

## **Chapter 25: Sensitive & Intelligence Information**

### **25.1 General Principles**

25.1.1 The investigating agency must provide the Crown with details of all relevant information obtained or generated during the course of an investigation (Criminal Justice and Licensing (Scotland) Act 2010, sections 117 and 119). This will include information of a sensitive nature such as intelligence information. While such information must still be provided, care must be taken to ensure that it is properly safeguarded throughout the disclosure process.

25.1.2 Sensitive information is defined by Section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010 as information which if disclosed would be likely to:

- a) Cause serious injury, or death, to any person;
- b) Obstruct or prevent the prevention, detection, investigation or prosecution of crime; or
- c) Cause serious prejudice to the public interest.

25.1.3 Depending on the nature of the sensitivity of a piece of information, it may also be categorised as being highly sensitive. Highly sensitive information is defined as information which if disclosed would be likely to:

- a) Lead directly to the loss of life;
- b) Directly threaten national security; or
- c) Lead to the exposure of a CHIS (covert human intelligence source).

25.1.4 When an investigating agency submits sensitive information to the Crown, it will be given a protective marking under the Government Protective Marking Scheme (GPMS). Such information will, depending on the nature of its sensitivity, carry a marking of restricted or higher. Further guidance on the GPMS markings can be found in PF Eye

25.1.5 It should also be noted that where information does not fall within the definition of highly sensitive detailed above but carries a GPMS marking above restricted, it can only be provided to staff within COPFS with the appropriate security clearance level, who, depending on the level of the GPMS marking, may be the Federation Head, functional lead or other vetted member of COPFS.

25.1.6 Accordingly, the investigating agency will provide such information using the procedures detailed below for highly sensitive information.

25.1.7 Further guidance on the type of information that might be considered to fall within the definition of sensitive information is contained in Chapter 35 of this Manual (in particular, at paragraphs 35.3.10 and 35.5.3).

### **25.2 Provision of Sensitive Information in Summary Proceedings**

25.2.1 The Reporting Officer (or Reviewing Officer, if appointed) will decide whether information obtained or generated during the course of an investigation is relevant information, i.e. information that may have some bearing on the offence(s) under investigation, or any person being investigated, or on the surrounding circumstances, unless it is incapable of having any impact on the case.

25.2.2 Once the officer has determined that the information is relevant and therefore must be provided to the Crown, they will then assess whether the information falls within the definition of sensitive or highly sensitive information detailed above.

25.2.3 Any relevant information assessed as being sensitive will be referenced and, if appropriate, summarised in the remarks section of the SPR. If it is considered inappropriate to summarise the information in the remarks section of the SPR due to level of sensitivity then a separate subject sheet will be submitted to the appropriately vetted member of COPFS. If the information comes to the attention of the police after the submission of the SPR, such information will again be provided by subject report. The summary will include a description of the information and details of why the information is considered to be sensitive in nature. If the information has come from the Scottish Intelligence Database (SID), then a short description of the content of the sanitised log(s) should be included along with details of the 5x5x5 grading that has been applied to it and the date of its submission to the database.

25.2.4 Thereafter, if the accused pleads not guilty and the matter proceeds to trial, the investigating agency will submit all witness statements, S numbers and productions. This should include the sensitive information referenced in the SPR (or any subsequent subject sheet) where it is considered that it may have some bearing on the offence(s) under investigation, or any person being investigated, or on the surrounding circumstances, unless it is incapable of having any impact on the case. If the investigating agency does not submit any item of sensitive information, but the depute preparing the case or conducting the trial considers that the information should be submitted in order for it to be properly considered for disclosure, then the depute should liaise with the Reporting Officer to ensure that the information is submitted.

25.2.5 Once the relevant sensitive information has been provided to the Crown, it must be assessed to ascertain:

- a) Whether it is material information and therefore disclosable; and, if so
- b) Whether there is any reason in the public interest why the information should not be disclosed.

25.2.6 Further guidance in relation to these considerations is contained later in this chapter.

### **25.3 Provision of Highly Sensitive Information in Summary Proceedings**

25.3.1 If the Reporting (or Reviewing) Officer considers that the relevant sensitive information falls within the category of highly sensitive detailed above, then this information will be submitted to a member of staff with the appropriate security clearance level, who, depending on the level of the GPMS marking may be the Federation Head, functional lead or other vetted member of COPFS.

