

Chapter 3: The Obligation of the Police and Other Investigating Agencies to Submit Relevant Information to the Crown

3.1. The Law

3.1.1 In order for the system of disclosure to function correctly, the Crown, the police and other investigating agencies must fulfil certain fundamental obligations:

“Ultimately, the correct functioning of any system of disclosure depends on the diligence and sense of duty of everyone involved, starting with the police and going on up through the Procurator Fiscal service to the Crown Office and the Lord Advocate herself.” McDonald [PC] at para 61.

3.1.2 The police and other investigating agencies are under an obligation to submit **all relevant information** to the Crown (Criminal Justice and Licensing (Scotland) Act 2010 s116). The court in **Smith v HMA** (1952 JC 66) at pages 71 and 71 set out that it is the duty of the police;

“to put before the Procurator-fiscal everything which may be relevant and material to the issue of whether the suspected party is innocent or guilty. We repeat, it is not for the police to decide what is relevant and material but to give all the information which may be relevant and material.”

This is affirmed in the Criminal Justice and Licensing (Scotland) Act 2010 which sets out the statutory obligation, as follows:

In relation to solemn cases, section 117 provides that:

“(1) where in a prosecution –

- (a) an accused appears for the first time on petition, or
- (b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) as soon as practicable after the appearance, the investigating agency must provide the prosecutor with *details* of all information that may be relevant to the case for or against the accused that the agency is aware of that was obtained in the course of investigating the matter to which the appearance relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.”

In relation to summary cases, section 119 provides that:

“(1) this section applies where a plea of not guilty is recorded against an accused charged on summary complaint.

(2) as soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.

(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.”

It should be noted that in both summary and solemn cases this obligation on the investigating agency to submit relevant information is a continuing duty until the conclusion of proceedings against the accused (Criminal Justice and Licensing (Scotland) Act 2010 s118 (Solemn) and s120 (Summary)). Therefore if during proceedings the investigating agency becomes aware of further information that may be relevant to the case for or against the accused they must inform the Procurator Fiscal of the existence of this information and, where required, provide him with details of it. Proceedings are taken to be concluded if:

- (a) a plea of guilty is recorded against the accused,
- (b) the accused is acquitted
- (c) the proceedings against the accused are deserted simpliciter
- (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
- (e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal, (in which case there are provisions for disclosure during live appeals – see chapter 26 herein)
- (f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or
- (g) the complaint/ indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

Clearly, in reporting the results of their investigation, the police and other investigating agencies must exercise a power of selection. Any reporting officer is not the judge of what is relevant and material and will tend to err on the safe side. If in doubt, COPFS should be consulted. A reporting officer will also remember that the result of the investigations must be put fairly before COPFS in order that they may decide whether or not to prosecute.

3.1.3 In the course of their investigation the police and other investigating agencies will retain information which *may be relevant*, which includes anything that appears to the police to have some bearing on any offence under investigation, or any person being investigated, or on the surrounding circumstances, unless it is incapable of having any impact on the case. Thereafter, the police will submit to the Procurator Fiscal details of all relevant information.

3.1.4 A failure on the part of the police or other investigating agencies to fulfil this obligation may result in a miscarriage of justice and/or breach of Article 6. For examples of cases in which non-disclosure of information by the police to the Crown gave rise to difficulties, see **HMA v. Johnston** (2006 SCCR 246) and **HMA v G.B.** (2006 SCCR 692).

3.2. Policy

3.2.1 Notwithstanding the disclosure duty on the Crown to disclose all statements of all witnesses on the Crown and defence lists, the police and other investigating agencies must **submit** to the Crown **all** statements held by them in respect of a case. Where multiple statements are taken from one witness, **all** of the statements taken **must** be submitted, regardless of whether the information contained in the statement is also included in later statements taken from the same witness. It includes statements which are recorded only in a police officer's notebook as well as statements which are recorded in other formats. As a matter of routine, the police will

submit electronic typed versions of original manuscript statements obtained from witnesses. Unless specifically requested by the Crown, these original manuscript statements will **not** be submitted. Further detail in relation to the submission and disclosure of manuscript statements is included at Chapter 4.3.

