Chapter 44: Large and Complex cases

Background

The Obligation of the Police and Other Investigating Agencies to Submit Relevant Information to the Crown

44.1. The Law

44.1.1 In order for the system of disclosure to function correctly the Crown, the police and other investigating agencies must fulfil certain fundamental obligations:

> "Ultimately, the correct functioning of any system of disclosure depends on the diligence and sense of duty of everyone involved, starting with the police and going on up through the Procurator Fiscal service to the Crown Office and the Lord Advocate herself." (**McDonald [PC]** at paragraph 61)

44.1.2 The police and other investigating agencies are under an obligation to submit **all relevant information** to the Crown. The court in **Smith v HMA** (1952 JC 66) set out that it is the duty of the police,

> "to put before the Procurator-fiscal everything which may be relevant and material to the issue of whether the suspected party is innocent or guilty. We repeat, it is not for the police to decide what is relevant and material but to give all the information which may be relevant and material."

44.1.3 In relation to solemn cases, section 117 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that:
"(1) where in a prosecution –

a) an accused appears for the first time on petition, or
b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).

(2) as soon as practicable after the appearance, the investigating agency must provide the prosecutor with *details* of all information that may be relevant to the case for or against the accused that the agency is aware of that was obtained in the course of investigating the matter to which the appearance relates.
(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

44.1.4 In relation to summary cases, section 119 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that:
(1) this section applies where a plea of not guilty is recorded against an accused charged on summary complaint.
(2) as soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.
(3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

44.1.5 It should be noted that in both summary and solemn cases this obligation on the investigating agency to submit relevant information is a continuing duty until the

conclusion of proceedings against the accused (Criminal Justice and Licensing (Scotland) Act 2010, s118 (solemn) and s120 (summary)). Therefore if during proceedings the investigating agency becomes aware of further information that may be relevant to the case for or against the accused they must inform the procurator fiscal of the existence of this information and, where required, provide him with details of it. Proceedings are taken to be concluded if:

a) a plea of guilty is recorded against the accused,
b) the accused is acquitted
c) the proceedings against the accused are deserted simpliciter
d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal, (in which case there are provisions for disclosure during live appeals – see chapter 26 herein)
f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or
g) the complaint/ indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation (Criminal Justice and Licensing (Scotland) Act 2010, s118(5) (solemn) and s120 (5) (summary)).

44.1.6 Clearly, in reporting the results of their investigation, the police and other investigating agencies must exercise a power of selection. But a cautious officer will remember that he is not the judge of what is relevant and material and will tend to err on the safe side. If he is in doubt, he should consult the Procurator Fiscal. He will also remember that, as he and he alone has the opportunity of the initial investigation in the public interest, he must put the result of his investigations fairly before the Fiscal in order that the Crown may have a fair basis on which to decide whether or not to prosecute.

44.1.7 In the course of their investigation the police and other investigating agencies will retain information which *may be relevant*, which includes anything that appears to the police to have some bearing on any offence under investigation, or any person being investigated, or on the surrounding circumstances, unless it is incapable of having any impact on the case. Thereafter, the police will submit to the Procurator Fiscal details of all relevant information, or in other words, all information which is not manifestly irrelevant. In relation to a law enforcement operation resulting in multiple cases being reported to COPFS relevance should be assessed against evidence ingathered in the course of the whole operation.

44.1.8 A failure on the part of the police or other investigating agencies to fulfil this obligation may result in a miscarriage of justice and/or breach of Article 6. For examples of cases in which non-disclosure of information by the police to the Crown gave rise to difficulties, see **HMA v. Johnston** (2006 SCCR 236) and **HMA v G.B.** (2006 SCCR 692).

44.2 Duty of the law enforcement agency

44.2.1 It therefore goes without saying that achieving fair and proper disclosure is dependent on the maintenance of full and accurate records of all relevant requests and actions taken during the course of an investigation followed by timely revelation of all such relevant records and material generated by, or acquired during the course of the investigation to the Crown.

44.2.3 Accordingly the schedules of information submitted to the Crown by law enforcement in all solemn cases must be detailed, clear and accurate (see Chapters 16, 34, 35 and 36).

44.2.4 The general rule is that all material ingathered in the course of an investigation requires to be examined in its entirety for relevance to ensure that law enforcement complies with the now statutory obligations under section 117 of the 2010 Act. If there are separate but linked cases reported under one operational name law enforcement should consider the need to appoint one Principal Reviewing Officer to consider all material in the linked/related cases to ensure that all relevant information is revealed to the Crown. It will not be sufficient for material in related cases to be considered in isolation.

44.3 Definition of a large and/or complex case

44.3.1 Without being overly prescriptive, a case should be considered large and/or complex having regard to:

a) the likely length of the trial,
b) the nature of the evidence to be adduced at the trial,
c) the legal issues likely to arise at the trial and
d) whether it forms part of a large, long running operation – each reported case on its own may not satisfy the 3 criteria above but collectively the operation does.

