

Chapter 6: Productions

6.1 The Law

6.1.1 The Crown has a subsisting duty to provide to the defence all material information i.e. information which is likely to materially weaken or undermine the evidence that is likely to be led by the prosecutor; materially strengthen the defence case; or to form part of the evidence to be led by the prosecutor in the proceedings against the accused. This duty applies to *all* material information, including all productions.

6.2 Policy

6.2.1 The general rule is that all material productions that are in the possession of the Crown should be disclosed to the defence. For the avoidance of doubt this extends not just to those productions listed in the Crown list, but also to any other items submitted by the police or other investigating agencies which are not listed as productions, but which are considered disclosable in terms of the materiality test i.e. information which is likely to

- materially weaken or undermine the evidence that is likely to be led by the prosecutor;
- materially strengthen the defence case; or
- form part of the evidence to be led by the prosecutor in the proceedings against the accused.

Any material information contained in additional items which are not listed on the indictment should be disclosed to the defence. For the avoidance of doubt, this includes items which, if listed as productions, would be labels.

6.2.2 The Crown can satisfy its disclosure obligations by either providing the defence with a copy of the production or by providing the defence with access to the production (**Hanif v HMA** (2009 SCCR 38)). In usual practice, the Crown will provide a copy of the production. Where, however, the production is either a label production or where it would be inappropriate or impracticable to provide the defence with a copy of the production then the defence must be advised of:

- (i) The existence of the production
- (ii) The whereabouts of the production for viewing purposes; and
- (iii) Details of the appropriate person to contact to arrange access to the production.

6.3 Timescales for Disclosure of Productions

SOLEMN PROCEEDINGS

6.3.1 In Solemn cases, prior to the service of the indictment, the Crown will provide to the defence the following where they meet the materiality test:

- 1) Copies of documentary information in the case (so far as it can be copied readily) having regard to departmental guidance on redaction of disclosable material; and
- 2) Where practicable, either copies of audio, video or digital recordings or details of these items and their location, and offer the defence an opportunity to listen to, or view them; and
- 3) Where practicable, details of the location of, any other productions in the case. and instructions in relation to the opportunity to examine them,

The Crown will provide to the defence, upon service of the indictment:

- 1) A courtesy copy indictment;
- 2) Copies of any previously undisclosed listed productions (so far as they can be copied readily);
- 3) Details of, the location of, and an opportunity to examine, any other listed productions in the case; and
- 4) Details of any other items seized and retained by the police which the Crown does not consider to be material evidence, so that, where approached by the defence, consideration can be given by the Crown to allowing the defence to view or examine such items.

6.3.2 The Procurator Fiscal will order all necessary productions and other material information in accordance with the timescales set out below, accepting that it will not always be appropriate to order every production due to certain items, for example, being the subject of forensic scientific examination, or hazardous, or contaminated, or by their nature, impracticable to transfer and store in the Procurator Fiscal's Office.

6.3.3 Different timescales apply depending on whether: (a) the accused is in custody; (b) the accused is at liberty; or (c) the case is to be treated as a priority (described below).

Custody Cases

6.3.4 Where the accused is in custody, or a case is to be treated as a priority, the Procurator Fiscal will request from the police all necessary outstanding productions and other material information immediately, on the same day as the accused first appears in court (CFE).

6.3.5 The police will submit all productions and other material information requested by the Procurator Fiscal within 7 days of the first appearance in court (CFE).

6.3.6 As soon as practicable, but no later than 28 days after CFE, the Procurator Fiscal will, where it has been intimated that the defence solicitor is acting for the accused, provide the defence solicitor with the items and information listed above at 6.3.1, (1) to (3) above, along with any information identified to date that does not form part of the prosecution case but could materially weaken the prosecution case or materially strengthen the defence case.

Cases Where the Accused is at Liberty

6.3.7 Where the accused is at liberty, the Procurator Fiscal will, as soon as possible, and not later than 3 working days after the first appearance in court (CFE), request from the police all necessary productions and other material information.