25.3.2 Similarly, if the sensitive information does not fall within the highly sensitive definition but carries a GPMS marking higher than RESTRICTED, e.g. CONFIDENTIAL or SECRET, then it will be treated as if it were highly sensitive information and will also be submitted to a member of staff with the appropriate security clearance, having regard to the level of the GPMS marking.

25.3.3 It should be noted that any information carrying a GPMS marking above RESTRICTED cannot be submitted to the PF electronically and must be submitted hard copy in line with the GPMS guidance.

25.3.4 As with all other relevant information provided to the Crown, any highly sensitive information provided must be assessed to ascertain:

- a) Whether it is material information and therefore disclosable; and, if so
- b) Whether there is any reason in the public interest why the information should not be disclosed.

25.3.5 Further guidance in relation to these considerations is contained later in this chapter.

## **25.4 Provision of Sensitive Information in Solemn Proceedings**

25.4.1 Once appointed, using the 3 stage assessment process set out in section 3.9 of this Manual, the Reviewing Officer will decide whether information obtained or generated during the course of an investigation is relevant information, i.e. information that may have some bearing on the offence(s) under investigation, or any person being investigated, or on the surrounding circumstances, unless it is incapable of having any impact on the case.

25.4.2 Once the Reviewing Officer has determined that the information is relevant and therefore must be provided to the Crown, they will then assess whether the information falls within the definition of sensitive or highly sensitive information detailed above.

25.4.3 Sensitive information will then be listed on the Sensitive Schedule and provided to the Crown as set down in Chapters 16 and 35 of this Manual. Thereafter it will be assessed by the precognoscer in close consultation with the Solemn Legal Manager following the processes set down in Chapter 37 of this Manual.

## **25.5 Provision of Highly Sensitive Information in Solemn Proceedings**

25.5.1 If the Reviewing Officer considers that the relevant sensitive information falls within the category of highly sensitive detailed above, then this information will be listed on the Highly Sensitive Schedule and provided to the Crown as set down in Chapters 16 and 36 of this Manual. Thereafter it will be considered by the Federation Head, functional lead or other vetted member of COPFS in terms of Chapters 36 and 37 of this Manual.

## **25.6 Assessing Sensitive & Highly Sensitive Information for Disclosure**

25.6.1 Relevant sensitive and highly sensitive information must be considered for disclosure in the same way as non-sensitive information. If the information forms part of the prosecution case or might either materially weaken the Crown case or materially strengthen the defence case it must be disclosed to the defence unless there is a reason in the public interest why such information should not be disclosed.

25.6.2 If sensitive information is not material (i.e. is not likely to materially weaken the Crown case or materially strengthen the defence case) or does not otherwise form part of the prosecution case (i.e. is not information that the Crown will be leading at trial) there is no requirement to advise the defence of the existence of that information. The only exception to this is in relation to criminal history record information.

25.6.3 As Criminal History Information is considered to be sensitive personal data under the Data Protection Act 1998, it will always be considered to fall within the definition of sensitive information detailed above. However, as stated in **Holland v HMA**, previous convictions and outstanding charges are a class of information that is always disclosable. If a witness has a criminal history record and the Crown considers that parts of the record are not material, and therefore not disclosable, the information can be redacted. However, such redaction must be obvious on the face of the disclosed record. If the full record is considered to be not material and therefore not disclosable, the defence must still be advised of the existence of the record in order that they can properly consider whether to challenge the Crown's determination of non-materiality.

## **25.7 Submission of Highly Sensitive Schedules to Crown Office**

25.7.1 Where the case is proceeding on petition and the information is highly sensitive, as stated in section 36.6 of this Manual, all highly sensitive schedules should be submitted, hard copy in line with the GPMS marking scheme, to the Director of Serious Casework, accompanied with a note setting out whether any of the information is disclosable.

25.7.2 Where the Federation Head, functional lead or other vetted member of COPFS is seeking to withhold information that is considered to be material, a report for Crown Counsel's instructions should also be submitted to the Director of Serious Casework along with the schedule. Further guidance on the content of the report is contained below in paragraph 25.8.11.

