

## Chapter 41: Fatal Accident Inquiries & Disclosure

### 41.1. Introduction

41.1.1 The Fatal Accidents And Sudden Deaths Inquiry (Scotland) Act 1976 ('the Act') and the Fatal Accidents And Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 make provision for holding of FAIs in respect of fatal accidents, deaths of persons in legal custody, sudden, suspicious and unexplained deaths and deaths occurring in circumstances giving rise to serious public concern.

41.1.2 However, the Act, which is now over 30 years old, does not include provisions in relation to the disclosure of information to other parties involved in the inquiry.

41.1.3 It is also important to note that a FAI may be required in order to satisfy obligations under Article 2 of the European Convention. In the case of **R (on the application of Goodson) v HM Coroner for Bedfordshire and Luton Coroner** ([2006] 1 WLR 432 (at 450)) the Court held that:

*"Where State agents potentially bore responsibility for the death, including potential liability in negligence, the events relating to the death should be subject to an effective investigation."*

Effectively, the State consists first and foremost of:

- Central government.
- regional and local government
- bodies carrying out governmental functions in the public sphere

41.1.4 Where any of these bodies potentially bear responsibility for a death, it is essential therefore, to satisfy obligations under Article 2, that there is an independent and effective investigation which is open to a sufficient element of public scrutiny and appropriately involves the nearest relatives. Disclosure of information in the possession of the Crown that either (i) the Crown intends to lead at the inquiry or (ii) may otherwise be material to the issues which will be relevant to the inquiry is a key part of ensuring an effective investigation.

### 41.2 Disclosure to Legally Represented Parties

41.2.1 Once a decision has been taken to hold a Fatal Accident Inquiry, all information which the Crown intends to lead at the inquiry should be disclosed as early as possible to agents. The information to be disclosed will include the police statements, productions and any expert reports which the Crown intends to lead at the Inquiry, subject to any redaction of sensitive and personal information.

41.2.2 Where the FAI follows criminal proceedings in respect of the same subject matter and the same agents are involved, it is important to note that, notwithstanding the fact that the information may have already been disclosed to the agents, the information will require to be disclosed again in the context of the civil proceedings. This is on the basis that, in relation to the earlier disclosure, the agent is governed by the Law Society Code of Conduct in Criminal Work and is only entitled to use the information for the proper preparation and presentation of the criminal case.

41.2.3 As Article 11 of the Code of Conduct in Criminal Work does not extend to civil proceedings, it is essential that, prior to disclosure, the solicitor provides an undertaking to the effect that the information is provided on the basis that:

- a) Such material, or any information contained in it, will not be used or disclosed other than for the purpose of the preparation and conduct of the Inquiry;
- b) Copies of the material will not be provided to interested party or to any other party without the express agreement in writing of the Procurator Fiscal; and
- c) In the event that you cease to act for the interested party, that any such material will be returned to the Procurator Fiscal

A copy of the template undertaking is available in the FOS templates on the intranet [DISCUNDCIVPROCESS.DOC]

### **41.3 Disclosure to Self-represented and Non-legally Represented Parties (including those represented by a solicitor who is not qualified in Scotland)**

41.3.1 In order to ensure compliance with the Data Protection Act, information which the Crown intends to rely on at the FAI **must** only be disclosed to a non-legally or self-represented party under the authority of a court order.

41.3.2 In such circumstances, the court should be petitioned for an order specifying the manner in which information should be disclosed to these parties and the purpose for which the information can be used.

41.3.3 Once agreement has been reached regarding the manner of disclosure, the non-legally or self represented party should be required to sign an agreement similar to a protective order in relation to criminal proceedings. Whilst this does not carry the same sanction as that provided by the Criminal Procedure (Scotland) (Act) 1995, if the Sheriff confirms the party's understanding of the undertaking and issues a warning to the party about breaching same, then the Sheriff could deal with any breach of this undertaking by way of a contempt of court in a similar manner to that applicable in the ordinary cause rules (section 4(7) Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976). A style undertaking is attached at Annex P and can be accessed in the FOS Templates.

### **41.4 Unused Information**

41.4.1 Where the Procurator Fiscal is in possession of information which the Crown does not intend to lead at the inquiry, this information should be disclosed to the other parties where the information may be material to the issues which will be relevant to the inquiry. Examples of this would be the statement of a further witness where several witnesses are led in relation to the same issue and an expert report where the author is unavailable to give evidence.

### **41.5 Criminal History Records**

#### *General Principles*

41.5.1 Any criminal history records in the possession of the Crown in respect of any witnesses that the Crown intends to lead at the inquiry should be considered for disclosure in order to ensure an effective investigation and satisfy the Crown's Article 2 obligations. **Unlike in criminal proceedings, however, there is no obligation to routinely *obtain* such records for consideration.**

41.5.2 **Only** previous convictions should be considered to determine whether or not they should be considered for disclosure. For the avoidance of doubt, outstanding charges, children's hearing appearances and fixed penalties should not be considered for disclosure.

41.5.3 Previous convictions should only be disclosed if they relate either to the subject matter of the FAI (e.g. health and Safety convictions) or where they relate to the credibility of the witness, as set down in paragraphs 19.6.3 – 19.6.8 of this Manual.

#### *Non-Disclosure of Material Convictions*

41.5.4 As the disclosure of any previous conviction is in the context of civil proceedings, then the Rehabilitation of Offenders Act 1974 must be applied. Accordingly, any spent convictions should not be disclosed, even where they are material. Further guidance on the application of the 1974 Act is contained in Annex Q to this Manual.

41.5.5 Notwithstanding the material nature of a previous conviction, however, circumstances may exceptionally arise where the Crown considers that public interest immunity should be claimed, e.g. where disclosure of the information could create a threat to life and limb of a witness or other persons. Where this arises the matter should be referred initially to the Head of the Scottish Fatalities Investigation Unit. Thereafter the matter should be reported to the Director of Serious Casework for the attention of Crown Counsel, with an appropriate recommendation, for a decision as to how the issue should be addressed.

41.5.6 Disclosure of witness previous convictions should only be made to the interested party's legal representative. Where the interested party is unrepresented the procedure at 41.3 above should be followed.