3.2.2 There is no general requirement for the police and other investigating agencies to submit to the Procurator Fiscal 'door-to-door' enquiry forms or pro forma questionnaires used to gather information and/or evidence at an early stage of the investigation. However any enquiry form or pro forma questionnaire from a witness who then provides a statement to the police or another investigating agency, which is submitted to the Procurator Fiscal and disclosed to the defence, should be submitted to the Procurator Fiscal;

3.2.3 Where 'door-to-door' enquiry forms or pro forma questionnaires exist and they are not from a witness from whom a witness statement is subsequently taken, the Reporting Officer must discuss with the Solemn Legal Manager whether any or all of this information should be submitted to the Crown. **(See Chapter 27, in particular paragraphs 27.2.2 – 27.2.5. and Chapter 16, paragraphs 16.4.1 – 16.4.3.)**

3.2.4 Where there is an appeal following conviction, for example, in additional evidence appeals, the Procurator Fiscal should remind the Reporting Officer to further consider, in light of the grounds of appeal, whether or not there is information which exists from individuals who are not witnesses, which should be submitted to the Crown. As stated earlier, the police or other investigating agencies are obliged to provide this information under s118 and 120 of the Criminal Justice and Licensing (Scotland) Act 2010.

3.2.5 Where an application is made by COPFS under the Double Jeopardy (Scotland) Act 2011 it is important not to forget about disclosure obligations. The principles and procedures are laid down in part 6 of the Act and further detail is provided in Chapter 43. These include an obligation on the prosecutor to review and disclose all information of which the prosecutor is aware that relates to the double jeopardy application.

3.2.6 The fact that the information in question is voluminous is not a good reason for not submitting relevant information to the Crown. If the volume of information which should be submitted to the Crown poses practical difficulties, the police and other investigating agencies should discuss practical arrangements for consideration of the information by the Crown with the Solemn Legal Manager. For example, depending on the circumstances, it may suffice that the Procurator Fiscal is given access to the relevant information in the hands of the police. **(See Chapter 27, in particular paragraphs 27.2.1 – 27.2.7, and Chapter 16, paragraphs 16.6.7 – 16.6.8.)**

3.2.7 Where there are large amounts of information being made available increasingly the Court will request for that information to be scanned in and provided to Judges in electronic format. This should be considered when productions are initially being ingathered and sent to the Crown.

3.2.8 **In order to ensure that the Crown is meeting its disclosure obligations, the Crown must be satisfied that the police and other investigating agencies have submitted details of all relevant information held by them.** Further

guidance is contained in Chapter 16 of this Manual about specific procedures in place for High Court cases to ensure this.

3.3 Reasonable Lines of Enquiry

3.3.1 An essential element of the duty of disclosure is the obligation on the police or other investigating agency to pursue all reasonable lines of enquiry, including any line of enquiry that might point away from the accused as the perpetrator of the offence.

3.3.2 What constitutes a reasonable line of enquiry will be dependant upon the circumstances of each individual investigation. If a line of enquiry is relevant to the offence then it is reasonable that further investigation should be undertaken, however it is important that the police or other investigating agency do not embark on lines of enquiry which are remote to the case. . The officer in charge of any investigation, and where appropriate under the direction of the Crown, has responsibility for determining what is a reasonable line of enquiry and therefore pursuable.

3.3.3 The Crown also has an obligation to ensure that all reasonable lines of enquiry are pursued and, accordingly, may instruct the police or other investigating agency to carry out particular lines of enquiry where this has not already been identified (**McDonald [PC]** at para 60). Additionally where the accused puts forward a line of defence at judicial examination there is a requirement that the Crown will secure the investigation, to such extent as is reasonably practicable, of any ostensible defence disclosed in the course of the examination (Section 36(10) Criminal Procedure (Scotland) Act 1995).

3.3.4 If there is any doubt as to the appropriateness of a particular line of enquiry in High Court cases then the issue should be raised for consideration and instruction from the Director of Serious Casework. As part of this process, any decisions taken in respect of a particular line of enquiry in any investigation, must be accurately retained and recorded, including decisions not to pursue a particular line, along with reasons for any particular decision.

3.3.5 Connected to the requirement to pursue all reasonable lines of enquiry, the police and other investigating agencies also have a duty to identify all information that could possibly be exculpatory. The officer in overall charge of any investigation has responsibility for ensuring that all potentially exculpatory information is identified and provided to the Crown, e.g. the existence of witnesses who speak in support of the accused's position or otherwise undermine the prosecution case.

Intelligence

3.3.6 The duty on the police to submit relevant material extends to intelligence information.

3.3.7 During any investigation, particularly a major inquiry, the SIO or other investigators may, during the initial phase of the investigation where there is no immediate suspect, explore hypotheses as to the persons responsible. This may mean the ingathering of numerous items of information. Only once clear lines of enquiry are established should the police begin to focus on and consider the need for revelation of **relevant material**. This principle is set out in *Smith v HMA*: '*Clearly, in reporting the results of their investigation, the police must exercise a power of selection. It would be absurd to suggest that all their results should be submitted*' and '*to put before the Procurator-fiscal everything which may be relevant and*

material to the issue of whether the suspected party is innocent or guilty. We repeat, it is not for the police to decide what is relevant and material but to give all the information which may be relevant and material.'

