

Chapter 7: Disclosure of Information Prior to First Appearance

7.1 General Principles

7.1.1 In all cases, where proceedings are taken in court, a summary of evidence is provided to the accused along with his or her complaint or petition. A summary of evidence should be provided in both police reported cases and specialist reported cases. IT software has been designed to assist with this process in relation to police reported cases. Where the report is from a Specialist Reporting Agency, different procedures will need to be followed.

7.1.2 It is important that the charges libelled are an accurate reflection of the summary of evidence. Particular care should be taken when drafting charges to ensure that they correspond to what can be proved on the basis of the available evidence as reflected in the summary of evidence, subject to any necessary evidential charges.

7.2 Submission of the Police Report

7.2.1 When the police electronically submit a police report to the Procurator Fiscal, the FOS system will automatically create a separate document containing an extract from the SPR. When you open the case in FOS, this will appear in the list of documents as "Summary of Evidence.doc".

7.2.2 This extract of the police report contains the following sections of the Section 4 summary of the SPR:

SPR1	SPR2
Description of locus	Description of locus
Description of events	Description of events
Police involvement	Medical evidence
Interview with accused	Police interview/text of admission
Caution and charge	Caution and charge/reply
Medical evidence	

7.2.3 The extract will not include the following sections of the Section 4 summary:

SPR1	SPR2
Antecedents	Antecedents
Background information	Analysis of Evidence/identification of accused
Reason for warrant request	Further enquiry
Analysis of evidence	Remarks
Remarks	Further information
Further enquiry	

7.3 Preparing the Summary of Evidence

7.3.1 Once it is decided that Court Proceedings are appropriate, the marking depute should read the summary of evidence document and confirm that (a) there is no information within the summary that should not be disclosed, having regard to the redaction guidance detailed in Chapter 15 of this Manual and (b) there is no information in any of the parts of the report listed at paragraph 7.2.3 above that

should be disclosed. **This should always be done before the checklist is completed and the C-kit is generated.**

7.3.2 Where information *is* contained in the summary which should not be disclosed, for example, for reasons of confidentiality, taking into account the current redaction guidance, it can be edited from the summary. Unlike the redaction of information from a witness statement or a criminal history record, the removal of the material should not be obvious on the face of the summary. What the Crown is disclosing is a summary of evidence not an extract of the police report, albeit we extract that summary from the police report for reasons of practicality and convenience. Therefore, there is no need to show the defence that material has been removed.

7.3.3 Where there is information in the police report which is not included in the summary of evidence but which falls to be disclosed, e.g. information contained within the “background information” section regarding an earlier incident that might have provoked the accused, then this should be manually copied and pasted into the summary of evidence document.

7.3.4 Consideration should also be given to whether additional information which has been submitted by means of a subject sheet (e.g. details of additional witnesses) should be included in the summary of evidence. If such additional information should be disclosed, again this should be manually added to the summary of evidence document.

7.3.5 A summary of evidence should **never** be provided to the accused without it first being checked as detailed in this section above.

7.4 Preparing the C-kit

7.4.1 Once the summary of evidence has been checked and the marking depute is satisfied that it can be disclosed to the accused, the checklist should be completed.

7.4.2 When the C-kit is generated it will pull in three copies of the summary of evidence. Accordingly, the summary should be prepared before completing the checklist. One copy of the summary should be attached to the complaint or petition and served on the accused. The other two copies should be retained on file.

7.5 Specialist Reporting Agency Cases

7.5.1 At present, when an electronic SRA report is submitted, a “summary of evidence” document is not automatically created. Accordingly, once it has been decided that court proceedings are appropriate, a separate document should be created. A summary should then be manually copied and pasted from the SPR and inserted into this document.

7.5.2 After generating and printing off the C-kit, three copies of the summary of evidence document should be printed off (as these will not automatically be pulled into the C-kit). One copy should be attached to the complaint or petition and served on the accused. The other two copies should be retained on file.

7.5.3 As for police reported cases, care should be taken to ensure that no material is included in the disclosed summary that should not be disclosed having regard to the redaction guidance in Chapter 15 of this Manual.

7.6 Failed/Rejected Direct Measures

7.6.1 Where a case has been marked for a direct measure (e.g. a diversion scheme referral or a road traffic conditional offer of a fixed penalty etc.) which has been unsuccessful and a decision is taken to commence court proceedings, a disclosable summary of evidence will require to be prepared.

7.6.2 It is a matter for local practice whether this summary should be prepared at the stage the case is marked for the direct measure, or at the stage court proceedings are taken up. The functional lead for ICP/Summary should, however, issue clear guidance on which stage is the appropriate stage to ensure that the summary is properly considered prior to disclosure.

7.6.3 If the summary is being considered at the marking stage, then this should be considered by the marking depute.

7.6.4 If the summary is being considered at the stage court proceedings are commenced, then this should be considered by the member of staff (administrative or legal) who is preparing the case for court.