## **25.8 Non-Disclosure of Material Information**

25.8.1 If relevant information forms part of the prosecution case or is otherwise considered as material information (i.e. information that might materially weaken the Crown case or materially strengthen the defence case), then it must be disclosed to the defence, unless there is a reason in the public interest why such information should not be disclosed.

25.8.2 Such a consideration will only arise where the relevant information is sensitive or highly sensitive. There should be no circumstances in which it would be in the public interest to withhold non-sensitive information.

### Information forming part of the prosecution case

25.8.3 If information of a sensitive or highly sensitive nature is only disclosable because it forms part of the prosecution case (i.e. the Crown intends to lead it in evidence at trial in support of the prosecution case) and is not otherwise information that might weaken the Crown case or strengthen the defence case, it cannot be withheld from the accused. The only options available to the Crown in such circumstances are to either (a) disclose the information, notwithstanding the prejudice to the public interest or (b) not use the information at trial.

25.8.4 Determining the appropriate option is a careful balancing exercise between the competing public interests of protecting the sensitive (or highly sensitive) information and that of maintaining the prosecution against the accused.

25.8.5 In solemn proceedings, Crown Counsel's instructions must be obtained on which public interest should take precedence, i.e. on whether the sensitive information should be disclosed or the proceedings should be discontinued (or a

particular charge, where the information relates to only part of the charges on the indictment). Where the information is material and falls to be disclosed then instructions are required before any decision is taken to disclose the information concerned.

25.8.6 In summary proceedings, the Summary Legal Manager should seek the instructions of the Functional Lead, Summary on whether to disclose the sensitive information or discontinue proceedings (or a particular charge, where the information relates to only part of the charges on the complaint). In cases of doubt or complexity, the Functional Lead, Summary should submit a report to the Director of Serious Casework for Crown Counsel's instructions. When submitting the report, it is essential that the method of transmission is consistent with the requirements of the GPMS guidance, e.g. if the information carries a marking above RESTRICTED the report must not be submitted electronically and should instead be submitted hard copy.

#### Information that materially weakens the Crown case or materially strengthens the defence case

25.8.7 Non-disclosure of *material* information should only arise in exceptional cases and will occur where the information is covered by public interest.

25.8.8 *Material* information may need to be withheld where there is a genuine concern that the disclosure of a piece of *material* information would:

- a) Cause serious injury, or death to any person;
- b) Directly threaten national security;
- c) Obstruct or prevent the prevention, detection, investigation or prosecution crime; or otherwise
- d) Cause serious prejudice to the public interest

25.8.9 In terms of section 122 of the 2010 Act, "sensitive information" is defined in respect of solemn cases as an item of information that if it were disclosed there would be 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 otherwise
- c) causing serious prejudice to the public interest.

This section provides that where information falls within the above categories which may be relevant but is not material then the details of that information need not be disclosed by the prosecutor. In essence this confirms that the sensitive (or highly sensitive) schedules will not be disclosed to the defence and therefore only sensitive information which meets the materiality test will be considered for disclosure. The existence of potentially relevant sensitive information which does not meet the materiality test will not be revealed to the defence.

#### Non-Disclosure of Material Information

25.8.10 The overriding obligation in respect of the criminal proceedings is to ensure that the accused has a fair trial. If the accused cannot have a fair trial without the disclosure of the information, then it must either be disclosed or the proceedings must be discontinued. Accordingly, any decision regarding the withholding of such information must, in all cases, be taken by Crown Counsel.

#### Reporting to Crown Counsel for Instruction re Non-Disclosure

25.8.11 If, after close consultation with the relevant legal manager, an item of information is identified as being material and therefore disclosable as set down in section 121 of the 2010 Act and it is considered that disclosure would not be in the public interest for any of the reasons specified above, the legal manager should immediately refer the matter to the Federation Head or functional lead (High Court/Sheriff and Jury) for consideration of referral to the Director of Serious Casework for an application to be made in terms of section 145 of 2010 Act, to prevent or restrict disclosure.

