

Chapter 34: The Non-Sensitive Schedule

34.1 Overview

34.1.1 The non-sensitive schedule will contain all information that does not meet the definition of sensitive information under Section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010, i.e. is not information, which if it were to be disclosed, would risk:

- i) Causing serious injury, or death, to any person,
- ii) obstructing or preventing the prevention, detection, investigation or prosecution of crime; or
- iii) Causing serious prejudice to the public interest.

If the information does not meet any of these 3 criteria, then it should be listed in the non-sensitive schedule.

34.1.2 This will be the most commonly used schedule and at least one schedule will be completed in respect of every case that is commenced on petition. In large volume cases, it is highly likely that multiple non-sensitive schedules will be completed. In many cases, only a non-sensitive schedule will be required.

34.1.3 Given the nature of the type of information listed in these schedules and given that they will be routinely disclosed to the defence, non-sensitive schedules will carry a "Not Protected" GPMS¹ marking and will be submitted by the investigating agency electronically.

34.1.4 The non-sensitive schedule will be considered by the Case Preparer in close consultation with the appropriate solemn legal manager.

34.1.5 Only the non-sensitive schedule(s) will be disclosed to the defence.

34.2 Format of the Non-Sensitive Schedule

34.2.1 Like both the sensitive and the highly sensitive schedules, the non-sensitive schedule has 2 distinct sections, the first of which is completed by the Reviewing Officer.

34.2.2 The second section, which lists the appropriate disclosure decision, will be completed by the Case Preparer in close consultation with the appropriate solemn legal manager. Further guidance in the consideration and completion of the schedules is contained in **Chapter 37** of this Manual.

34.3 The Investigating Agency Section of the Schedule

34.3.1 The Investigating agency section comprises 7 columns:

- URN
- Material Type
- Description and Relevance

¹ Government Protective Marking Scheme – provides a method of ensuring information is handled according to its importance and the effect of loss or compromise. The worse the impact of compromise, the more protection is needed. There are 6 levels of protective marking: not protected, protect, restricted, confidential, secret and top secret.

- Where lodged
- Note
- Date of Submission to PF
- Exculpatory Yes/No

Guidance in respect of each of these columns is provided below.

34.3.2 The **URN** is the unique reference number which the investigating agency will allocate to each item of information obtained/generated during the investigation. This number is for internal investigating agency purposes, but will provide a sequential record of items for COPFS staff.

34.3.3 The **material type** column will give a brief indication of what type of information the entry relates to, e.g. witness statement; forensic report; detention form.

34.3.4 The **description and relevance** column will provide a concise summary of what the information contains, which will provide an indication as to why the Reviewing Officer considers that item of information to be relevant. The investigating agency must provide *details* of all the information that may be relevant to the case for or against the accused (Criminal Justice and Licensing (Scotland) Act 2010 section 117(1)). As indicated in Chapter 16, the schedules will list all information that may be relevant but not all of this information will necessarily be submitted to the PF office for consideration. Accordingly, it is essential that the description provided here is sufficiently detailed and accurate so as to allow the Case Preparer to properly assess whether there is a need to obtain and consider the actual piece of information.

34.3.5 An example of a description would be *“Questionnaire from John Smith who was present at the locus on the night of the incident. He did not witness the incident as was in the bar area at the time and incident occurred in another room. He cannot identify anyone involved in the incident”*.

34.3.6 Where an item of information listed in the schedule is not disclosed to the defence, on the grounds that the Case Preparer does not consider that it is material in nature, this description and relevance column will also be significant to the defence in determining whether, in their view, the information may be of material assistance to the proper preparation and presentation of the defence.

34.3.7 Accordingly, it is essential that this column is correctly completed by the Reviewing Officer. Where the description is insufficient, the Case Preparer should return the schedule to the Reviewing Officer with a written instruction regarding the amendments required to improve the description.

34.3.8 The **where lodged** column will detail where the information is currently held. This will relate to the location of the original document and **not** any electronic version that has been generated. Accordingly, for example, the location of the original manuscript statement will be listed here. By accurately listing the location of the item here, this ensures that any requests by the PF for viewing either by them or the defence can be efficiently facilitated.

