

## Chapter 35: The Sensitive Schedule

### 35.1 Overview

35.1.1 The sensitive schedule will contain all information that the disclosure of which, if compromised, 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.

The Criminal Justice and Licensing (Scotland) Act 2010 provides the definition of “information” (s.116) and “sensitive” (s.122(4)) as follows:

Information, in relation to criminal proceedings relating to a person, means material of any kind given to or obtained by the prosecutor in connection with the proceedings.

Information is deemed to be sensitive if, were it to be disclosed, there would be a risk of one or more of the consequences outlined at paragraph 35.1.1 above. If the information does not meet any of these 3 criteria, then it should be listed in the non-sensitive schedule.

35.1.2 If the information is assessed as sensitive **and** it is also assessed as being information which, if compromised, is likely to:

- i) Lead directly to the loss of life;
- ii) Directly threaten national security; or
- iii) Lead to the exposure of a CHIS

then the information should be listed in the Highly Sensitive schedule. In addition, information that does not fall under these 3 heads may be listed on the highly sensitive schedule if it carries a GPMS<sup>1</sup> marking of confidential or higher. Further guidance on this schedule is contained in Chapter 36 of this Manual.

35.1.3 Given the nature of the type of information listed in the sensitive schedules they will carry a GPMS restricted marking and will be electronically submitted by the investigating agency. A document with a GPMS Marking of restricted or below can be e-mailed. If higher, it should be submitted hard-copy. In very limited circumstances, a confidential marking may be appropriate in which case the schedule must be submitted hard copy. However, usually where the mere listing of the information in a schedule would make that schedule confidential, it is expected that the information will be listed in the highly sensitive schedule.

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

**35.1.5 The sensitive schedule(s) will not be disclosed to the defence.**

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<sup>1</sup> 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.

## 35.2 Format of the Sensitive Schedule

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

35.2.2 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 on the consideration and completion of the schedules is contained in Chapter 37 of this Manual.

## 35.3 The Investigating Agency Section of the Schedule

35.3.1 The Investigating Agency section comprises 8 columns:

- URN
- Material Type
- Description and Relevance
- Where lodged
- Reason for Sensitivity
- Note
- Date of Submission to PF
- Exculpatory Yes/No

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

35.3.2 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.

35.3.3 The **material type** column will give a brief indication of what type of information the entry relates to, e.g. witness statement; criminal history record; medical records.

35.3.4 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). 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 to allow the Case Preparer to properly assess whether there is a need to obtain and consider the actual piece of information.

35.3.5 An example of a description would be "*Criminal History Record for John Smith*".

35.3.6 Where intelligence information from the Scottish Intelligence Database (SID) is listed on the schedule, the description and relevance entry should provide the following information:

- i) Date and time the intelligence was submitted;
- ii) The grading in terms of the 5x5x5 system; and
- iii) A sanitised text.

35.3.7 It is essential that this column is correctly completed by the Reviewing Officer as it may be used by Case Preparers to determine whether an item of information may be material. 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.

35.3.8 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.

35.3.9 The **reason for sensitivity** column will detail why the Reviewing Officer has assessed the information as being sensitive in terms of the criteria set down in paragraph 34.1.1 above.

35.3.10 Information may be sensitive if it relates to any of the following criteria:

- i) Information relating to national security;
- ii) Information received from intelligence and security agencies;
- iii) Information relating to intelligence from foreign sources revealing sensitive gathering methods;
- iv) Information received by the investigating agency on an undertaking by them that the information is received in confidence;
- v) Information relating to the use of a telephone system and supplied for intelligence purposes only;
- vi) Information relating to informants, undercover investigating agency officers and others at risk if identified;
- vii) Information revealing investigating agency surveillance location(s) or the identify of any person allowing that location to be used;
- viii) Information revealing techniques and investigative methods relied upon by the investigating agency;
- ix) Information that facilitates the commission of other offences or hinders the prevention and/or detection of crime;
- x) Information contained within internal investigating agency communications;
- xi) Information upon the strength of which search warrants were obtained;
- xii) Information regarding the personal details of ID Parade participants;
- xiii) Information generated by an official concerned with the regulation of corporate bodies or financial activities;
- xiv) Information generated by social services, and (area) child protection committee or other party and relating to a child or young person;
- xv) Investigating agency intelligence information;
- xvi) Restricted personal information such as addresses, telephone and vehicle numbers;
- xvii) Information relating to the private life of a witness, e.g. medical or social work records; criminal history records etc; and
- xviii) Investigating agency misconduct information

35.3.11 The information detailed above has been reproduced in a numeric list by the investigating agency. If the information falls within any of these listed categories, the reviewing officer will insert the corresponding generic sensitive note number into the **reason for sensitivity** column.