6.3.8 The police will submit all productions and material information requested by the Procurator Fiscal within 14 days of the first appearance in court (CFE).

6.3.9 As soon as practicable, but no later than 28 days after CFE, the Procurator Fiscal will, where it has been intimated that the defence solicitor is acting for the accused, provide the defence solicitor with the items and information listed above at 6.3.1, (1) to (3), along with any information identified to date that does not form part of the prosecution case but could materially weaken the prosecution case or materially strengthen the defence case.

Priority Cases

6.3.10 Certain cases where the accused is on bail or ordained to appear will be treated by the Procurator Fiscal as if the accused were remanded in custody. This can apply to both summary and solemn cases.

6.3.11 Examples of such cases include murder cases, domestic assaults, and cases involving children or other vulnerable witnesses. This list is not exhaustive.

6.3.12 Where a case has been identified as a priority case, the timescales set out at above regarding custody cases will apply.

6.3.13 When requesting productions and other material information in priority cases, the Procurator Fiscal will highlight the case as such.

Forensic Science Reports

6.3.14 The above timescales are subject to any different timescales agreed between COPFS, SPA and Police Scotland in respect of forensic science reports.

6.4 Sensitive Productions

6.4.1 Care requires to be taken in relation to productions that contain sensitive information i.e. information which if it were to be disclosed would constitute a risk of (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.

6.4.2 It may be necessary, for example in intelligence-based cases, to redact part of an original document where there are sound operational reasons for doing so. This often occurs in cases where RIPSAs apply where, for example, the disclosure of the full copy of a surveillance authority may prejudice an ongoing operation. In such a case the provision of a certified copy of a redacted version of the authority would be appropriate, provided that this does not conflict with the Crown's duty to disclose material information i.e. information which is likely to materially weaken or undermine the evidence that is likely to be led by the prosecutor; materially strengthen the defence case; or to form part of the evidence to be led by the prosecutor in the proceedings against the accused. Information should only be redacted if it is *immaterial*.

6.4.3 A similar approach may be required where productions contain sensitive *material* information which, for example, relates to children, or the investigation of indecent images. In those circumstances it may be appropriate to limit disclosure to the defence to allowing access to view the material rather than the providing a copy production, e.g. a copy of a visual recording of an interview of a child.

6.4.4 In particular, in relation to indecent images of children, **under no circumstances** should these be copied and disclosed in the usual way to the defence. The defence should be encouraged to view the images at the earliest opportunity so that they can give fully informed advice to their client, and indicate their position regarding any dispute on matters such as whether the images depict children or are indecent. Arrangements to view the images should be made in liaison with the police using the police computer equipment at a suitable location.

Obtaining and Disclosing Sensitive Personal Records in Sexual Crime Cases

6.4.5 During the investigation of a sexual crime particular consideration will require to be given to the question of whether to obtain sensitive personal records such as health records (including psychiatric and psychological records), education records or social work records. The fact that such material is very often sought by the defence and admitted at trial compels the Crown to seek to anticipate such action by recovering these records early thereby preventing delay, narrowing the scope of what is to be disclosed, responding to any application to recover the records and to counter in evidence any adverse inference which might be drawn from the history they disclose.

6.4.6 The primary consideration should be whether the complainer has a history which is likely to be relevant to the prosecution or the defence. It is clear that the prospect of sensitive personal information being obtained, disclosed and aired in the course of a public criminal trial may be a potentially distressing prospect for complainers in sexual offences cases. The potential impact of obtaining and disclosing such material should not be underestimated. Indeed for some complainers the likelihood of such information being obtained and disclosed may influence the extent to which they will support the prosecution.

6.4.7 It is essential that, from the earliest stage in the investigation, the case preparer, the Solemn Legal Manager and the National Sexual Crimes Unit are focussed on the question of whether relevant records will require to be obtained, considered and disclosed where appropriate in order to comply with the Crown's disclosure obligations.