44.3.2 In long running and more complex enquiries the following information is likely to be considered by law enforcement for the purposes of revelation to the Crown:

- Witness statements;
- Forensic evidence;
- Electronic evidence;
- Financial evidence;
- Directed Surveillance Authorities;
- Surveillance management records;
- Surveillance log books;
- Material obtained under search warrants;
- Material obtained under International Letter of Request (ILOR) and mutual legal assistance (MLA) procedures;
- Material obtained under Production orders;
- Material obtained covertly (e.g. CMP (Covert Monitoring Post) evidence).

44.3.3 Examples of large and complex cases are set out below. This list is illustrative rather than exhaustive and will usually involve the generation of a substantial amount of material for consideration in the course of the investigation:

- Long running specialist operations targeting those involved in the supplying of controlled drugs – this may involve significant importation, manufacture or supply, particularly with an international dimension;
- Significant and complex economic crime including but not restricted to share fraud, VAT fraud, insider trading, money laundering and other acquisitive crimes, and other cases in which there is a significant economic element or economic benefit to the accused (and a significant proceeds of crime interest) or where there have been a substantial number of victims or incidents;

- Large scale human trafficking ;
- Terrorist investigations;
- Some homicide investigations;
- Operations focussing on serious and organised crime groups or networks who feature on organised crime mapping – this may include multiple cases under the umbrella of one operational name;
- Cases involving complicated public interest immunity (PII) or other non disclosure issues;
- Cases involving the analysis for evidential purposes of information retrieved from communication service providers (CSPs)
- Cases involving deployment of Covert Monitoring Posts (CMP) and retrieval of audio product;

44.4 Difficulties in ensuring compliance with the disclosure regime that arise in such cases

44.4.1 Large and complex investigations involving multiple accused, multiple trials and sometimes linked investigations can raise particular disclosure issues. In cases of greater complexity there can be severe difficulty in managing the amount of information recovered in an investigation.

44.4.2 One of the principal difficulties in ensuring compliance with the disclosure obligations is that in cases involving multiple trials or multiple accused, investigations are often lengthy, may be "interlinked" with other associated investigations and consequently the quantity of material produced during the investigation can be significant. It is not unusual therefore, particularly where there are multiple accused, for issues impacting on the Crown's duty of disclosure to only emerge or become relevant as the trial approaches, or even only after the trial begins.

44.4.3 In large and complex cases, ensuring that exculpatory material is reliably defined and identified can present challenges both for law enforcement agencies when considering their duties of revelation, and for the Crown when considering their duties of disclosure.

44.4.4 Relevant factors include:

a) The significant volume of potentially relevant and disclosable material;
b) Investigation and evidence gathering may continue after accused have appeared on petition and often right up to and including trial itself;
c) The existence and status of what might at first seem irrelevant and non disclosable material could change as the investigation (and possibly the trial) progress;
d) Due to the size and complexity of a case, numerous pre-trial applications and hearings which may be necessary, defence statements may only be served relatively close to the commencement of the trial (if at all);
e) There may be an overlap and of issues between the prosecution and different accused and/or different trials;
f) Issues which are relevant may only emerge or develop at a later stage in the proceedings (sometimes during the trial itself);

44.4.5 In the context of the large and complex case, it is imperative that there has been close law enforcement and Crown collaboration from a very early stage in the operation, when milestones for the investigation have been identified and law enforcement have decided on an investigation strategy. In order to ensure that the

Crown is fully sighted and can take a decision in early course about how disclosure is to be managed, the relevant Functional Lead or the Head or Deputy Head of SOCD should have been advised in writing of:

- The Principal subjects of the operation;
- Major associates;
- Background Information about the operation, including but not restricted to:

    - Offence(s) under investigation
    - General intelligence picture
    - Previous operations against this criminal enterprise/subject(s) and result.
    - Links to other ongoing operations

- Operational objective(s) i.e. what the Reporting Agency would deem to be sufficient to conclude the operation;
- Anticipated duration of operation;
- Resources allocated to the enquiry including Reviewing Officer details;
- Whether there have been any financial enquiries conducted into the main subjects i.e. is it anticipated that there will be a money laundering enquiry, has there already been a request submitted to the Serious and organised Crime Division at Crown Office for designation as a money laundering enquiry, investigation into assets etc, research into the financial history, current financial status, financial profile(s) etc.
- Planned operational tactics i.e. Directed Surveillance, Intrusive Surveillance
- International/Cross Border aspects including but not restricted to:

    - assessment of involvement with organised criminal networks (OCN) based elsewhere in UK;
    - assessment of involvement with OCNs based abroad;
    - likely requirements in terms of International Letters of Request (ILORs)
    - Identification of likely criminal justice partner agencies, both UK and abroad.