25.8.12 If the Federation Head or functional lead (High Court/Sheriff and Jury) agrees that the item of information is material and that there is a likely prejudice to an important public interest if it were to be disclosed, then the Federation Head or functional lead (High Court/Sheriff and Jury) should then report the matter to the Director of Serious Casework for the attention of Crown Counsel. The report should include:

- i) A brief summary of the case, including any known line of defence;
- ii) Details of the item of information, setting out why the information is material and the nature of the likely prejudice to an important public interest; and
- iii) An appropriate recommendation on whether:
  - a. To discontinue proceedings completely or in relation to a particular charge (or accused);
  - b. The information could be disclosed or partly disclosed in such a way that would protect the public interest while still ensuring that the accused received a fair trial, e.g. by redacting or removing parts of the information or by provides extracts or summaries of the information; or
  - c. To seek to invoke public interest immunity.

25.8.13 When submitting the report, it is essential that the method of transmission is consistent with the requirements of the GPMS guidance, e.g. if the information carries a marking above RESTRICTED the report must not be submitted electronically and should instead be submitted hard copy.

25.8.14 Where the Crown is not prepared to discontinue proceedings it is not entitled unilaterally to withhold the information from the defence. The question of whether the information should be disclosed will require to be decided by the Court in its determination of a request for restricted disclosure or non-disclosure in terms of section 145 of the 2010 Act. See for example **Hemming v HM Advocate**, (1997 J.C.), in which the court considered the public interest in disclosure of witness statements and also **Friel v Chief Constable of Strathclyde**, (1981 S.C. 1) and **Parks v Tayside R.C.** (1989 S.C. 38) in which the courts sought to balance various factors in terms of the public interest in the disclosure or otherwise of information.

## 25.9 Non-Disclosure in the Public Interest

25.9.1 Where information meets the materiality test as set down in section 121 of the 2010 Act, the Crown must determine whether there are any reasons in the public interest why that information should not be disclosed to the defence.

25.9.2 If the Crown is satisfied that such reasons exist, then the Crown should not disclose the information meantime and should apply to the court for an order under section 145 of the 2010 Act to prevent or restrict disclosure. **All applications for an order to withhold or restrict disclosure of information must be approved by the Director of Serious Casework.**

25.9.3 Depending on the nature or type of information that the Crown is seeking to withhold the following orders should be sought :

- i) Where disclosure of the nature or type of information that the Crown is seeking to withhold would not compromise the public interest that the Crown is seeking to protect under a non-disclosure order, then only a **non-disclosure order** under section 145 of the 2010 Act should be sought (This will be made on Form 7A.6 –C in Act of Adjournal (Criminal Procedure Rules Amendment No.4) (Disclosure) 2011).
- ii) Where disclosure of the nature or type of the information that the Crown is seeking to withhold is likely to cause a real risk of substantial harm or damage to the public interest that the Crown is seeking to protect, then a **non-disclosure order** under section 145) **and** an **exclusion order** under section 142(2)(b) or (3) of the 2010 Act (This will be made on Form 7A.6 – B in Act of Adjournal (Criminal Procedure Rules Amendment No.4) (Disclosure) 2011 ) should be sought; and
- iii) Where even the fact that the Crown is seeking to withhold information is likely to cause a real risk of substantial harm or damage to the public interest that the Crown is seeking to protect, then a **non-disclosure order** under section 145, an **exclusion order and a non-notification order** also under section 142 (This will be made on Form 7A.6 –A in Act of Adjournal (Criminal Procedure Rules Amendment No.)(Disclosure) 2011) should be sought. It should be noted that this combination can only be sought in **solemn** cases.

### **Non-Disclosure Order**

25.9.4 Application for a non-disclosure order should be considered in any case, where there is information which the Crown wishes to withhold in the public interest, but the existence of the nature or type of information would not in itself compromise the public interest which the Crown is seeking to preserve.

25.9.5 A non-disclosure order may be applied for in any solemn or summary case and unless it is impractical to do so the application should be assigned to the same justice of the peace, sheriff or as the case may be, judge as has been assigned to the trial diet in those proceedings (Criminal Justice and Licensing (Scotland) Act 2010 section 158(3) and (4)(a)). This will, where possible, ensure that the fairness of the non-disclosure order can be kept under review throughout the trial.