7.7 Roll Up Cases

7.7.1 At present the summary of evidence function does not fully operate in respect of roll up cases. The summary of evidence for the destination (main) case is the only summary which will automatically be pulled into the C-kit. In respect of the source case(s) rolled up into the destination case, the summary/ or summaries will need to be printed and manually added to the C-kit.

7.8 Information that routinely needs to be removed

7.8.1 Where Procurators Fiscal find that they are routinely removing information from the summary of evidence document in police reported cases, the functional lead for ICP/Summary should liaise with the relevant Divisional Commander to ensure that such material is included in one of the non-disclosable parts of the police report, as listed in paragraph 7.2.3 above.

7.9 Custody Statements

7.9.1 Where the accused is reported in custody and bail is to be opposed, the summary of evidence provided to the accused will be sufficient intimation of the evidence against him/her. There is, therefore, no requirement to serve a separate custody statement. It is good practice, in such cases, to insert the bail position at the end of the summary to give the accused and his/her representative early notice where the Crown will be opposing bail.

7.10 Disclosure of further information

7.10.1 Provision to the accused of the summary of evidence does not absolve the Crown of its duty to disclose further information which falls within the duty of disclosure described in Chapter 2 above.

7.11 Disclosure to Solicitors from England, Wales & Northern Ireland

7.11.1 In cases where the accused instructs agents who are solicitors based in England, Wales or Northern Ireland, or the agent is an in-house solicitor it should be

ascertained whether they hold a practising certificate for Scotland prior to handing over any information for disclosure purposes. Larger solicitor firms in England, Wales or Northern Ireland may have employees who are dual qualified but where they do not they should be advised that disclosure will only be made to a local agent instructed to act on their behalf. Similar principles will apply where the accused person is assisted by a “McKenzie friend as outlined in **McKenzie v McKenzie** ([1970] 3 All ER 1034)¹.

7.11.2 Solicitors who are not members of the Law Society of Scotland are not governed by the provisions of Articles 11 and 12 of the Law Society Code of Conduct for Criminal Work and as such there is no safeguard on what they do with information that they receive from COPFS.

7.11.3 All criminal defence solicitors practising in Scotland require to sign an undertaking prior to COPFS handing information over. This is routinely covered by letters of engagement, which require to be submitted prior to any disclosure being made. These letters include the signed undertaking, in respect of the information disclosed in the particular case, 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 any trial or any appeal in the case referred to;
- (b) such material will not be made available to the accused or to any other party without the express agreement in writing of the Procurator Fiscal; and
- (c) in the event of the accused becoming unrepresented, any such material will be returned to the Crown

7.11.4 The main purpose of this undertaking is to ensure that COPFS, as data controller at the time of the handover of that data, complies with the seventh data protection principle namely; that appropriate technical and organisational measures are taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. The Information Commissioner has confirmed that when data is handed over to defence agents for the purpose of disclosure the agent becomes the data controller. Additionally this undertaking reminds the defence agents of their legal obligations surrounding the use and sharing of such information, in terms of Articles 11 and 12 of the Law Society Code of Conduct for Criminal Work. The Information Commissioner has confirmed that defence agents require to be registered as data controllers. The agents “process” the data once in receipt of this from COPFS and the responsibility for compliance with the terms of the Data Protection Act 1998 transfers to them at this point.

7.11.5 The general rule therefore when dealing with agents from outside Scotland is that disclosure will only be made to a local Scottish agent instructed to act on their behalf.

7.11.6 However there is provision for disclosure direct to agents in England, Wales and Northern Ireland upon request in certain circumstances and upon the acceptance by them of conditions akin to those specified in the undertaking.

¹ The role of a McKenzie friend was set out in *McKenzie v McKenzie* [1970] 3 All ER 1034, which provided that litigants are entitled to have assistance, lay or professional, unless there are exceptional circumstances. A McKenzie friend assists a litigant in person in a common law court and need not be legally qualified.

7.11.7 For instance, due to the unique nature of some Health and Safety cases, disclosure can be made to solicitors who do not hold a practising certificate in Scotland prior to a complaint being served, in order that proper consideration can be given to the issues prior to being called to plead. In such circumstances, however, the solicitor must be asked to sign an undertaking to the effect that the information is provided on the basis that:

- i) The information disclosed will not be used or further disclosed other than:-
 - (a) For the purposes of the proper preparation and presentation of the accused's case in the original proceedings;
 - (b) With a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
 - (c) For the purposes of the proper preparation and presentation of the accused's case in any such appeal
- ii) The documents provided will not be made available to the accused or to any other party without the express agreement in writing of the Procurator Fiscal;
- iii) In the event of the accused being unrepresented, any such information will be returned to the Procurator Fiscal.

7.11.8 It is important to remember, and to remind agents when appropriate, that it is a criminal offence under section 163 and 164 of the Criminal Justice and Licensing (Scotland) Act 2010 for any person to knowingly use or disclose information, or anything recorded in it, for any purpose other than those detailed in the undertaking.