44.4.6 The role of the Crown in such cases will go beyond merely providing legal advice on investigative techniques such as

- search warrants;
- surveillance;
- undercover deployments;
- use of CHIS and Participating Informants
- use of assisting offenders under sections 91 – 97 of the Police, Public Order and Criminal Justice (Scotland) Act 2006

and early engagement is therefore vital to ensure that, having regard to the scope of the investigation, the targets of the investigation and the case strategy what is proposed in these large and complex investigations is manageable or feasible from a prosecution perspective. It may be helpful to liaise with law enforcement to produce a disclosure plan, especially if law enforcement hold material stored digitally.

44.4.7 It is essential that liaison between COPFS and law enforcement is such that the Crown can be satisfied that investigating and reviewing officers are fully aware of

their obligations to reveal everything relevant to the Crown. This is particularly the case in relation to use of covert techniques or CHIS issues, such as use of participating informants or undercover officers.

44.5 Cross-agency investigations

44.5.1 Particular care requires to be taken in cases which are the product of joint or separate investigations by multiple reporting agencies, different divisions within a police force or separate police forces [pre April 2013]. This may arise from the outset of the investigation or the conjoined interests or overlapping enquiries may become apparent only after the investigation has commenced or even, in extreme cases, after the case has been reported.

44.5.2 The relevant SIOs and disclosure officers appointed by each force/agency should be encouraged to work closely together. It is particularly critical that, in their assessment of relevance, they consider what information held may be relevant to the overall case and not only to the charges which stem from their own investigation/operation.

44.5.3 As is set out above if there are separate but linked cases reported under one operational name, law enforcement should consider the need to appoint one Principal Reviewing Officer to consider all material in the linked/related cases to ensure that all relevant information is revealed to the Crown. It will not be sufficient for material in related cases to be considered in isolation, or for law enforcement to reveal all information to the Crown without an assessment for relevance.

44.5.4 Particular care needs to be taken where cases are associated in part, with some accused and incidents being associated and prosecuted together and others considered separately. In those cases, there should be a clear understanding that the assessment of relevance relates only to those charges, and those persons, who are being proceeded against. If an accused later incriminates another person who was also the subject of investigation the relevance of any information relating to them must be reconsidered.

e.g. Accused A and B are prosecuted on the same indictment. In addition to those charges on which both A and B appear, there are a number of charges on which A appears alone and is libelled as acting alone. Those charges were the product of a separate investigation into the separate and joint conduct of A and C. There was insufficient evidence against C and a decision was taken not to prosecute those charges on which A and C were suspected to have been acting together. The conduct of C, and investigation of C, is not relevant to the indictment as it relates to entirely separate matters. If C is later incriminated, the information held in relation to him may be relevant and so must be revealed to the prosecutor and assessed for materiality. If the information relating to C's criminality and the statements of the witnesses who speak to C's criminality are considered to be material then they should be assessed for sensitivity and listed in the appropriate disclosure schedule. In that example, the information about C is unlikely to be material, and therefore disclosable, as A is libelled as acting alone and there is no evidence of C being involved in those charges despite the fact that C was operating a similar scheme.

e.g. Accused D and E are prosecuted on the same indictment and are libelled as acting along with other persons. G is one of those other persons but is not being prosecuted. G's involvement related to victims who are not libelled on the list of witnesses and whom the Crown does not intend to lead in evidence. These victims

are highly vulnerable. The indictment discloses the fact that D and E acted with other persons. Other information disclosed, including police interviews with D and E, reveal that G was involved in their criminality. G has not been incriminated. Information relating to G, including the statements of the witnesses speaking to Gs criminality (whom the Crown does not intend to lead in evidence) may be relevant, however and therefore must be revealed to the prosecutor and assessed for materiality. If considered material, the information relating to G should be assessed for sensitivity and listed on the appropriate disclosure schedule. The information about G's criminality is unlikely to be material, and therefore disclosable, and thus should be listed on the schedule as "statement taken from witness on [date] at [hours]" and marked as "WM – relates to witness not on the indictment and not otherwise material". If G is later incriminated, disclosure should be reconsidered.

44.5.5 At the time of reviewing information, law enforcement should anticipate, as far as possible, any persons from the case who might be incriminated. It may be helpful to keep a separate record of any information which may require to be reconsidered in the event that they are incriminated to speed the review process.

44.5.6 It is worth remembering the prosecutor's duty to review following receipt of a defence statement. Upon receipt of a defence statement, the prosecutor must, as soon as practicable, review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware. The legislation places the responsibility on the prosecutor however this will have to be achieved through communication of the content of the defence statement with the Reviewing officer in the case who will be aware of all information held and particularly information which was previously considered to be manifestly irrelevant. Further information on defence statements and the process to be followed upon receipt can be found in Chapter 42 of this manual.

