

Chapter 40: Professional Misconduct - Investigating Agencies

40.1 General Principles

40.1.1 As set out in Chapter 3 of this Manual, under the Criminal Justice and Licensing (Scotland) Act 2010 the police and other investigating agencies must provide the Crown with all relevant information which is capable of having an impact on the case. The investigating agency will hold information relating to the professional misconduct by serving officers. In order to ensure that the investigating agency comply with their obligation to provide all relevant information to the Crown, therefore, it is essential that this includes details of misconduct information that may affect the reliability or credibility of any investigating agency witness.

40.1.2 Only misconduct admitted or proved at a hearing is relevant for the purposes of consideration for disclosure.

40.1.3 Professional misconduct by police officers is regulated by the Police (Conduct) (Scotland) Regulations 1996. Schedule 1 of the Regulations provides a list of conduct which will constitute misconduct. This list includes a broad spectrum of conduct ranging from minor misconduct such as uniform irregularities to neglect of duty.

40.1.4 There are six separate options for Forces in dealing with allegations of misconduct. The first five are used for minor misconduct which should not normally have any bearing on the credibility or reliability of the officer involved. These options consist of:

- i) No action;
- ii) Action outwith the Conduct Regulations, e.g. counselling
- iii) Warning in terms of Regulation 5(2) – *allows for an allegation that is of a minor or trivial nature to be formally concluded without first taking direction from a Deputy Chief Constable;*
- iv) Warning in terms of Regulation 5(3) – *allows for an allegation, which has been referred to the DCC, to be dealt with by means of a preliminary enquiry rather than the appointment of an investigator. This process is not limited to minor or trivial allegations;*
- v) Warning in terms of Regulation 6(6) – *this is the most serious form of statutory warning given to a police officer and will be considered where the DCC has decided that the allegation is of sufficient gravity to formally appoint an investigating officer in terms of the Regulations:*
- vi) Misconduct hearing

40.1.5 For the purposes of consideration for disclosure, **only** the sixth outcome above is considered as potentially relevant as it may include conduct which, if known, may impact on issues of reliability and credibility at trial. Significantly, it is also the only option open to Forces where, unless admitted, an allegation of misconduct is tested in a quasi-judicial setting.

40.1.6 For the avoidance of doubt, where a hearing concludes that there has been no misconduct on the part of the officer, then the circumstances of the alleged misconduct should **not** be obtained or considered for disclosure purposes

40.2 Defence Requests for Information relating to Misconduct Warnings

40.2.1 As stated above, all findings of guilt at a misconduct hearing should be proactively obtained by the Crown and, if material, disclosed to the defence, without the requirement of a request from the defence for such information.

40.2.2 If, however, the defence requests details of any misconduct information which did not result in a misconduct hearing, i.e. details of any warnings issued in terms of the Regulations specified above in 40.1.2 at paragraphs (iii)-(v), then the request should be referred to the Director of Serious Casework for consideration. The referral should provide an assessment on whether the request appears justified, as opposed to speculative and should include a recommendation on whether the information should be obtained from the police, having regard to the issues at trial.

40.2.3 If the Director of Serious Casework is satisfied that information about warnings issued may be relevant and material to the issues at trial, then the information should be obtained and then considered for disclosure. Any material warnings should then be disclosed to the defence.

40.3 Revelation of Misconduct Information by the Investigating Agency

40.3.1 Having regard to the general principles above, misconduct hearing findings (or admissions) of guilt will be revealed to the Crown for consideration for disclosure, as appropriate, in accordance with 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. Records of other misconduct warnings - dealt with by Forces by any of the other five options - will **not** be *routinely* revealed. However, where Crown Counsel consider that a defence request for this information is justified, the Crown should instruct the police to submit details of all *relevant* misconduct dealt with in terms of the Regulations (i.e. as specified in paragraphs (iii)-(v) above). Thereafter, the Crown must consider this information to determine whether it should be disclosed in accordance with the materiality test.

