POLICY ON OBTAINING AND DISCLOSING SENSITIVE PERSONAL RECORDS IN THE INVESTIGATION AND PROSECUTION OF SEXUAL CRIME CASES

BACKGROUND

1. 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 us to seek to anticipate such action by recovering these records early, allowing us to attempt to prevent delay, narrow the scope of what is to be disclosed, respond to any application to recover the records and to counter in evidence any adverse inference which might be drawn from the history they disclose. Sensitive, personal records can provide *de recenti* an important perspective on the impact of sexual offending on the victim's life, sometimes disclosing a pattern of behaviour typical in cases of sexual abuse and which may provide support for the complainer's allegation. Such records may contain a profoundly personal record of the victim's life, much of which may be irrelevant to the matters under investigation but which has the power to undermine, significantly, not only the victim's testimony but also the victim themself. As prosecutors we must assess the likely relevance of sensitive and personal records. We must make that assessment in every case and we must do so at the outset and throughout the life of a case. Where we do obtain records, the normal rules of disclosure will apply and where the test is not met disclosure will not be made. At the heart of the policy is a recognition that victims deserve, and are entitled, to be told about why we may wish or need to recover health, social work or education records and they should be asked for their view on the matter. It is imperative that as we seek to bring prosecutions in the public interest, we do not do so at the expense of the victim's rights to privacy, in accordance with Article 8 of the ECHR.

2. In S and Marper v United Kingdom 2008 ECHR 1581, 2009 48 EHRR 50 the court stated, at paragraph 66,

> "The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person."
> The Court recognised that "Information about the person's health is an important element of private life" and referred to the case of Z v. FINLAND where, in discussing the state's obligations under Article 8, the court stated the following at paragraphs 95-99:
> "95... the court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a persons enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. … The domestic law must therefore afford appropriate safeguards to prevent any such

communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.

…

99. As to the issues regarding access by the public to personal data, the court recognises that a margin of appreciation should be left to the competent national authorities in striking a fair balance between the interests of publicity of court proceedings, on the one hand, and the interests of a party or third person in maintaining the confidentiality of such data on the other hand. The scope of this margin will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference."

3. This chapter provides general guidance for Crown Counsel, Procurators Fiscal, precognoscers and VIA on the approach which should be adopted when deciding whether to obtain records as part of the COPFS investigation. The policy and guidance which is provided here has been formulated following extensive consultation with Crown Counsel, Procurators Fiscal, Precognition Officers, representatives of the health and social work professions, organisations representing victims' interests and the Information Commissioner's Office in Scotland.

THE GENERAL APPROACH

4. The purpose of obtaining health, social work, educational or other sensitive personal records, as with any evidence which is obtained during an investigation, is to consider whether the material contains information which supports or undermines the Crown case or supports the defence case. Sensitive personal records should be obtained by the Crown only where their recovery is necessary for the proper investigation and prosecution of crime.

5. In terms of the Data Protection Act 1998, Schedule 3 provides that the conditions relevant for processing of sensitive personal data include at subsection 7 that the processing is **necessary** for:

- The administration of justice;
- The exercise of any functions conferred on any person by or under an enactment; or
- The exercise of any functions of the Crown, a Minister of the Crown or a government department.

6. The provision here emphasises that the disclosure is considered as necessary and not merely expedient or convenient to allow the functions outlined to be performed. Furthermore the Data Protection (Processing of Sensitive Personal Data) Order 2000 [SSI 2000 No.417] provides at Section 2 that for the processing of sensitive personal data to be lawful it must:

- be in the substantial public interest;
- be necessary for the discharge of any function which is designed for protecting members of the public against – (i) dishonesty, malpractice, or other seriously improper conduct by, or the

unfitness or incompetence of any person, or (ii) mismanagement in the administration of, or failures in services provided by, any body or association; and

- necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the discharge of that function.

7. In these provisions the test is one of processing being necessary for the administration of justice and in the "substantial public interest". This will need to be considered and justified by the Crown before sensitive personal data is disclosed.

8. The primary consideration, therefore, should be whether the complainer has a history which is likely to be relevant to the prosecution or defence.

9. It is clear that the prospect of such sensitive personal information being obtained, disclosed and aired in the course of a public criminal trial may be potentially distressing prospect for complainers in sexual offence 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. However, disclosure is a vitally important aspect of criminal procedure. The principal purpose of disclosure is to secure the fair disposal of criminal proceedings and ensure that justice is done. The Crown is obliged to disclose all material information for or against the accused (subject to any public interest considerations) and relates to all information of which the Crown is aware.

10. Against this background, it is essential that, from the earliest stage in the investigation, the precognoscer, the Solemn Legal Manager and the National Sexual Crimes Unit are focussed on the question of whether health, social work and other relevant records will require to be obtained, considered and the records or material parts thereof disclosed to the defence to comply with the Crown's disclosure obligations.