44.6 Spontaneous duty of disclosure

44.6.1 The decision of the Supreme Court in **McDonald v HMA** (2010 JCPC 1) makes it clear that for Article 6 purposes the Crown's spontaneous duty of disclosure extends only to material of which they are, or become, aware while discharging their primary prosecuting function:

- It does not include the carrying out of potentially extensive and time-consuming investigations as dictated by the defence. It is not open to the defence to produce a "wish list" of inquiries which they would like to see carried out, and then to instate that the prosecution be delayed and disrupted – perhaps to no useful purpose – while such inquiries proceed (**Ramzan + 1 v HMA** ([2011] HCJAC 103)).
- As a rule and in the absence of highly exceptional circumstances, the question whether there has been a breach of the "fair trial" guarantee contained within Article 6 can only be judged in retrospect once a trial has taken place. The Crown's continuing duty of disclosure is one to be performed spontaneously as circumstances develop from time to time, and neither the manner nor the timing of such performance is normally to be directed or enforced by any order of the court.

44.7 Issues which can arise

44.7.1 Because of the nature of some law enforcement operations, it is imperative that the Crown is advised at the initial stages of any sensitivity around certain aspects of the evidence, disclosure of which during preparation of the initial reported cases could prejudice the ongoing operation. Through early contact, steps can be taken to safeguard the law enforcement position while still ensuring that the Crown meets its disclosure obligations. This would allow an opportunity to consider:

- Delaying disclosure of certain witness statements or productions. The Crown would require as much information as possible prior to making this decision as invariably the issue may require to be reported to Crown Counsel for consideration. In the normal course of events we would be looking to fulfil our disclosure obligation between 21 and 28 days following committal for further examination. The decision to delay disclosure could however take place where for example there are further enquiries ongoing or there is for example surveillance evidence relating to other suspects who have not yet appeared before the court and indeed may not realise that they are under suspicion;
- Redaction of the relevant statements or copy productions. Each case needs to be looked at carefully and much will depend upon what it is that is being redacted. There is no point in a redaction if the reader would be able for example to “read between the lines” or make a link to the sensitive information through consideration of other disclosed information.
- Applying to the court for a Non Disclosure Order, an Exclusion Order and/or a Non Notification Order, depending upon the nature of the material involved. See Chapter 25 of the Disclosure Manual.
- If there is a financial investigation into assets for the purposes of confiscation, the reviewing officer will have to ensure that material ingathered for the purposes of the financial investigation is reviewed with a view to considering whether any of it is relevant to the original criminal case.

44.8 Assessment for relevance

44.8.1 In general terms, and in accordance with ACPOS guidance, the reviewing and assessing process will involve examining inspecting and viewing or listening to all the material that has been obtained or generated during the course of the investigation to determine relevance.

44.8.2 In order that law enforcement do not carry out unnecessary examination of material for the purposes of revelation, and in the context of early engagement it is imperative that where large volumes of information are ingathered, categories of information are identified which are deemed by their category to be manifestly irrelevant to the investigation, so that page by page examination of that category of information will not be necessary.

44.8.3 In order that this exception can be utilised it is essential that the relevant law enforcement agency in consultation with the relevant SLM-

(i) Identify the relevancy criteria in respect of the investigation;
(ii) Set down thereafter categories of the documentation/information ingathered which they consider will be relevant to the prosecution and that which will be exculpatory;
(iii) Identify the category or categories of information that they have deemed manifestly irrelevant, thereafter, record details of the information ingathered and retained which has not been examined and the basis on which that category of information has been ruled manifestly irrelevant.

44.8.4 That record will thereafter be held as an audit trail should there be any subsequent requirement for referral to the information or to the basis on which it was not examined. This is of particular importance against the background of early engagement and continuous review.

44.9 Information not on mass media storage devices

44.9.1 Dealing firstly with all information ingathered which at the point of seizure is not held on a mass media storage device; it would not be acceptable to the court, as a general policy, that the material ingathered in the course of a criminal investigation on the strength of investigative orders and voluntary surrenders by witnesses, be scanned to disc and thereafter for law enforcement to apply search criteria to determine relevance.

44.9.2 That approach would present the prosecution with two potential difficulties:-

(i) That a proportion of information ingathered would be ruled by law enforcement as manifestly irrelevant without ever having been examined; and
(ii) If no assessment of the hard copy material was carried out first, law enforcement may have no comprehensive idea of the information ingathered and that the formulation of search criteria to be applied could be flawed.

44.9.3 Accordingly, subject to the exception re manifestly irrelevant material referred to above, a page by page examination of all documentation ingathered in the course of the investigation requires to be carried out. Any potential departure from the page by page search should be discussed with the appropriate functional lead.