25.9.6 Where the application relates to appeal proceedings which are continuing then the application should be assigned by the court, to the same judge as has been or is to be assigned to those proceedings (Criminal Justice and Licensing (Scotland) Act 2010 section 158(3) and (4)(b)).

25.9.7 When an application is made under section 141 of the 2010 Act, the court must consider whether it is possible to disclose, or partly disclose, the information in such a way that the public interest remains protected and the disclosure would still enable the accused to receive a fair trial. Where proceedings have concluded, consideration will be given to whether the accused would have been able to receive a fair trial in light of the non-disclosure.

25.9.8 Ways in which an item of information can be disclosed or partly disclosed include:

- i) Providing the information after removing or obscuring parts of it, whether by redaction or otherwise.
- ii) Providing extracts or summaries of the information or part of it.

25.9.9 Where an application to withhold information has been made and is refused by the court, or part refused, the Crown must either disclose the information concerned or discontinue proceedings in respect of the charge or charges to which that item of information relates. It is however also open to the Crown to appeal against the refusal or part refusal of the application and the refusal of an exclusion or non-notification order. Pending the outcome of any such appeal, the Crown must not disclose the item of information to which the appeal relates.

25.9.10 Where an application for a non-disclosure order is being considered a report should be prepared and submitted to the Director of Serious Casework to seek approval for such an order to be sought.

25.9.11 The report for the Director of Serious Casework must contain a summary of the charges and circumstances of the case, the procedural history of the case, the nature and classification of the information that the Crown is seeking to withhold and details of the public interest that the Crown is seeking to protect. Details of whether the Crown case can proceed without this particular piece of information and whether it is believed that the accused can still receive a fair trial even if the information is not disclosed should also be included in this report. Recommendations in relation to whether it is felt appropriate to apply for an exclusion order and or non-notification order should also be included. Full details on these orders are contained below.

25.9.12 Thereafter instructions will be issued by Director of Serious Casework in respect of whether to proceed to make the application for non-disclosure and this will be allocated to an appropriately vetted member of staff to proceed with in court.

### **Exclusion Order**

25.9.13 Application for an exclusion order should be considered where there is information which the Crown wishes to withhold in the public interest, **and** the existence of the nature or type of information is likely to a cause real risk of substantial harm or damage to the public interest that the Crown is seeking to protect,

25.9.14 An exclusion order may be applied for in any case where a non-disclosure order is also being applied for and unless it is impractical to do so this will be assigned by the court, to the same justice of the peace, sheriff or as the case may be judge as has been assigned to the trial. This will, where possible, ensure that the fairness of the non-disclosure order can be kept under review throughout the trial.

25.9.15 If after giving the prosecutor the opportunity to be heard on the application the court is satisfied that the conditions in section 144 (5) are met the court may make an exclusion order.

25.9.16 The conditions to be considered by the court are

- i) that disclosure to the accused of the nature of the information to which the application for the section 145 order relates would be likely to cause a real risk of substantial harm or damage to the public interest.
- ii) that, having regard to all the circumstances the making of an exclusion order would be consistent with the accused's receiving a fair trial.

25.9.17 Where an application for an exclusion order has been made and is refused by the court, the Crown must then consider whether to proceed with the non-disclosure order application. The effect of the refusal of the exclusion order will be



that the accused will be entitled to be present at the hearing to determine the non-disclosure order. It may be that the nature and type of the information that the Crown is seeking to withhold is such that it could be relayed to the court without full details being released. This would allow consideration of the non-disclosure order to be made without full details being relayed to the accused at the hearing. This will be dependent on the classification of the information in question and full instructions should be sought from the Director of Serious Casework before proceeding to a non-disclosure hearing where an exclusion order has been refused.

25.9.18 Where an application for an exclusion order has been made and is granted by the court then consideration will be given to the content of the non-disclosure order application. The accused will not be entitled to be present at such a hearing.

### **Non-Notification Order and Exclusion Order**

25.9.19 Application for an non-notification order and exclusion order should be considered in **solemn** cases where the circumstances of even the fact that the Crown is seeking to withhold information is likely to cause a real risk of substantial harm or damage to the public interest that the Crown is seeking to protect.