11. While it will always be necessary to apply judgement to the question of whether it is appropriate to obtain sensitive, personal records, it is also important to recognise that it is impossible to know in advance what information sensitive, personal records will yield. Accordingly, there may continue to be cases in which early decisions to obtain records will ultimately prove to be unpopular because the exercise did not yield relevant information or because the exercise disclosed information which was regarded as problematic for the complainer. Similarly, there may be cases in which early decisions not to obtain records require to be revisited in light of defence requests for access or developments in the Crown's investigation. These are inevitable consequences of a policy which recognises that there can be no universal approach and which requires decisions to be taken by the Crown in advance of trial and without knowledge of the precise nature of the defence.

12. Paragraphs 20-39 below provide guidance on the kind of circumstances which will found the basis of a legitimate inquiry into aspects of a complainer's background. This section provides an overview of the approach to be adopted.

13. A four stage approach should be adopted:

a) Is there a reason to obtain records as part of the investigation?
b) If so what is the complainer's view of their records being obtained?
c) Where records have been obtained, do they contain information which requires to be disclosed to the defence?
d) Where information has been disclosed to the defence, is it inadmissible in terms of section 275 of the 1995 Act or, at common law, because it relates to collateral matters which are generally excluded (DS V HMA 2007 SLT 1026)

14. In **all** sexual offence investigations consideration should be given at the outset to whether there are likely to be health, social work or other sensitive records which may contain material evidence for or against the accused. Where it is likely that these are in existence, the question of obtaining such records should be considered by:

- the Procurator Fiscal when submitting the initial report to the NSCU;
- the NSCU when instructing initial action;
- the Solemn Legal Manager when allocating the case; preparing the allocation note and when reading the case before countersigning;
- the precognoscer, throughout the life of the investigation and when reporting the case to the NSCU;
- the NSCU when issuing instructions.

15. At the initial stages of the investigation there may be little information on which to form a clear view on the potential relevance of any such records and the question is one which must be kept under review throughout the life of the case. The policy is intended to strike an appropriate balance between obtaining records early in all cases where potential relevance has been identified, while ensuring that records are obtained only where there is a clear investigative need for doing so and where proceedings are likely.

INITIAL QUESTIONS TO BE ASKED TO DETERMINE WHETHER PERSONAL SENSITIVE RECORDS OF COMPLAINERS IN SEXUAL OFFENCES CASES SHOULD BE OBTAINED.

SOCIAL WORK RECORDS

16. Was the complainer in care at the time of the alleged offences? If so, the **presumption** is to obtain the records. (These records may disclose important information about the complainer's reaction to the crime or the impact of the crime on their life).

17. Was the complainer the subject of social work involvement at the time of the alleged offences? If so did the complainer disclose the offence(s) to a social worker or other worker which may be recorded in the records? If so, obtain the records. Further if the alleged abuse was known to the social work department and the records are likely to contain information about the alleged abuse the records should be obtained.

18. Is there any information to suggest that the complainer has made false allegations of criminal conduct of a similar nature? If so there is a **strong presumption** in favour of obtaining social work records.

EDUCATIONAL RECORDS

19. Did the complainer disclose alleged abuse at his/her school. If so, obtain the educational records.

MEDICAL RECORDS

20. Did the complainer ever consult a doctor about injuries caused by the alleged abuse or about conditions related to the abuse? If so, obtain medical records.

21. Did the complainer ever disclose alleged abuse to a doctor. If so, obtain medical records.

22. Does the complainer/other witness have learning difficulties/disabilities such as may impact upon recollection or interpretation of events or competence or reliability in giving evidence. To ascertain the position here initial enquiry needs to be made of carer/school/family, as appropriate, to identify the professional who is able to assess the disability and provide an opinion about the impact of the learning disability on the overall competence of the witness.

23 Does the complainer have a psychiatric history? If so, has she been diagnosed with a particular condition? The Crown should ascertain the identity of the treating psychiatrist (if necessary from GP). We will need to know the nature of her psychiatric condition and the identity of the psychiatrist treating the complainer. Thereafter we need to know if the matter for which the complainer sought/received treatment would have any impact on her credibility/reliability (the policy details “impact upon memory / confabulation,/hallucination/false memory/delusion/pathological lying/drug induced altered mental state or perception/failure to take medication”)

CIRCUMSTANCES IN WHICH RECORDS SHOULD BE OBTAINED

24. 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 history in question will contain evidence which will form part of the Crown case or which will otherwise be disclosable. It is sufficient that it may contain material information. In all cases, however, it is essential that the purpose of the inquiry can be clearly defined according to this guidance.

25. The need to obtain sensitive, personal records should be determined according to the particular facts and circumstances of each case.

Specific Examples Not Requiring Further Investigation by Reference to Sensitive Records

26. There will be cases in which it is considered that the complainer's personal history can have no relevance to the investigation. For example:

- Where there is strong independent evidence to support the allegation such as compelling and incontrovertible CCTV footage or eyewitness testimony, which suggests that the complainer's past behaviour or character will not be put in issue;
- Cases where there is simply no basis on which to presume that the complainer's background will be relevant, for example, in stranger rape cases involving force where there is no evidence that the complainer and accused are known to one another and there is independent evidence of force.