40.3.2 Misconduct allegations that resulted in no action being taken or action being taken outwith the regulations will not be considered for relevancy by the police. Similarly, where a hearing was held which did not result in a finding of guilt, then the misconduct which was considered at the hearing will not be routinely submitted to the Crown.

40.4 The Police Officer Misconduct Database

40.4.1 It is recognised that it would be very resource intensive for Professional Standards Units to carry out a check every time an officer is cited as a witness in a summary case or appears on the list of witnesses in a solemn case. Accordingly, procedures have been put in place to ensure that the Crown meets its disclosure obligations, while also ensuring that the information is obtained efficiently.

40.4.2 COPFS holds and maintains a database, which can only be viewed and accessed by a limited number of staff in ISD (COPFS Information Systems Division), detailing all serving police officers with a finding of guilt before a misconduct hearing. This database, which is updated regularly based on information provided by Professional Standard Units, is checked automatically whenever an SPR or witness report is submitted to the Procurator Fiscal. A witness report is a separate subject sheet submitted electronically by the police subsequent to the submission of the SPR which includes the details of witnesses not originally included in the SPR.

40.4.3 In order to ensure confidentiality and satisfy data protection principles, police officers are referred to in the database by their URN rather than their name. If a police officer does not have a misconduct finding, his/her URN will not appear on the table. Whenever a police officer is listed in an SPR as a witness, his/her URN is also included in the report. This is mandatory and no police officer can be listed as a police witness unless his/her URN is inserted.

40.4.4 On receipt of the SPR or witness report, POLIN (the COPFS computer system that enables the Crown to receive electronic reports) will automatically access the database and ascertain whether any of the URNs in the database match any of the URNs in the police report. If there are any matches, POLIN insert a misconduct 'flag' into the SPR or witness report.

40.4.5 Where an officer listed in the SPR as a witness, is also listed in the COPFS database, this misconduct 'flag' will be populated automatically in sections 1.3 and 8.1 of the SPR, thus enabling COPFS staff to request details of the misconduct finding directly from the appropriate Professional Standards Unit (i.e. the Professional Standards Unit within the Force where the case originates). Where an officer listed in a witness report as a witness is also listed in the COPFS database this misconduct 'flag' will be populated automatically on the witness report itself enabling COPFS staff to request details of the misconduct finding directly from the appropriate Professional Standards Unit (i.e. the Professional Standards Unit within the Force where the case originates).

40.4.6 For the avoidance of doubt, the misconduct flag only highlights that an officer has a finding of guilt against them at a misconduct hearing. It will not identify those officers who have received a warning or warnings under the Regulations. Accordingly, if the defence request this information, the database cannot be used to extract this information. The procedures where the defence request information about warnings is contained below at section 40.7.

40.5 Updating the Database

40.5.1 Professional Standard Units within Police Scotland have responsibility for advising ISD of any updates to the database, for example, when a police officer listed in the database leaves the Police Force, or a police officer has been found guilty at a misconduct hearing and requires to be added to the database.

40.5.2 Although the 1996 Regulations are silent on how long this finding should be retained, the Police (Scotland) Regulations 2004 state that the finding must be expunged from the officer's record after 3 years clear of default. In effect this means the finding is 'live' for 3 years. However, it has been agreed that if any Force record is held of a misconduct finding then this must be revealed to the Crown.

40.6 Obtaining and Scheduling Details of the Misconduct Finding in Solemn Proceedings

40.6.1 Where a case is proceeding on petition and therefore subject to the scheduling system as set down in Chapters 16 and 34-37 of this Manual, it is essential that any findings of guilt at a misconduct hearing for any police witnesses are included in the sensitive schedule.

