency are advised at the earliest opportunity that the productions are required, e.g. obtaining local agreement to order productions before court, in cases where bail is opposed.

22.9.1.3 In terms of paragraphs 22.9.1.1 and 22.9.1.2, above, productions should be ordered at the same time as Statements and Witness 'S' (CHS) Numbers.

22.9.1.4 Where the investigating agency have submitted the necessary productions, as a matter of best practice, the Crown should, where intimation has been received in writing that the defence solicitor is acting for the accused, provide the defence with the items and information listed above, at paragraph 22.7.1 not later than 7 calendar days before the intermediate diet.

#### *22.9.2 Summary Bail / Ordained to Appear Cases*

22.9.2.1 Where the accused pleads not guilty, the Crown will as soon as possible and not later than 3 working days after the pleading diet, request from the police or investigating agency all necessary productions.

22.9.2.2 Where the investigating agency have submitted the necessary productions, as a matter of best practice, the Crown should, where intimation has been received in writing that the defence solicitor is acting for the accused, provide the defence with the items and information listed above at paragraph 22.7.1 not later than 28 calendar days before the intermediate diet.

### **22.10 Procedures and Timelines in Solemn Cases**

22.10.1 The Crown will order all necessary productions in accordance with the timescales set out at paragraph 22.10.3 below, accepting that it will not always be appropriate to order every production due to certain items, for example, being the subject of forensic scientific examination, or hazardous, or contaminated, or by their nature, impracticable to transfer and store in the Procurator Fiscal's Office.

22.10.2 Different timescales apply depending on whether (a) the accused is in custody, (b) the accused is at liberty, or (c) the case is to be treated as a priority.

#### *22.10.3 Custody / Priority Cases*

22.10.3.1 Where the accused is in custody, or a case is to be treated as a priority, the Crown will request from the investigating agency all necessary outstanding productions immediately, on the same day as CFE.

22.10.3.2 As soon as practicable, but no later than 28 calendar days after CFE, the Crown will as a matter of best practice, where intimation has been received in writing that the defence solicitor is acting for the accused, provide the defence with the items and information listed above, at paragraph 22.8.1.

#### *22.10.4 Cases Where the Accused is at Liberty*

22.10.4.1 Where the accused is at liberty, the Crown will, as soon as possible, and not later than 3 working days after CFE, request from the investigating agency all necessary productions.

22.10.4.2 As soon as practicable, but no later than 28 calendar days after CFE, the Crown will as a matter of best practice, where intimation has been received in writing that the defence solicitor is acting for the accused, provide the defence with the items and information listed above, at paragraph 22.8.1.

### **22.11 Priority Cases**

22.11.1 Certain cases where the accused is on bail or ordained to appear will be treated by the Crown as if the accused were remanded in custody. This can apply to both summary and solemn cases.

22.11.2 Examples of such cases include murder cases, domestic assaults, and cases involving children or other vulnerable witnesses. This list is not exhaustive.

22.11.3 Where a case has been identified as a priority case, the timescales set out in paragraph 22.9.1 (for summary cases) or paragraph 22.10.3 (for solemn cases) should apply.

22.11.4 When requesting productions in priority cases, the Crown should highlight the case as being a priority.

### **22.12 Forensic Science Reports**

22.12.1 The timescales, for both summary and solemn cases (set out in paragraphs 22.9 – 22.13), are subject to any different timescales agreed between COPFS and SPA in respect of forensic science reports.

22.12.2 Early disclosure is particularly important in relation to forensic science reports. Consideration should be given to supplying a copy of any such report to the defence in early course. Arrangements should be in place to ensure that there is no significant time delay between the completion of a report and its transmission to the Fiscal. It may be possible, in certain circumstances, to receive reports in electronic format in order to speed up the process.

### **22.13 Productions Added by Section 67 Notice**

22.13.1 The use of section 67 notices should be avoided wherever possible. As a matter of best practice, section 67 notices should not be delayed to await details of all additional witnesses and productions that require to be added to the indictment. In such circumstances, it is preferable to utilise multiple notices to ensure that the defence are given early notice of the additional information.

22.13.2 If a notice is served less than 7 days before the Preliminary Hearing (not the trial diet), the productions or witnesses will only be added to the list on cause shown. It will be necessary, in such circumstances, to provide the Advocate Depute instructed for the Preliminary Hearing with a full explanation as to why the witness or production was not included at an earlier stage.