25.9.20 A non-notification order and exclusion order may be applied for in any **solemn** case where a non-disclosure order is also being applied for. This application will be assigned by the court, unless it is impractical to do so, to the same sheriff or judge as has been assigned to the trial. This will, where possible, ensure that the fairness of the non-disclosure order can be kept under review throughout the trial.

25.9.21 In cases where the information is so sensitive that consideration is being given to making an application for a non-notification and exclusion order then this must be authorised by the Director of Serious Casework. The case should be referred to the Federation Head or functional lead (High Court/Sheriff and Jury) in the first instance who will arrange for a report in the terms outlined at 25.9.11 above to be submitted to the Director of Serious Casework as soon as possible.

25.9.22 In dealing with applications for non-notification, exclusion and non-disclosure orders the court may appoint a person referred to as special counsel, to represent the interests of the accused in relation to the determination of the application. The underlying test for the court is that it is considered that the appointment of special counsel is necessary to ensure that the accused receives a fair trial. Whilst there is no provision within the legislation for the Crown to pre-empt an appointment of special counsel, it should be borne in mind that if the situation arises and there is no mention of special counsel then it would be prudent to bring the provision to the attention of the court. It would not be in the public interest to allow such a hearing to go ahead without the accused's article 6 rights being considered as this may have a detrimental effect on the outcome of any case.

### **Orders Preventing or Restricting Disclosure**

#### **Appeal and Review of Orders**

25.9.23 Where an application has been made to withhold information and this is refused or part refused then it is open to the Crown to appeal against the refusal or part refusal of the application and also any refusal of an exclusion or non-notification

order. Pending the outcome of any such appeal the Crown must not disclose the item of information to which the appeal relates.

25.9.24 Appeals may be made by the **Crown** to the High Court against–

- a) the making of a section 145 order under section 145(7) – non disclosure order partly refused,
- b) the making of a section 146 order,
- c) the making of a restricted notification order,
- d) the making of a non-attendance order,
- e) the refusal of an application for a non-notification order,
- f) the refusal of an application for an exclusion order, or
- g) the refusal of an application for a section 145 order.

25.9.25 Appeals may also be made by the **accused**, to the High Court against the making of –

- a) an exclusion order under section 144 (4),
- b) a section 145 order,
- c) a section 146 order, or
- d) a non-attendance order.

25.9.26 Appeals may be made by the appropriate **Secretary of State** to the High Court against –

- a) the making of a section 146 order under section 146 (11)
- b) the refusal of an application for a restricted notification order,
- c) the refusal of an application for a non-attendance order, or
- d) the refusal of an application for a section 146 order.

25.9.27 Where special counsel has been appointed in relation to an application for a non-notification order, appeals may be made by **special counsel** to the High Court against the making of –

- a) the non-notification order, or
- b) a section 145 order in relation to the same item of information.

25.9.28 Where special counsel has been appointed in relation to an application for a restricted notification order, appeals may be made by **special counsel** to the High Court against the making of –

- a) the restricted notification order, or
- b) a section 146 order in relation to the same item of information.

25.9.29 The accused is entitled to be heard in an appeal against the making or refusal of any of the orders mentioned above unless the court has made an order excluding them or restricting or withholding notification of the hearing.

25.9.30 An application for a review of a non-disclosure order may be made by the prosecutor, or as the case may be, special counsel or the accused where the court has made a non-disclosure order, and during the relevant period the prosecutor or accused becomes aware of information that was unavailable to the court at the time when the order was made.

25.9.31 The same persons who were entitled to be heard on the application for the non-disclosure order are entitled to be heard on the application for review. The exception being where a non-notification order has been granted in relation to the non-disclosure order which is under review. In this case the court may make an order prohibiting notification being given to the accused of the application for review.

25.9.32 Where an exclusion order was granted in relation to the non-disclosure order which is under review the court may, where the prosecutor or, as the case may be, special counsel or the accused applies for the review, exclude the accused from the review.

25.9.33 If the court is not satisfied that the following conditions are met –

- a) that the prosecutor is required in terms of the legislation to disclose the item of information
- b) that the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused or the information would materially strengthen the accused's case,
- c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
- d) that withholding the item of information would be consistent with the accused's receiving a fair trial, and
- e) that the public interest would be protected only if a non-disclosure order were to be made

may either recall the non-disclosure order or recall the non-disclosure order and make an order requiring disclosure to the specified extent.