34.3.9 The **Note** column will be used by the investigating agency to include any note regarding the piece of information listed. A numeric list of generic notes has been prepared and is attached at Annex K. These notes will provide Case Preparers with additional information about the piece of information that has been listed, e.g. *this*

material contains sensitive information and may require redaction prior to disclosure; or, this production has been forwarded to SPSA for forensic examination

34.3.10 In addition to the generic notes, listed in Annex K, the Reviewing Officer can, where necessary, create additional notes which can be numbered and added to this generic list.

34.3.11 A copy of the list of notes, whether it consists only of the generic notes or generic and additional notes, will always be submitted along with any schedule. This list should then be disclosed to the defence along with the schedule.

34.3.12 The **date of submission** column will detail the date that the piece of information has been submitted to the PF. Witness statements and productions will usually always be submitted (unless they have been submitted to the forensic laboratory for examination). If the piece of information has not been submitted then this section should be left blank.

34.3.13 Where the Solemn Legal Manager has discussed and agreed with the Reviewing Officer that information need not be submitted, then a note to this effect should be included in the note field (by adding the relevant numbered note from the generic list of notes), e.g. house to house or other questionnaires.

34.3.14 The **exculpatory Y/N** column must be completed in respect of each item of information. As part of the reviewing and assessment process specified in chapter 16 of this Manual, the Reviewing Officer must review and assess each item of information to determine whether it is information that might materially weaken the Crown case, materially strengthen the defence case, or otherwise exculpate the accused and then insert Y or N in this column.

34.3.15 The final decision, however, on what constitutes material evidence will lie with the Case Preparer (working in close consultation with the Solemn Legal Manager). Where, however, the Case Preparer disagrees with the Reviewing Officer's assessment of the information as being exculpatory, then the Case Preparer should discuss the case with the Reviewing Officer before reaching a final decision on the materiality of the information. If the schedule entry is "Y" but the Case Preparer, after consultation with the Reviewing Officer, determines that the item of information is, in fact, not potentially exculpatory and, therefore, not disclosable, then the non-sensitive schedule should be amended prior to disclosure to the defence.

34.4 Listing Witness Statements

34.4.1 Where a witness statement listed on the schedule is also **submitted** to the PF Office then the description and relevance section should **not** provide a summary of the content of the statement and will instead provide the following information:

- Name of the witness
- Sequential number of the statement
- Age of the witness
- Date and time the statement was obtained

34.4.2 If the Reviewing Officer has identified that a particular witness statement contains information that might materially weaken the prosecution case or materially strengthen the defence case, then the description and relevance section **should** also give a brief summary setting out why the statement is exculpatory.

34.4.3 Where the witness statement has **not** been submitted to the PF Office, e.g. because it is a house to house questionnaire, then a summary of the content of the statement **must** still be provided in order that (a) the prosecutor can keep the materiality of that statement under review and (b) the defence can give informed consideration to whether the statement may be of material assistance to the defence.

Note: The Reviewing Officer must seek express authority from the SLM not to submit a witness statement.

34.5. Listing Productions

34.5.1 In relation to each production, the Reviewing Officer **must** provide the following **minimum** information in the description and relevance column:

- Description of item
- Who the item was seized from (if applicable)
- The exact location where the item was found (*although if the item was seized from a witness's home which is not the locus of the offence, this should be specified as "at witness X's home" rather than by specifying the actual address*)
- Date the item was seized
- Details of the officer seizing the item
- Production register number

34.5.2 Only where the above information is not sufficient to demonstrate the relevance of the production need the Reviewing Officer provide any further information within the schedule. If, however, the Reviewing Officer has identified that a particular production might materially weaken the prosecution case or materially strengthen the defence case, then the description and relevance section **should** also give a brief summary setting out why the production is exculpatory.

34.6. Listing Actions

34.6.1 An Action is a documented instruction to an Officer to carry out a particular line of enquiry. Actions will generally be raised from a document, which has been submitted to a major incident room.

34.6.2 The Reviewing Officer will consider each action on an individual basis to assess whether it may be relevant. However, it has been agreed that, as actions are usually raised from a source form or document, where an action results in the obtaining of an other item of information, for example a production or witness statement, which is listed elsewhere on a schedule, there is no requirement to list that action on the schedule.