6.4.8 A four stage process should be adopted;

- Identify whether there is a reason to obtain the records as part of the investigation
- Identify the Complainer's view of the records being obtained
- Consider whether the records contain information which requires to be disclosed under the materiality test
- Where information has been disclosed identify whether it is inadmissible in terms of section 275 of the Criminal Procedure (Scotland) Act 1995 or in terms of the fact that it relates to collateral matters (see **DS v HMA** (2007 SLT 1026))

6.4.9 At all stages of the case consideration should be given as to whether there are likely to be health, social work or other sensitive records which may contain material evidence for or against the accused. This should be considered by the Depute preparing the initial report, the National Sexual Crimes Unit, the Solemn Legal Manager and the Case Preparer.

6.4.10 The test for recovering sensitive, personal records will be met when a legitimate purpose which justifies a particular line of investigation has been identified. That line of investigation may ultimately yield material evidence for or against the accused (which therefore requires to be disclosed) but it may not. It is not necessary to conclude that the records in question will contain evidence which will form part of the Crown case or which will otherwise be disclosable. It is sufficient that the records in question may contain relevant information. In all cases it is essential that the purpose of the inquiry can be clearly defined

6.4.11 It is essential that the complainer is fully informed of the nature of any enquiry which will be undertaken and of the implications of their records being obtained. In order to ensure that the victim's rights to privacy provided for by Article 8 of the ECHR are given proper consideration, it is vital that the Procurator Fiscal

places the victim on notice and gives the victim an opportunity to express their views on the recovery of personal and sensitive records and that any view given is informed by and understanding of the process and the implications of recovery.

6.4.12 In High Court cases Crown Counsel's instructions will be sought at an early stage and the Crown will contact the agents acting for the accused to inform them of the nature and extent of the records being sought or, just as importantly, that no such personal records will be sought. If a response is received from the agents this will be considered and if it includes information such as to form a basis on which further or different records might appropriately be requested by the Crown, or where it is possible that this information may form a basis on which such further or different personal records may be obtained then additional instructions will be sought from Crown Counsel.

6.5 Visual Recording of Child Witness Interviews

6.5.1 Visual recordings of joint investigate interviews with children must be made available to the defence where the recording is **material**, unless there are overriding public interest considerations that justify non-disclosure.

6.5.2 Accordingly, where there is a visual (including audio) recording of a child witness interview and it is considered to be **material** and therefore disclosable, the defence should be provided with details of the recording and its location in order that the defence can make arrangements to view the recording.

6.5.3 Routinely, the recording shown should be an unedited version of the interview, but where the interview contains sensitive and immaterial information then careful consideration should be given to showing the defence an edited version. This may not require the same considerations as for the redaction of statements where the accused may not be given access to the video by virtue of section 288C of the 1995 Act. Where the recording contains sensitive and material information and there are public interest reasons for not disclosing a report should be submitted by the functional lead for High Court / Sheriff & Jury / Summary (depending on the forum of the case), Federation Head or other appropriately vetted member of COPFS staff. Thereafter the matter should be reported, including an appropriate recommendation, to the Director of Serious Casework for the onward attention of Crown Counsel as set out in Chapter 25 of this Manual.

6.5.4 Access to the recording should be given to the defence solicitor, counsel and any expert instructed, provided the expert has been instructed for a purpose that requires access to the recording. The defence may take notes when viewing the recording of the interview – an interview transcript is not usually available at this stage. The defence should be allowed to view the recording more than once if necessary, except where a request for additional access appears unreasonable.

6.5.5 Where the defence consider that the particular circumstances of the case require that the accused should see the redacted recording, a request to this effect should be submitted providing detailed reasons why it is considered necessary for the accused to view the recording. Thereafter, a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions.

6.5.6 Where Crown Counsel considers that it is not in the public interest to disclose the recording to the accused or that disclosure will in any way put a child at risk or otherwise interfere with the Convention rights of the child, Crown Counsel may

consider it best that the request be refused and that an application for a ruling be lodged by the defence and the matter adjudicated by the Court.