44.10 Mass media storage devices

44.10.1 In relation to information which at the point of seizure is held on a mass media storage device, difficulties can be presented where these devices contain huge volumes of information much of which may be manifestly irrelevant.

44.10.2 The likelihood is that documents, images, correspondence (email) etc. will be stored on computers and other digital storage media rather than exist in a paper based format. As a consequence, the burden on law enforcement to recover material from computers, etc. is increasing.

44.10.3 Computer hard disks now routinely have a storage capacity measured in hundreds of gigabits. The ensuing common types of files often result in an average number of pages per gigabyte. A modern computer has a hard disk average of 500GB:

Document Type	**Average Pages/Doc**	**Average Pages/GB**	**Number of files fit on 500 GB Hard Disk**
Microsoft Word	8	64,782	32,391,000
Email	1.5	100,099	50,049,500
Text	20	677,963	338,981,500

Image	1.4	15,477	7,738,500

44.10.4 Although different types of documents produce different numbers of pages per gigabyte, the average number of pages produced compared to the size consumed by the initial documents remains consistent, making it possible to supply estimates as to the number of pages that would likely result if documents were printed.[1]

44.10.5 The ability of specialist law enforcement units to examine all documents and images on a computer, etc. is made very difficult by the volume of such material. As a consequence a process has been adopted as standard whereby searches of computer storage media are undertaken based on parameters determined by the Senior Investigating Officer (SIO) or Investigating Officer (IO) in consultation with COPFS.

44.11 Standard Practice for the Examination of Computers and allied Digital Storage Media

44.11.1 The following practice has been agreed between ACPOS and COPFS and should be implemented as standard:

- Computer, etc. seized as evidence;
- Computer etc to be imaged and original retained pending further discussion with the Crown;
- The SIO / IO will determine 'narrow' search parameters, based on key words or images, as a basis for which the computer etc will be examined, to recover documents or images which inculpate the accused or which exculpate the accused or otherwise undermine the prosecution case;
- The SIO / IO must record and reveal to COPFS their search parameters and their reasoning for setting these. They should also record any reasons why they did not extend their search parameters. A record must be kept of all searches made.
- Following the submission of any documents or images recovered from a computer to COPFS, once examined, COPFS may instruct the SIO / IO to undertake a further search of the computer, etc. based on new search parameters. Again these should be narrowly defined, based on knowledge of the case. There should be no blanket requests from COPFS for an examination of a computer, etc. based on wide ranging criteria.
- COPFS may wish to hold a case conference with the SIO in Solemn cases to determine these (second stage) search parameters.
- The defence should be contacted and asked to indicate any particular searches they wish to have made of digital material held by law enforcement;
- The defence should also be asked to confirm whether there is any material on the device/computer which could attract a claim of legal confidentiality;
- Following receipt of a 'Defence Statement' COPFS may instruct that a further search of the device be undertaken. Again this (third stage) examination should be based on specific search criteria outlined by the Accused or Defence.
- Should an Accused or the Defence ask for a wide ranging search (which would impact negatively on the capacity or capability of the specialist unit)

[1] Source: Setec Investigations

then the unit will invite the Defence to undertake their own examination of the hard disk within a controlled law enforcement environment **or** pay law enforcement to 'image', i.e. copy the hard disk or other digital storage media and undertake their own examination. When doing this Care should be taken to consider potential problems of disclosure of sensitive/confidential material, especially in relation to co-accused or third parties.

- There will be no 'imaging' of a hard disk or other storage media in a case of sexual crime as this may entail passing indecent or paedophile images outwith law enforcement, in some instances to those who are suspected of committing the offence. It should also be noted that in cases of non sexual crime there may be sexual images held on computer hard disk – the nature of the case should not be the sole determining factor re whether or not an image of the hard disk should be provided to the accused, rather the initial assessment of what is contained on the hard disk.
- If the Accused or Defence undertake their own examination, they must notify COPFS of any documents or images that they discover on the computer, etc. upon which they intend to rely in a further 'Defence Statement'. The specialist unit will then recover such documents or images from the original media.

44.11.2 On that basis an exception can be made to the basic rule of page by page examination of material. This exception arises out of the non divisibility of the hard disk/mass media storage device at the point of seizure.