34.6.3 However, if the action might materially weaken the prosecution case or materially strengthen the defence case, it should always receive a separate entry on the schedule, setting out in the description and relevance column why it is exculpatory.

34.6.4 Where an action does not result in the generation or obtaining of an item of information and the Reviewing Officer considers it to be relevant information, it

should be recorded on the schedule. However, consideration may be given to including a block entry to cover multiple actions in such circumstances. **The final decision of the appropriateness of a block entry rests with the Solemn Legal Manager** who must be satisfied that a block description of multiple items still enables the Crown to keep the materiality of each item under review.

34.7. Listing Messages

34.7.1 A message form is used to record information entering a major incident room, whether by telephone, verbally or written. The message records the details of the person providing the information, the content and details of the person recording the information.

34.7.2 The Reviewing Officer will consider each message on an individual basis to assess whether it may be relevant. Where the message results in another item of information being obtained and listed on the schedule, there is no requirement to list that message separately.

34.7.3 However, if the message might materially weaken the prosecution case or materially strengthen the defence case, it should always receive a separate entry on the schedule, setting out in the description and relevance column why it is exculpatory.

34.7.4 Where a message does not result in the generation or obtaining of an item of information and the Reviewing Officer considers it to be relevant information, it should be recorded on the schedule. However, consideration may be given to including a block entry to cover multiple messages in such circumstances. **The final decision of the appropriateness of a block entry rests with the Solemn Legal Manager** who must be satisfied that a block description of multiple items still enables the Crown to keep the materiality of each item under review.

34.8. Listing Internal Communications between the Investigating Agency and the Crown

34.8.1 As stated in **Hanif v HMA** (2009 SCCR 38) internal communications between the Crown and investigating agency are not usually disclosable (paragraph 24):

“A matter of internal communication between those concerned with the prosecution of [an] alleged crime...was not evidential material which could properly be regarded as disclosable”.

Accordingly, there is no requirement for the investigating agency to list any internal communications on a schedule.

34.8.2 If, however, the internal communication sets out information that might materially weaken the prosecution case or materially strengthen the defence case that is not contained elsewhere, e.g. in a witness statements, prosecution report etc, then the communication should be listed along with a summary setting out why the information might be exculpatory.

34.9 The Crown Section of the Schedule

34.9.1 The COPFS section of the schedule comprises 3 columns:

- Disclosure action
- Comment
- Date disclosed to the defence

Guidance in respect of each of these columns is provided below.

34.9.2 The **disclosure action** column is where the Case Preparer will record the appropriate disclosure action of which, on the non-sensitive schedule, there are 4 options:

- Disclose to the defence (*by provision of a copy*)
- Withhold meantime (*e.g. pending a particular action such as precognition of a witness*)
- Disclose by access
- Not disclosable (assessed as non-material)

34.9.3 The Case Preparer must consider each item of information and then insert the appropriate disclosure action in this column.

34.9.4 The **comment** column allows the Case Preparer to include any relevant comment in relation to the disclosure action. For example, if the disclosure action recorded in the previous column is “withhold meantime”, the action that is required prior to disclosure must be included in this comment; if the disclosure action is “disclose by access”, then the appropriate place for the access to take place should be entered here, e.g. at PF Office; at Forensic lab etc; if the item of information is only to be disclosed in a redacted form, this should be inserted here.

34.9.5 It should be noted that it may be necessary to list more than one comment, e.g. where disclosure is to be by access at the PF Office and that access is to be to a redacted version of the piece of information.

34.9.6 The **date disclosed to the defence** column will be completed by a member of administrative staff at the stage the piece of information is disclosed (e.g. date uploaded to the website).

34.9.7 Where disclosure of any piece of information is by access, then the comments column should be updated once the defence have viewed the information to reflect the date that access was facilitated.

34.10 Content of the Non-Sensitive Schedule

34.10.1 The Reviewing Officer will take the initial decisions regarding the sensitivity of any piece of information and information not considered to be sensitive will be listed on the non-sensitive schedule.

34.10.2 Information is considered to be sensitive if the disclosure of that information would risk:

- 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.