40.6.2 Where a misconduct 'flag' appears in the SPR or in a witness report in respect of a relevant witness i.e. a witness that the Crown intends to lead at trial, the

precognoscer should immediately generate a letter for transmission to the relevant Professional Standards Unit, requesting the preparation of a sensitive schedule detailing the misconduct that resulted in a finding of guilt before a hearing. Template letter DISCPSSSCHEDULE.DOC which is available on the FOS/SOS-R templates should be used for requesting the schedule. Once received, the PSU Sensitive Schedule should be considered in accordance with the guidance contained in Chapter 37 of this Manual.

40.7 Obtaining Details of the Misconduct Finding in Summary Proceedings

40.7.1 Where a misconduct 'flag' appears in the SPR or in a witness report in respect of a witness marked for citing in FOS/PROMIS in summary cases, a letter should be generated for transmission to the relevant Force Professional Standards Unit, requesting details of the misconduct that resulted in a finding of guilt before a hearing. This should be sent at the same stage as statements and CHS records are being requested in the case. Template letter DISCPSSUM.DOC which is available on the FOS/SOS-R templates should be used for requesting the information. It is the responsibility of the case marker at the stage the case is marked for proceedings to ensure that an instruction to this effect is included in the summary instruction case preparation sheet.

40.7.2 Forces will thereafter reveal this information by way of an appropriately marked subject sheet.

40.8 Defence Requests for Information

Requests for misconduct information in relation to a disposal less than a finding of guilt before a hearing

40.8.1 Where the defence request the disclosure of the misconduct record of a particular officer and Crown Counsel agree that the request is reasonable, a letter should be generated for transmission to the relevant Professional Standards Unit, requesting revelation of relevant misconduct information. Template letter DISCPDEFREQ.DOC should be used for requesting the information in solemn cases and letter DISCPDEFREQSUM.DOC in summary cases.

40.8.2 In solemn cases Professional Standards Units will prepare and complete a sensitive schedule detailing the officer's misconduct record. For summary cases revelation will be achieved by the completion and submission of an appropriately marked subject sheet.

Requests for further information regarding misconduct resulting in a finding of guilt

40.8.3 In addition, where details of a finding of guilt before a misconduct hearing have been disclosed, the defence may request further information in relation to that misconduct. Again, such requests must be justified by the defence as being necessary for the proper preparation and presentation of the defence.

40.8.4 If satisfied that the request is reasonable, then the Case Preparer or depute should consult with the Professional Standards Unit and request any further relevant information regarding the misconduct. Thereafter, this information should be carefully considered for disclosure.

40.8.5 If the case preparer or depute is content that the additional information is not material, then the defence should be advised that it is not being disclosed.

Where the defence considers that the prosecutor has failed to disclose an item of information which is disclosable in terms of the materiality test the defence may apply (Criminal Justice and Licensing (Scotland) Act 2010 section 128(2)) to the Court for a ruling on whether the information in question falls within the realms of the materiality test. Guidance on applications for such rulings can be found in Chapter 39 of this Manual.

40.8.6 If the case preparer or depute, after close consultation with the appropriate legal manager considers the additional information to be material (either in full or in part), then a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions on disclosure.

40.9 Assessing the Materiality of Misconduct Information

40.9.1 Once the details of a misconduct finding – or other relevant misconduct information - have been obtained for an investigating agency witness, a member of **legal** staff should consider the record and determine, in terms of the principles set out below, whether any of the material requires to be disclosed.

40.9.2 Misconduct information may be relevant and material for one of two reasons:

- It potentially bears on an issue in the case; or
- It may legitimately be used to attack the credibility or reliability of the witness.

40.9.3 The Crown should assess each misconduct finding and any other misconduct information revealed and determine whether or not each piece of information is material on one of these grounds. If the Crown does not consider that the information is material that information should not be disclosed. But the Crown should not take an unduly restrictive approach to the assessment of materiality. Where the issue of disclosure is one of fine judgement or balance, then Crown Counsel's instructions should be obtained.