44.12 Recovery and retention of material

44.12.1 In respect of these items, law enforcement should be instructed consider whether it is viable to image and return the image of the device to the person from whom it was seized as, depending on the case, the device may be used for legitimate purposes in the course of a business for example and requests have been made to the Crown to return material to the suspect/accused to allow that legitimate business to continue to operate. Law enforcement should be advised to:-

a) Record the capacity of the device together with the volume of information held. Determine in the light of that whether it is feasible to examine every file contained on an individual storage item. If the volume held is such that it is feasible to examine every item, all files should be examined. Even where every file on a particular storage device is to be examined there will, in any event, be a key word search of that device to examine the free space.

b) Determine whether the volume of information is so great that it is not feasible to examine each individual file, and if so key word search should be applied to the storage device. It is essential that the extent of the word search is drawn to reflect the relevance criteria established. The results of the key word search should be recorded to demonstrate the number of hits against each individual word. Examination of each of the key word hits should then be undertaken to determine relevancy.

c) Communicate with Crown. In due course the key word search and record of hits will be disclosed to the accused and any co accused. The Defence will have the opportunity to request further searches to be carried out. In the event of such requests including a "Trojan" key word, consultation should take place with the Crown to determine the extent of examination of information produced.

44.13 Information recorded in a language other than English

44.13.1 It is not necessary that all material held is fully translated in a language other than English. In the first instance, information held in a language other than English should be reviewed by the reporting agency with the assistance of an interpreter.

44.13.2 Statements should be taken from the interpreter detailing their involvement and the material reviewed with their assistance.

44.13.3 If a police officer involved in the investigation is fluent in the language in which the information is recorded, he or she may review it without the assistance of an interpreter. Particular caution should be exercised here and any question of doubt as to relevance should be assessed in the accused's favour. It would be appropriate to have an audit trail to demonstrate the checks which have been made to be satisfied that the police officer is actually sufficiently fluent to undertake this type of unassisted translation work.

44.13.4 It is critical that for each item of information reviewed a synopsis, in English, of the content of the document is noted and the assessment of relevance is carefully recorded. Any items of information which it is considered may be relevant should be translated in full and provided to the Procurator Fiscal to consider whether it is material and therefore requires to be disclosed.

44.13.5 Independent translation may be required following this initial review for the purposes of revelation to the Crown.

44.14.1 Although, strictly speaking, there is no obligation on the Crown to obtain information held in a foreign jurisdiction for the purposes of disclosure, if the Crown become aware of information being held in a foreign jurisdiction which may be relevant consideration should be given to disclosing to the accused the existence of that information to enable him/her to consider whether to obtain the information by way of International Letter of Request (ILOR).

44.14.2 There may be circumstances where, in order to preserve a trial diet and avoid delay to the proceedings and substantial inconvenience to victims and witnesses, it may be considered appropriate to assist to seek an ILOR to obtain the information, notwithstanding that it is not intended to lead it in evidence at trial given the channels which exist for international co-operation between prosecuting authorities. The accused should be advised of this and also that the sole purpose of seeking the information by ILOR is to assist the accused and to expedite its recovery and not that it is being sought to fulfil the Crown's disclosure obligations.

44.15 Witness protection

44.15.1 Section 82 of the Serious Organised Crime and Police Act 2005 (SOCPA) makes provision for the protection of witnesses and certain other persons involved in investigations or legal proceedings. Arrangements for protection under section 82 may be made by protection providers.[2] Other powers to provide protection are not

[2] Listed in section 82(5) A protection provider is—

(a)a chief officer of a police force in England and Wales;

(b)a chief constable of a police force in Scotland;

(c)the Chief Constable of the Police Service of Northern Ireland;

affected. This means that persons who are not protection providers will still be able to provide protection to witnesses and others under their existing powers. It also means that protection providers may continue to use other powers. For example, if the only protection required is the provision of a security lock or a panic alarm, a protection provider may think it appropriate to use his existing powers rather than rely on section 82.

44.15.2 In determining whether to make arrangements for protection under section 82(1), or to vary or cancel arrangements made under that subsection, a protection provider must, in particular, have regard to:

(a) the nature and extent of the risk to the person's safety,

(b) the cost of the arrangements,

(c) the likelihood that the person, and any person associated with him, will be able to adjust to any change in their circumstances which may arise from the making of the arrangements or from their variation or cancellation (as the case may be), and

(d) if the person is or might be a witness in legal proceedings (whether or not in the United Kingdom), the nature of the proceedings and the importance of his being a witness in those proceedings.

44.15.3 In cases where any witnesses are subject to formal protection measures under SOCPA or where any witness is vulnerable, particular care should be taken in relation to disclosure.
Any information which might disclose:

- their current whereabouts
- the location or approximate location of any safe-house in which they might have been placed; or
- any information in relation to a national identity change

should be redacted unless that information is essential to proving the charge.

44.16 Potential Incriminees

44.16.1 In cases involving multiple suspects, not all of whom are proceeded against, there is the potential for a suspect who has not been proceeded against to be incriminated.

44.16.2 Difficulties can arise where the precognoscer identifies a potential incriminee at an early stage but defence do not lodge a notice of intimation until much later.

44.16.3 Evidence held by the Crown requires to be assessed for disclosure whether a notice of incrimination has been lodged or not.