25.9.34 An application may be made for a review of an order issued by the Court under section 146 – preventing or restricting disclosure providing that during the relevant period the Secretary of State, prosecutor, special counsel or accused becomes aware of information that was unavailable to the court at the time the order was made.

25.9.35 Where a restricted notification order was granted in relation to the order which is under review the court may, where the Secretary of State or, as the case may be the prosecutor or special counsel applies for a review, make an order prohibiting notification of the application for review being given to the accused.

25.9.36 Where a non-attendance order was granted in relation to the order which is under review the court may, where the Secretary of State, or as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused for the review.

25.9.37 The court if not satisfied that the following conditions are met –

- a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
- b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and
- c) that the public interest would be protected only if a section 146 order preventing the disclosure of the information were to be made,

may recall the order which is under review, or recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.

25.9.38 Where an order under section 145 or 146 of the 2010 Act has been made, the court must from time to time consider in relation to each order whether, having regard to the information of which the court is aware, the order continues to be appropriate. If the court considers that the order concerned may no longer be appropriate the court must appoint a hearing to review the matter.

25.9.39 Intimation of and attendance at such a hearing will be dealt with in the same manner as the original hearing at which the order was made.

## **25.10 Disclosure of Witness Statements**

25.10.1 As stated in **Sinclair v HMA**, witness statements of those witnesses that the Crown intends to lead at trial, are a class of information which is always disclosable, i.e. will always be considered to be information that may materially weaken the prosecution case or materially strengthen the defence case.

25.10.2 However, in terms of COPFS policy and the Crown Practice Statement on Disclosure of Information in High Court Cases, **all** witness statements in the possession of the Crown are disclosed.

25.10.3 If a witness statement relates to a witness whom the Crown intends to lead at trial and is therefore disclosable in terms of **Sinclair v HMA**, but it is considered that its disclosure might prejudice an important public interest, then the process detailed above in section 25.8 should be followed.

25.10.4 Where the witness statement contains information of a confidential or sensitive nature which is either (a) irrelevant to the issues in the case; or (b) relevant to the issues in the case but does not contain any information which falls 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 then it should be withheld if its disclosure would prejudice an important public interest consideration. As the information is *not material and therefore not disclosable* then Crown Counsel's instructions will not be required.

25.10.5 In summary cases, the Summary Legal Manager should consider this. In cases of doubt Crown Counsel's instructions should be sought on withholding the statement.

25.10.6 In solemn cases, Crown Counsel's instructions should routinely be sought via the disclosure page at the stage the case is reported to Crown Office.

25.10.7 Further guidance in relation to the disclosure and withholding of witness statements is contained in Chapters 4 and 13 of this Manual.

## **25.11 Sensitive Intelligence Information held by another Investigating Agency**

25.11.1 Where the police become aware that another police force or investigating agency holds intelligence information relevant to their investigation which might materially weaken the prosecution case or materially strengthen the defence case, the Reviewing Officer will contact the other force/ agency to obtain the information. Thereafter, it will be revealed in the usual way detailed above.

25.11.2 However, in certain circumstances the security level of the intelligence will prohibit the other investigating agency from providing the information to the police. In such circumstances, the police will formally request that the other agency submit the information directly to the Crown, at the appropriate security clearance level, usually the Federation Head, or functional lead (High Court/Sheriff and Jury/Summary).. The Federation Head or functional lead (High Court/Sheriff and Jury/Summary) should

also be advised of the fact that the other investigating agency is in possession of intelligence information, the non-disclosure of which may impact on the Crown's ability to ensure that the accused has a fair trial.

25.11.3 Where the other investigating agency declines to reveal the information directly to COPFS on a request from the police, then the Federation Head or functional lead (High Court/Sheriff and Jury/Summary) should, if considered appropriate, contact the other investigating agency directly and arrange for the information to be revealed and considered by the Crown.

## **25.12 Further Guidance in relation to particular forms of Intelligence Information**

25.12.1 Guidance in relation to the revelation and disclosure of intelligence information is contained in Annex N of this Manual.