6.5.7 Where Crown Counsel considers that there are circumstances which require the accused to have access to the recording, this should not be done unless or until it becomes clear that the case is proceeding to trial. All issues of timing should be carefully considered and it is preferable that the disclosure to the accused is made as close to the preliminary hearing/ first diet/ intermediate diet as is practicable.

6.5.8 If it is agreed that the accused should see the recording, or the Court has ruled that the recording is disclosable in terms of the materiality test, then careful consideration requires to be given as to whether or not to disclose by access a redacted version of the recording (removing any sensitive and immaterial information). Under no circumstances should a non-redacted version of the recording be made available. It is important to note that a Court ruling that information is disclosable, is not per se a ruling to disclose the information. In circumstances where the Crown continues to be of the view that it is not in the public interest to disclose the recording (even in a redacted form) a report should be submitted to the Director of Serious Casework for Crown Counsel's Instructions as to whether or not the case at hand merits risking the Crown being held to have breached its disclosure obligations. It should be remembered that breach of the Crown's disclosure obligations will not always result in an unfair trial in terms of Article 6 ECHR. This approach should only be followed in exceptional circumstances.

6.5.9 Viewing of the recording should be facilitated through the Reviewing Officer, although the defence, including the accused (if applicable) should be permitted to view the recording in private. However, the Reviewing Officer should confirm suitable arrangements are in place to ensure that no copies are made and that the recording is returned to the Crown after viewing.

6.5.10 At present, the police will only provide a transcript of the interview once it has been confirmed that the recording is to be used as a production in the case. When a transcript is available, this should be disclosed to the defence, subject to the principles of redaction as set out above.

6.5.11 Further guidance in relation to section 288 of the 1995 Act and the unrepresented accused is contained in Chapter 23 of this Manual.

6.6 Video Identification Parades

6.6.1 Where the Video Identification Parade Electronic Recording System (VIPER) has been used, the DVD containing the video parade will not routinely be lodged as a production. However, if an issue relating to the conduct or composition of the parade is raised, the defence should **not** be provided with a copy of the DVD. Instead the defence should be allowed access to the DVD and, if necessary, the Crown should arrange for the DVD to be lodged as a production.

6.7 Witness Statements as Productions

6.7.1 Where a witness statement is disclosed to the defence in terms of the Crown's disclosure obligations, then it should be the typescript version of the statement that is disclosed.

6.7.2 However, where the Crown intends to lodge a witness statement as a production, then it should be the original statement that is lodged and not the typescript version. Where the handwritten statement has been prepared in NSS format, then only sections 1-3 of the handwritten NSS should be lodged. In exceptional circumstances, the full statement may require to be lodged, i.e. where there is material evidence contained within section 6 that the Crown intends to rely on at trial.

6.7.3 Where a handwritten statement is lodged as a production, a copy will require to be disclosed to the defence as well. Where the typescript version of the statement previously disclosed to the defence has been redacted, then the handwritten version of the statement **must** contain the same redactions. In such circumstances, the handwritten statement should be copied and redacted. A schedule 8 certificate should then be prepared under the Criminal Procedure (Scotland) Act 1995 and the certified copy of the redacted handwritten statement should then be lodged as a production.

6.7.4 The appropriate form of the schedule is Form 26.1-A.17 – certified copy of a document by person in possession and control of the original and should be completed by the precognoscer. Accordingly, the precognoscer **must** ensure that they are in possession of the original at the time they complete the schedule.

6.8 Applications for Search Warrants

6.8.1 Where a search warrant application is submitted in respect of an investigation, the content of the application must be considered to determine whether any of the information contained within the application might materially weaken the Crown case or support the defence case.

6.8.2 Where such information does appear to exist, then, the solemn or summary legal manager **must** discuss this with the Reporting Officer to ascertain if there are public interest concerns in disclosing this information.

6.8.3 If, following discussion with the Reporting Officer, there do appear to be public interest grounds for not disclosing the information notwithstanding its materiality, then a report must be submitted to the Director of Serious Casework for Crown Counsel's instructions on whether to withhold the material.