44.16.4 In cases of doubt or difficulty or where an issue of sensitivity arises, a report should be submitted to the DSC recommending that instructions be sought from

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(d)the Director General of SOCA;

(e)any of the Commissioners for Her Majesty's Revenue and Customs;

(f)the Director of the Scottish Drug Enforcement Agency;

(g)a person designated by a person mentioned in any of the preceding paragraphs to exercise his functions under this section.

Crown Counsel as to whether any evidence tending to implicate the potential incriminee should be disclosed prior to any notice of incrimination being lodged.

44.17 Managing disclosure

44.17.1 It is essential that consideration is given to how disclosure will be managed within COPFS as this is likely to be resource intensive both in terms of the volume of work (especially dealing with schedules which may run to hundreds of pages) and consideration of how to deal with complicated and/or sensitive issues such as withholding of disclosure on PII grounds.

44.17.2 In addition it is likely to be necessary to plan how disclosure is to be achieved, i.e. whether this can be done via the disclosure web-site or whether it will be necessary to use pen or hard drives. If there is a very large quantity of material to be disclosed thought should be given to how the material can be "packaged" so as to be comprehensible to the defence and prosecutors should be amenable to liaising with the defence to assist them, if requested, to place disclosure in context and provide guidance as to significance of particular items disclosed.

44.18 Telephone records – call data records

44.18.1 Telephony evidence and call data records are often used in large and complex cases to assist in considering the attribution of telephones/numbers to certain individuals. To do this analysts will consider the call data to produce call statistics, behavioural patterns and, in conjunction with "cell site" analysis, regularly frequented locations.

44.18.2 It is therefore time consuming, expensive and can be complex. Given these factors, it is only used in the most serious crimes, and, in the context of cell site, generally only in the investigation and prosecution of homicides and significant organised crime investigations.

44.18.3 The Crown's duty of disclosure does not extend to disclosing irrelevant telephone numbers (and those which seem to have no connection to the events which are the subject of the criminal proceedings). Telephone numbers can constitute "personal data" as defined within the Data Protection Act 1998 (and set out below) and care must be taken when disclosing information, even within the framework of a criminal case.

44.18.4 The Data Protection Act 1998 does not provide authority to disclose information in the absence of a specific legal authority to make such a disclosure, which would constitute "processing" within the meaning of section 1 of the Act. Therefore conformity with the Principles and provisions of the Act does not ensure that the disclosure itself was lawful, it simply provides the framework regulating the manner in which the disclosure can be made.

44.18.5 The DPA works in two ways:

- Anyone who records and uses personal information (data controllers) must be open about how the information is used and must follow eight principles of 'good information handling';
- It also gives individuals (data subjects) certain rights, including the right to see information that is held about us and to have it corrected if it is wrong.

44.18.6 The Data Protection Act applies to 'personal data' that is, data about identifiable living individuals. Section 1 of the Act defines "personal data" as data which relate to a living individual who can be identified-

- From those data, or
- From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. In this case it is important to note that if the Crown holds information which could be cross referred with call data records to lead to the identification of living individuals, the information in the records could constitute personal data, which requires to be processed in accordance with the DPA.

44.18.7 In **Michael John Durant v Financial Services Authority** ([2003] EWCA Civ 174 Court of Appeal (Civil Division)) the court provided a further guide to what constitutes personal data and concluded that:

> *'personal data' "is information that affects [a person's] privacy, whether in his personal or family life, business or professional capacity".*

44.18.8 The concept of privacy is therefore clearly central to the definition of personal data.

44.18.9 The Act requires that personal data be processed "fairly and lawfully". Personal data will not be processed fairly unless certain conditions are met.

44.18.10 The Data Protection Act makes specific provision for sensitive personal data. Sensitive data is defined in section 2 of the Act and includes: racial or ethnic origin; political opinions; religious or other beliefs; trade union membership; health; sex life; criminal proceedings or convictions. Sensitive data can only be processed under strict conditions, which include:

- Having the explicit consent of the individual;
- Being required by law to process the data for employment purposes;
- Needing to process the information in order to protect the vital interests of the data subject or another;
- Dealing with the administration of justice or legal proceedings.

44.18.11 Any information obtained by the Crown in connection with the prevention and detection of crime, or the apprehension and prosecution of offenders should only be disclosed in the following circumstances:

- For the purposes for which the information was imparted; or
- If the disclosure of such information is in accordance with a statutory duty or a common law authority – the Crown formerly had the common law authority under **McLeod** and now has a statutory authority under the 2010 Act

44.18.12 Disclosure to the defence of any extraneous call data (which could be linked to other data held by the Crown and could therefore identify living individuals), where the Crown has satisfied its statutory disclosure obligation could be a breach of the Data Protection Act and subject to sanction by the Information Commissioner's Office.