40.9.4 However, disclosure of misconduct information does not reflect an admission or concession that the information is relevant either to the issues in the case or to the credibility or reliability of the witness. Deputes should, where appropriate, take objection to reliance on the misconduct record of a police witness where there are good grounds for doing so.

Misconduct finding bearing on an issue in the case

40.9.5 Although it is likely to be rare, misconduct information which bears on an issue in the case should always be disclosed. For example, where the integrity of productions is a live issue in a case, the fact that a police witness has been found guilty of misconduct for wilful or careless damage to property within the care of the police of the complainer should be disclosed, since it may be material.

Misconduct finding bearing on credibility

40.9.6 More commonly, misconduct information which could reasonably be considered to bear on the credibility of the witness should be disclosed. The question in any case is whether or not the information could legitimately be relied upon by the defence in an attack on the credibility of the witness at trial. For example, a misconduct finding for corrupt practice will always require to be considered for

disclosure. Other information which could be founded upon to attack the general character of the witness should also be considered for disclosure.

Misconduct finding bearing on reliability

40.9.7 Misconduct information which could legitimately be used to attack the reliability of the witness should also be disclosed. So for example, a recent misconduct finding of being unfit for duty due to alcohol may be disclosable, since it may provide a basis for cross-examination as to whether the witness was under the influence of alcohol at the time of the incident and whether this affected the witness's reliability.

40.10 Disclosing Misconduct Information

Solemn Proceedings

40.10.1 Misconduct information in solemn proceedings will not be disclosed to the defence until the stage the indictment is served, and the police witness is confirmed as being listed on the indictment.

40.10.2 **Misconduct information should not be disclosed in solemn proceedings without Crown Counsel's instructions.** This applies equally to cases indicted in the High Court and cases in the Sheriff Court. Recommendations and requests for instructions should be carefully recorded on the Disclosure Page

40.10.3 Where disclosure is instructed, this should be done in the form of a letter to the defence setting out the nature of the misconduct, the regulation under which the misconduct was deemed to be found and the result.

Summary Proceedings

40.10.4 All decisions to disclose misconduct information **must** be approved by the Summary Legal Manager. In cases of doubt or difficulty, the Summary Legal Manager should submit a report to the Director of Serious Casework for Crown Counsel's instructions.

40.10.5 Thereafter, the material misconduct information should be disclosed to the defence immediately after the intermediate diet.

40.10.6 Disclosure of any material misconduct should be in the form of a letter to the defence setting out the nature of the misconduct, the regulation under which the misconduct was deemed to be found and the result.

40.11 Keeping the position under review

40.11.1 Where a decision has been made not to disclose all or part of the misconduct record of a witness on the ground that it is not material, the position must be kept under review. In particular, issues may arise at trial which require disclosure of misconduct information which until then has not been considered to be material.

40.11.2 While there is a duty to keep the materiality of misconduct information under review, there is no obligation to routinely obtain updated information from Professional Standards Units regarding an officer's misconduct record. Such updates should be request only where the Crown is in receipt of information, either

from the defence or other sources, that reasonably indicates that there is new misconduct information that is material in nature.

40.12 Additional Witnesses not included in SPR

40.12.1 Where details of additional police witnesses are provided hard copy in another format the police misconduct database system referred to above at section 38.3 will **not** be activated. Accordingly, the case preparer or depute preparing the case in summary proceedings, must proactively contact the relevant Professional Standards Unit within Police Scotland to ascertain whether any additional police witness has any findings of guilt against him or her at a misconduct hearing. If so, the procedures detailed in sections 40.5 or 40.6 above should be followed, depending on whether the case is proceeding on indictment or summarily.

40.13 Police Officers as Defence Witnesses

40.13.1 Where a police officer is detailed on a defence list of witnesses, there is no obligation in summary proceedings to obtain details of his or her misconduct record, including findings of guilt before a hearing.

40.13.2 Where the case is proceeding on indictment, details of material misconduct findings for police witnesses who are detailed on the defence list of witnesses should be disclosed.