List of Persons of Possible Interest to the Enquiry

3.3.8 There has been a recently established practice, particularly in respect of homicide cases, of the defence requesting disclosure of lists of all suspects and/or persons of possible interest to the enquiry. The general rule of thumb in relation to such requests is to refuse them on the basis that COPFS is not the haver of any such list and routinely no such list in fact exists. There is no obligation on the prosecutor to instruct the police to create such a list for the purposes of disclosure.

3.3.9 The responsibility and duty rests with the police to assess the extent to which they will trace, investigate and eliminate individuals identified by way of intelligence as of possible interest to an enquiry.

3.3.10 If following the trace, investigate and eliminate process the SIO deems any of the named persons to be potentially relevant to the investigation then this information would be revealed to the prosecutor by way of the appropriate disclosure schedule, most likely the Highly Sensitive Schedule and then considered by the prosecutor for disclosure in terms of materiality. It is unlikely however that such information would exist or be revealed in list format. If however such a list was revealed and considered for disclosure it is critical that the necessary redactions are made prior to disclosure being made to ensure that any non-material, sensitive information is removed.

3.3.11 Persons of possible interest identified via intelligence and then subsequently excluded by the police are unlikely to meet either the relevance or materiality tests. For example a person named via intelligence as a person of potential interest to the enquiry may following investigation be found to have been in custody at the time of the offence.

3.4 The Role of the Reporting Officer

3.4.1 In general terms, the Reporting Officer has overall responsibility for the conduct of an investigation unless a Senior Investigating Officer (SIO) has been appointed.

3.4.2 Depending on the scale of the enquiry, the Reporting Officer will carry out a range of differing functions and have overall responsibility for:

- Conducting all lines of enquiry;
- Recording and retention of all information;
- Production management;
- Compilation of SPR;
- Ensuring timeous submission of statements and productions to the Crown (Criminal Justice and Licensing (Scotland) Act 2010 s117 (solemn) and s119 (summary));
- Submission to the Crown of any additional information (Criminal Justice and Licensing (Scotland) Act 2010 s118 (solemn) and s120 (summary)
- Conducting enquiries as directed by the Crown
- Reviewing all relevancy decisions.

3.4.3 Where the case is proceeding on petition and an SIO has not been appointed, the Reporting Officer will also have responsibility for preparing and submitting all schedules in respect of the case and providing undertakings in relation to revelation.

3.5 The Role of the Senior Investigating Officer

3.5.1 An SIO will be appointed in major crime investigations and will have responsibility for the direction and conduct of that investigation. The SIO will be accountable for the investigative strategies and associated policy decisions.

3.5.2 In relation to disclosure, the SIO will also have particular responsibilities in relation to:

- Appointing a dedicated Reviewing Officer;
- The recording and retention of information obtained or generated during the investigation;
- Assessing whether such information is relevant; and
- Ensuring that the all information that may be relevant is revealed to COPFS.

3.5.3 When appointing a Reviewing Officer, the SIO must decide:

- i) If a dedicated Reviewing Officer is required, or whether the role can be taken on by another officer already involved in the investigation;
- ii) Whether a particular Reviewing Officer is required for intelligence information; and
- iii) Whether multiple Reviewing Officers are required.

3.5.4 Where multiple Reviewing Officers are appointed, the SIO must determine which of these officers will take on the role of Principal Reviewing Officer, who will have overall responsibility for the revelation of information to the Crown.

3.5.5 The Reviewing Officer must liaise closely with the SIO to ensure that the revelation responsibilities have been timeously, effectively and efficiently discharged, as the SIO retains overall responsibility for ensuring that the duties relating to revelation and disclosure are properly carried out.

3.5.6 The SIO must also ensure that all reasonable lines of enquiry, as specified in section 3.3, are investigated and that the outcomes of these enquiries are carefully recorded.

3.5.7 Finally, the SIO has responsibility through the Reviewing Officer for ensuring that all material which may be relevant, which has been obtained or generated during the investigation is revealed to the Crown and listed on the appropriate schedule.