44.18.13 Telephony evidence comes in two basic forms:

- results of the examination of the telephone itself, and
- use of data held by communication service providers (the telephone companies themselves - CSPs)

and is used for two purposes, namely:

- to confirm (broadly) contact between two persons, and
- to place an individual at or in a location or sector.

44.18.14 For both purposes, the holder of the data concerned - the CSP - will require to provide data held by it for another purpose, and will do so under a RIPA authorisation. To this end, the police will now routinely ask witnesses to provide a telephone number in the course of their statements. Such telephone numbers may after full investigation, turn out to be:

i. Irrelevant;
ii. Relevant insomuch as they can be used to establish attribution to an accused/suspect's phone;
iii. Relevant as calls or messages to and from that number form part of the Crown case and the content is itself evidence; or
iv. Relevant as the making of that telephone contact allows us to site the accused.

44.18.15 Examination of any individual's mobile telephone will inevitably involve "collateral intrusion" which is unwarranted or unauthorised intrusion into the privacy of third parties or intrusion into the privacy of the subject/accused for purposes other than that necessary for the investigation.

44.18.16 This will involve:

- the content of texts, e-mails and other messages;
- revealing of numbers and attribution to irrelevant third parties; and
- revealing details of third parties who are necessary to attribute the telephone to the accused (or occasionally third party)

44.18.17 At the time the SLM reads and redacts the statement for disclosure, it is likely that the status of telephone numbers and their potential relevance to the case is unknown. Therefore telephone numbers should be redacted save for the last 4 digits, meaning if the number falls into category i above, no harm is done, and if it falls into any of ii, iii or iv, sufficient detail is disclosed to allow identification of that number.

44.18.18 The reason for disclosure of the last 4 digits of these "irrelevant numbers" is to contextualise the telephone billing for the assistance of the defence and to allow them to identify frequently called numbers which may open up particular lines of enquiry. This practice therefore allows for protection of irrelevant data yet still allows meaningful perusal of a statement, and later attribution to an individual if this is necessary.

44.18.19 If there is any suggestion that 2 or more numbers in the records end with the same last 4 digits, the approach above should be amended to extend the number disclosed to the last 5 digits and so on as appropriate.

Cell site data

44.18.20 Cell site analysis is a technique performed by an experienced analyst using call data stored by CSPs. Call Data Records can be analysed to investigate where a mobile phone handset or SIM card *could have been* located in relation to a past call event, therefore *where* the location of an accused at a particular time or his movements are relevant for proof of the Crown case, then an expert report can be sought and produced from a specialist company.

44.18.21 Even if a named individual is recorded by the CSP as being the owner of the account, this does not necessarily mean that they were the user of the mobile phone/SIM card at a particular date and time. Detailed analysis of the call data records over an extended period of time can help to establish who could have been the user of the handset or SIM at a particular time. Therefore it should be noted that attribution of the phone to a particular user will not form part of the analyst's report, and is assumed for that purpose from information supplied by the police.

44.18.22 The process broadly is:

- the police have specialised units that can access the same information that CSPs themselves access (using a RIPA authority). The investigating force is sent the information usually as an excel spreadsheet, or PDF. This allows the groundwork to be done. Once the Crown decides to evidence the information, a formal request is made to each CSP, who provide certified copy of the data required. The CSP usually provides this hard copy, via e-mail as a PDF or excel spreadsheet and occasionally on a disc;

- An intelligence report is then provided, on the basis of the information the police themselves obtained, then a final report based on the certified records from the CSP direct;

- The specialist report and the spreadsheets/pdf with the information attached are all disclosed to the defence hard copy. The raw data will be redacted to take out all but the last 4 digits of the remaining phone numbers. This redaction will not apply to the critical numbers (e.g. accused's). The technical data, such as azimuth, northing and easting (which relate to geographic co-ordinates) will appear intact.

44.18.23 What should therefore be disclosed to the defence to satisfy the Crown's statutory obligation of disclosure under the 2010 Act is:

- the report from the specialist company;
- the raw data on which it is based, **hard copy**, redacted as above; and
- attribution statements

44.18.24 Accordingly the defence will generally receive a copy of the report that is redacted to exclude so much of the irrelevant and sensitive information as possible. Messages sent via mobile phones can contain astonishing amounts of highly sensitive personal detail and the assumption is that if an individual sends a message and is not committing a crime, there is a degree of privacy surrounding that message.

44.18.25 Any requests from the defence which would require a deviation from this policy, such as requests for access to the discs containing the raw data, should be referred to the appropriate Federation High Court lead, or in relation to an SOCD case, the Head of SOCD, for decision and action.

44.18.26 When it comes to the indictment the redacted copy records shall be listed and lodged as the productions unless there is good reason to believe that a witness would be hindered in the evidence they could give by being provided with the redacted copy in the witness box. If such circumstances arise a report should be submitted to the DSC's office for Crown Counsel’s instructions about which version to add to the indictment.