6.8.4 If there are no public interest concerns, or Crown Counsel instruct disclosure following submission of a report under paragraph 6.8.3 above, then the information must be disclosed to the defence. The application itself, however, should not be disclosed. Any material information contained within the application should be extracted and disclosed to the defence in a letter.

6.8.5 If there are exceptional circumstances that might justify the disclosure of the actual application, then Crown Counsel's instructions must again be sought before any such disclosure can be made.

6.9 Forensic Files

6.9.1 Where forensic analysis has been instructed and carried out, the results of the analysis as detailed in the forensic report should be disclosed to the defence. Negative findings should also be disclosed.

6.9.2 During the course of the analysis, the Forensic Laboratory will create a forensic file in relation to the analysis. The file should only contain forensic notes and will not include copies of the prosecution report or any witness statements. This file should not be provided to the Crown, nor should the Crown request a copy of the file.

6.9.3 If the defence request access to the forensic file, then arrangements should be made through the forensic laboratory for a suitably qualified expert instructed by the defence to examine the forensic file.

6.9.4 There is no obligation on the Crown to obtain from the Forensic Laboratory and thereafter disclose to the defence, the written recordings of their workings which relate to the examination carried out and form the basis of the report which is then prepared and revealed to the Crown.

6.9.5 These items will form the contents of a forensic case file. There is no routine obligation to reveal such information or to provide the contents of the forensic case file to the police or Crown unless it contains relevant information which has not been included within the joint report or associated witness statement(s). If such information is identified, then it must be revealed to the Crown in order that it can determine whether or not the information should be disclosed. However, as a matter of routine, all relevant information should be included in either the joint report or the associated witness statements.

6.9.6 There may occasionally be the need for limited, supervised access to forensic notes during defence precognitions or defence examinations to allow a defence expert with sufficient knowledge and skill to interpret such notes in order to assess them for materiality. This will be done under the guidance contained within the SPA's Defence Access Policy. Accordingly, at the end of each joint report, the following phrase should be inserted: *"Access to the examination and analysis records held by the SPA will be in accordance with the current SPA Defence Access Policy."*

6.9.7 Forensic scientists will not provide the defence with copies of material from the file or allow the case files or any part of them to be removed or copied unless on the directly instruction of the prosecutor.

6.10 Continuing Duty to Disclose

6.10.1 **The Crown has a continuing duty of disclosure. Until proceedings against the accused are concluded, the prosecutor must "from time to time" review all of the information which the prosecutor is aware of in relation to the case and make required disclosure.**

6.10.2 Where any relevant information not previously disclosed to the defence comes to the attention of the police or other reporting agency after initial disclosure of any productions either the police or other investigating authorities will inform the Crown immediately about such items and/or the Crown will disclose (where the items are material information), or provide details of any such items to the defence, as soon as practicable. **(See Chapter 2, in particular paragraph 2.1.4 and Chapter 3, on the obligation of the Police and other investigating agencies to submit relevant information to the Crown.)**

6.11 Recording of Productions on Schedules

6.11.1 Productions should usually be listed in the non-sensitive schedule. However, the sensitivity of each production must be considered on its own merits and then recorded on the appropriate schedule.

6.11.2 In terms of Section 2 of the Data Protection Act 1998, sensitive personal data includes information about a person's physical or mental health or condition. Accordingly, medical, dental and social work records should be considered as sensitive data and recorded in the sensitive schedule.

6.11.3 Further guidance on the types of information likely to be listed in the sensitive or highly sensitive schedules is contained in Chapters 35-36 of this Manual.

6.11.4 Where the Reporting/Reviewing Officer does consider a production to be sensitive and accordingly lists it on either a sensitive or highly sensitive schedule, the reasons for classifying the information as sensitive will be specified in the "Reasons for Sensitivity" column.

6.11.5 Sensitive information is defined as that which if it were to be disclosed would constitute a risk of (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.