35.3.12 If the information does not fall within any of the criteria listed at paragraph 35.3.10 and contained within the corresponding list of generic sensitive notes, then the Reviewing officer must instead insert a full explanation for the categorisation of the information as sensitive.

35.3.13 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. *the S number has been inserted into section 4 of the NSS.*

35.3.14 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.

35.3.15 A copy of the list of notes, whether it consists only of the generic notes or generic and additional notes, will be submitted along with the schedule.

35.3.16 The **date of submission** column will detail the date that the item 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.

35.3.17 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).

35.3.18 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.

35.3.19 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 issue with the Reviewing Officer before reaching a final decision on the materiality of the information.

35.3.20 Where the Reviewing Officer assesses information as being sensitive and exculpatory and the officer has concerns about the information being disclosed (i.e. believes there to be public interest immunity considerations), then the Reviewing Officer should bring this to the attention of the Case Preparer at the earliest opportunity.

35.3.21 Further guidance on the listing of witness statements, productions, actions, messages and internal correspondence between the PF and the investigating agency is contained in sections 34.4 to 34.8 of this Manual.

## 35.4 The Crown Section of the Schedule

35.4.1 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.

35.4.2 The **disclosure action** column is where the Case Preparer will record the appropriate disclosure action of which, on the sensitive schedule, there are 5 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)
- PII required

35.4.3 The Case Preparer must consider each piece of information and then insert the appropriate disclosure action in this column. Further information on carrying out this process is contained in chapter 37 of this Manual.

35.4.4 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 piece of information is only to be disclosed in a redacted form, this should be inserted here.

35.4.5 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.

35.4.6 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).

35.4.7 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 this was done.

## 35.5 Content of the Sensitive Schedule

35.5.1 The Reviewing Officer will take the initial decisions regarding the sensitivity of any piece of information.

35.5.2 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.

35.5.3 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 sensitive schedule:

- Criminal History Records
- SIO Policy Log
- Operational briefings
- Vulnerable witness profiles
- Internal Wanted/ Missing reports
- Dental Records for witnesses
- Information from Social Services/ Local Authorities
- Policy Files
- Port Warnings
- RIPSAs supporting documentation
- Offender profiles
- Investigating Agency Misconduct material
- Family Liaison Logs
- Debriefing sheets
- Crimestoppers Records
- Warrant application reports (for both search & arrest warrants)
- Medical Records for witnesses
- Force Intelligence bureau information
- Custody Records for witnesses
- Sanitised CHIS reports
- Information held by Social Services/ Local Authorities

35.5.4 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 non-sensitive schedule. However, this list will act as a guide to assist Reviewing Officers in determining the appropriate schedule.

35.5.5 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.

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

## 35.6 Recording Disclosure Decisions

35.6.1 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.

35.6.2 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.

### **35.7 The Crown Sensitive Schedule**

35.7.1 Where the Case Preparer has obtained relevant information from a source other than the investigating agency, the sensitivity of this information must be assessed, having regard to paragraph 34.5 above. The Case Preparer should then prepare a Crown Non-Sensitive schedule listing this information.

35.7.2 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.

35.7.3 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.

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

### **35.8 Disclosure to the Defence**

35.8.1 As previously stated, any sensitive schedules (including Crown sensitive schedules) will **not** be disclosed to the defence. It is essential, therefore, that the assessment of undisclosed relevant information is properly assessed as the existence of non-sensitive information is intimated to the defence in the form of disclosure of the non-sensitive schedule. Therefore, Case Preparers must particularly take care to ensure that any information classified as sensitive that is deemed **not** to be disclosable, has been properly classified.

35.8.2 When in doubt regarding the sensitivity of an item of information, Case Preparers must consult in the first instance with the relevant Solemn Legal Manager. If still in doubt, Crown Counsel's instructions should be obtained.