3.6 The Role of the Reviewing Officer

3.6.1 An SIO will determine whether a dedicated Reviewing Officer should be appointed to take on responsibility for reviewing, assessing and preparing schedules and for revelation to the Crown of all information that may be relevant.

3.6.2 Where the SIO does not consider it necessary to appoint a dedicated Reviewing Officer, this role will be appointed to another officer already involved in the investigation, usually the Reporting Officer.

3.6.3 All Reviewing Officers, whether dedicated or carrying out a dual role, have responsibility for carrying out a 3-stage assessment process of all information obtained or generated during an investigation as set down in section 3.9 below.

3.6.4 After the 3-Stage assessment process has been conducted, the Reviewing Officer must ensure that all information that may be relevant is recorded in one of the following categories of schedule:

- i) Non-sensitive schedule;
- ii) Sensitive schedule; or
- iii) Highly sensitive schedule.

Full guidance in relation to schedules is contained in Chapters 16 and 34-37 of this Manual.

3.7 Dedicated Reviewing Officers

3.7.1 Dedicated Reviewing Officers will usually be appointed where it is anticipated that a large volume of information will be obtained, or where the investigation is complex or detailed. It is anticipated that dedicated reviewing officers will be appointed in relation to all homicide investigations.

3.7.2 In particular, the dedicated Reviewing Officer will have responsibility for:

- Identifying and ensuring that there is a record of all information obtained or generated during the investigation;
- Identifying if there are any linked or parallel investigations within the force/agency or within other forces/agencies and liaising with them to establish whether they hold any information that may be relevant;
- Reviewing and assessing all information as per the 3 stage assessment process;
- Preparing the appropriate schedules and providing same to the Crown;
- Continuously reviewing the schedules and the retained information throughout the life of the investigation and any proceedings and providing updates to the Crown as required;
- Identifying any additional information to the Crown and submitting additional schedules and copies of relevant information;
- Submitting any additional information to the Crown as requested or facilitating access to additional information;
- Facilitating defence access to information on instructions of the Crown; and
- Dealing with any revelation and disclosure issues arising during the investigation, preparation or presentation of the case or any subsequent appeal.

3.7.3 The Reviewing Officer must liaise early and closely with both the relevant solemn legal manager and the precognoscer in order to ensure that both the police and the Crown comply with their respective revelation and disclosure obligations.

3.7.4 Depending on the size and complexity of the investigation, the SIO has discretion to appoint more than one reviewing officer. On such occasions, however, the SIO must also identify a principal reviewing officer who will have overall responsibility for (i) ensuring that all information that may be relevant is revealed to

the Crown and (ii) liaising with the Crown in relation to all revelation and disclosure issues.

3.8 Intelligence Reviewing Officers

3.8.1 Where an investigation involves information that is held by an Intelligence Cell, the SIO will liaise, at an early stage, with the intelligence cell manager to agree whether a separate and distinct dedicated reviewing officer should be appointed to deal with highly sensitive information held on the intelligence side of the firewall. This will depend, to a certain extent, on the degree of sensitive information held by the intelligence cell.

3.8.2 The role of the intelligence reviewing officer is the same as for reviewing officers on the operational side of an investigation, as set out in section 3.7 above.

3.8.3 An intelligence reviewing officer must work closely with the operational reviewing officer(s) to ensure that there is no duplication of work and to ensure that they both have sufficient information to make an accurate and informed decision regarding the information held by them

3.9 The 3-Stage Assessment Process

3.9.1 Once appointed or identified, the Reviewing Officer must consider each item of information obtained or generated during an investigation and determine:

- i) Whether the information may be relevant and therefore must be revealed to the Crown within the appropriate section of the SPR, subject report or in the appropriate schedule in solemn proceedings;
- ii) Whether that relevant information is sensitive (Criminal Justice and Licensing (Scotland) Act s122(4)) and the extent of the sensitivity i.e. is it highly sensitive?
- iii) Whether the information might (a) materially weaken or undermine the Crown case or (b) materially strengthen the defence case.

3.9.2 Where the information is sensitive it should be revealed to the Crown through the remarks section of the SPR in summary cases or an appropriately marked subject report. Where it is a solemn case, the information should be detailed in the appropriate sensitive or highly sensitive schedule.

3.9.3 Where the information is potentially exculpatory, then this should be detailed in section 4 of the SPR. In solemn proceedings, it should also be highlighted in the schedule as being potentially exculpatory information.

3.10 Police Scotland Standard Operating Procedures

3.10.1 The Police Scotland Standard Operating Procedures set out the essential elements of the police's revelation and disclosure obligations and provides practical guidance to all officers.