

Chapter 36: The Highly Sensitive Schedule

36.1 Overview

36.1.1 Under Section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010 sensitive information is any information that the disclosure of which, 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.

36.1.2 Once information has been assessed as sensitive, it must then **also** be assessed to ascertain whether it is “highly sensitive” information. Information is classified as highly sensitive where it is 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.

If information is so classified, then it **must** be listed in the Highly Sensitive schedule.

36.1.3 In addition, there may be information that might not fall under these 3 headings, but due to the GPMS marking that the information attracts, it cannot be revealed to a Case Preparer or legal manager because they do not hold the required security clearance. Such information must be included in the Highly Sensitive schedule and only revealed to a person with the required level of security clearance, i.e. the Federation Head and/or Functional Lead (High Court/ Sheriff and Jury/ Summary) or the Head or Deputy Head of SOCD.

36.1.4 The number of cases that will involve obtaining or generating information of a highly sensitive nature will be very small and is most likely to arise in cases involving serious and organised crime or terrorism.

36.1.5 Given the nature of the type of information listed in the highly sensitive schedules they will carry a GPMS¹ marking of Confidential, Secret or Top Secret. Accordingly these schedules must be submitted hard copy.

36.1.6 Only police officers within the intelligence arena will complete the highly sensitive schedules and they will only be revealed to staff within COPFS with the appropriate security clearance level, who, depending on the level of the GPMS marking, may be the Federation Head and/or Functional Lead (High Court/ Sheriff and Jury/ Summary) or the Head or Deputy Head of SOCD.

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

36.2 Format of the Highly Sensitive Schedule

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.

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

36.2.2 The second section, which lists the appropriate disclosure decision, will be completed by the the Federation Head and/or Functional Lead (High Court/ Sheriff and Jury/ Summary) or the Head or Deputy Head of SOCD as appropriate in terms of security clearance. Further guidance on the consideration and completion of the schedules is contained in Chapter 37 of this Manual.

36.3 The Police Section of the Schedule

36.3.1 The police section of the Highly Sensitive schedule is comprised of the same 8 sections as for the Sensitive schedule. Further information on the completion of the police section is contained in section 35.3 of this Manual.

36.3.2 As with all information listed on any of the schedules, although the Reviewing Officer will make an initial assessment of its materiality, the final decision on what information contained within the Highly Sensitive schedule constitutes material evidence will lie with the Federation Head and/or Functional Lead (High Court/ Sheriff and Jury/ Summary) or the Head or Deputy Head of SOCD as appropriate in terms of security clearance..

36.4 The Crown Section of the Schedule

36.4.1 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.

36.4.2 The **disclosure action** column is where the (or identified deputy) will record the appropriate disclosure action of which, on the highly 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

36.4.3 the Federation Head and/or Functional Lead (High Court/ Sheriff and Jury/ Summary) or the Head or Deputy Head of SOCD as appropriate in terms of security clearance will 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.

36.4.4 The entitlement to disclosure of material information is not an absolute right and there may be competing interests, such as national security or the need to protect witnesses from the fear of reprisals, this must be weighed against the right of the accused to receive a fair trial (**Rowe and Davis v U.K.** 2000 30 E.H.R.R. 1).

Accordingly, there may be circumstances where highly sensitive information may require to be disclosed. If a decision is taken, usually after consultation with the Reviewing Officer, that an item of highly sensitive information should be disclosed, then the **date disclosed to the defence** column will be completed at the stage the item of information is disclosed. The information should also be provided to the trial depute, once identified.

36.4.5 Where disclosure of any item 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.

36.5 Content of the Highly Sensitive Schedule

36.5.1 As stated above, the highly sensitive schedule will contain any information of such a sensitive nature (as detailed in section 35.5.3 of this Manual) that it can only be revealed to staff within COPFS with the appropriate security clearance level.

36.6 Reporting to Crown Office

36.6.1 In order to ensure consistency of approach under this new system, 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.

36.6.2 Where the Federation Head and/or Functional Lead (High Court/ Sheriff and Jury/ Summary) or the Head or Deputy Head of SOCD 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.

36.7 Disclosure to the Defence

36.7.1 As previously stated, any highly sensitive schedules will **not** be disclosed to the defence. Equally, they will not be disclosed to the Case Preparer or trial depute.