34.10.3 This will require an assessment of the content of each item of information. However, if considered to be information that *may be relevant*, the following type of information would usually be listed in the non-sensitive schedule:

- Witness statements (including anything that gives an account of the what the witness says in whatever format it is held, e.g. pro forma questionnaires; SOLO (Sexual Offence Liaison Officer) Reports)
- PI Tapes and Transcripts
- Notes of interviews with witnesses
- Visually recorded interviews with witnesses or accused
- Fingerprint forms
- ID Parade forms
- Forensic Reports
- TSU Examination Reports
- Detention Forms
- Voluntary Attendance Forms
- Arrest Forms
- Ballistic Examination Reports
- Post Mortem Reports
- Other Expert Reports
- Plans/Videos of crime scenes
- Custody records (for accused)
- Production Logs
- Records of Searches
- Incident logs
- Crime report
- Police Notebooks
- Media releases
- Questionnaires
- DNA or other forensic material
- Drink Driving Forms
- Device Print-outs under RTA
- Tachograph Charts
- Certificates of Accuracy
- Certifications of analysis of blood and urine
- Video Operator's certificate re video/digital evidence
- Police Casualty surgeon reports for accused
- Medical examinations Forms for suspects
- Hospital Records relating to the accused
- Dental Records relating to the accused
- Lay Visitors police cell reports
- Surveillance/Observation Logs (Except where the content of such logs is sensitive or the existence of such surveillance is itself sensitive, having regard to the definition of sensitive set down in paragraph 34.1.1)

34.10.4 This list is **not** prescriptive and, depending on the actual information contained within each individual item, it may, on occasion, be appropriate for it to be listed on the sensitive schedule. However, this list will act as a guide to assist reviewing officers in determining the appropriate schedule.

34.10.5 Further, the appearance of items of information on this list above is **not** an indication that this type of information is routinely relevant. It remains the case that only witness statements and criminal history records are **always** routinely relevant. All other information obtained or generated during the course of the investigation **must** be assessed for relevance. Thereafter, if it is deemed to be information that may be relevant, this table will assist in determining the appropriate schedule in which to list the information.

34.10.6 Guidance on what to do if the Case Preparer disagrees with categorisation of information as non-sensitive is contained in paragraph 37.2.3 of this Manual.

34.11 Recording Disclosure Decisions

34.11.1 As stated above, the disclosure decision regarding each item of information listed in this schedule will be recorded in the **disclosure action** column. This will then enable the Case Preparer and the trial depute to properly keep this decision under review throughout the life of the case.

34.11.2 In addition, this record will be the main reference point in all solemn appeal cases for establishing what information was disclosed to the defence during the initial proceedings.

34.12 The Crown Non-Sensitive Schedule

34.12.1 Where the Case Preparer has obtained relevant information from a source other than the investigating agency, this information must be assessed, having regard to paragraph 34.9 above. The Case Preparer should then prepare a Crown Non-Sensitive schedule listing this information.

34.12.2 The Crown non-sensitive schedule has 6 columns, similar in nature to the investigating agency non-sensitive schedule:

- Information type
- Description & Relevance
- Where held
- Disclosure Action
- Comment
- Date disclosed to the defence.

34.12.3 The Case Preparer should complete all columns, except the date disclosed to the defence column. Guidance on completion of these sections is contained in Chapter 37 of this Manual.

34.12.4 Administrative staff will complete the last column at the stage any information listed within the schedule is disclosed to the defence.

34.13 Disclosure to the Defence

34.13.1 As previously stated, any non-sensitive schedules, including non-sensitive Crown schedules will be routinely disclosed to the defence. This gives the defence details of all relevant, non-sensitive information held by the Crown that it considers does not meet the materiality test, i.e. information which would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused; would materially strengthen the accused's case; or is likely to form part of the evidence to be led by the prosecutor.

34.13.2 The non-sensitive schedule, including any prepared non-sensitive Crown schedule should be disclosed to the defence along with statements, i.e. no more than 28 days after CFE. Any additional schedules received thereafter should be disclosed as soon as it is reasonably practicable so to do.

34.13.3 As the schedule provides a description of each piece of relevant information, its disclosure to the defence also enables the defence to make an informed decision on whether they think that the undisclosed information would materially assist the defence. This in turn allows them to make informed decisions when considering whether to lodge an application for a court ruling on whether or not certain relevant information is or is not material. Further guidance on applications for court rulings can be found in Chapter 39 of this Manual.