27. There is, of course, always the prospect that as the investigation progresses in such cases the complainer's history will emerge as potentially relevant. Where, the defence assert in such cases, prior to trial, that sensitive, personal records should be obtained, the question of recovering records will require to be revisited.

Specific Examples Requiring Further Investigation by Reference to Sensitive Records

28. In some cases there may be a specific aspect of the case which demands further investigation. Examples of such triggers include:

- Social work records should always be obtained where the complainer was in the care of the local authority or had social work involvement at the time of the offence under investigation and the allegation is one of in-care abuse, whether perpetrated by a carer or another child in care. Equally, where the complainer has disclosed abuse to a social worker, social work records should always be obtained;
- Where the complainer has disclosed abuse to his or her doctor or has sought medical attention in relation to conditions related to sexual abuse, for example, repeated urinary infections, genital injuries or bedwetting problems;

- Where a child has disclosed abuse to a teacher the educational records relative to the disclosure should be obtained as well as any educational records which are concurrent or subsequent to the period of abuse. In all other cases it should be presumed that the educational history will be irrelevant to the matters under investigation unless some specific line of inquiry emerges during the investigation;
- References by witnesses, including the complainer, to having concurrent treatment for a mental disorder which may impact upon a number of things, such as a) memory b) confabulation c) hallucination d) false memory d) delusion e) pathological lying f) drug induced altered mental state or perception g) failure to take prescribed medication, or combining it with illicit or unprescribed medication or alcohol. Mental disorder is defined by The Mental Health (Care and Treatment) (Scotland) Act 2003 to be **mental illness, learning disability or personality disorder**. A diagnosis of any or all three of these conditions means that the person has a mental disorder;
- References or indications in the evidence that the complainer or significant eye witness has learning disabilities such as may impact upon either a) the recollection and interpretation of the events spoken to *or* b) competence or reliability in giving evidence;
- Evidence of a change in behaviour, particularly one which coincides with key events such as the beginning or end of the period of abuse;
- References by the defence witnesses, including the accused (for example in police interview) to any belief in any specific social work or medical fact relating to the complainer relevant to their state of mind or reasons for their conduct or the conduct of the complainer in connection with the offence (for example: “he’s had sex with me in the past and gave me V.D.” or “she told me sex was a bit uncomfortable because she recently had an abortion” or “she said was ok to do it without a condom because she was sterilised last year” or “ she said she was very upset that day because her children were still in care and she had hoped to get them back”;
- Where the complainer or medical examiner attributes significant medical findings (for example, bruising, fissures on anus, hymenal damage, predisposition to bruising easily, prescription of certain medication and its claimed effects) to some event or condition other than the alleged crime.

Specific Examples Which May Require Further Investigation by Reference to Sensitive Records

29. Particular situations in which the question of recovering sensitive, personal records <u>may</u> arise are considered below:

<u>Complainers with social work histories</u>

30. Where the complainer has had social work involvement or been in the care of the local authority, but not at the time of the incident under investigation, then it should be presumed that any such history will be

irrelevant to the matters under investigation unless some specific line of inquiry emerges during the investigation.

31. In cases where the complainer was in the care of the local authority or had social work involvement at the time of the offence under investigation, but the allegation is not against a carer or does not relate to "in care" abuse, very careful consideration will require to be given to obtaining records which may disclose important information about the complainer's reaction to the crime or the impact of the crime on their life. This is a question which should be addressed in the initial report to the National Sexual Crimes Unit. In any cases where there is information to suggest that the complainer may have made false allegations of criminal conduct of a similar nature against the accused or any other person, there is a strong presumption in favour of obtaining social work records.

32. In any case where it is determined that records should be obtained, the full records should be sought and considered by the precognoser, but only the material parts of the records should be disclosed to the defence. Where a decision is made to disclose only part of the records to the defence, a full note should be made and filed as to the rationale behind the decision. If the precognoser considers that the full records or part thereof maybe material, that is sufficient reason to disclose the records. In marginal decisions, the Crown should err on the side of disclosure. It is important that all decisions are recorded within the disclosure page of the precognition and that this is updated with all developments on disclosure. It is imperative that this document is available within the case papers to ensure that there is an accurate record of the position which can be presented to the court if a point is raised by the defence. Furthermore if a new line or a change in line of the defence is intimated the Crown should consider whether there is information which was not previously considered to be disclosable which should be disclosed in light of the new line of defence. (Disclosure Manual Chapter 31)

Complainers with mental health conditions

33. Such cases should be approached with the utmost sensitivity recognising that complainers with mental health conditions may be particularly vulnerable within the criminal justice system. It is essential that appropriate measures are taken to address any additional communication and support needs which arise as a result of a particular condition. In this regard, Crown Counsel, Procurators Fiscal, Precognoscers and VIA should consult chapters 10 and 11 of the COPFS Consolidated Guide on Disability for an overview on the particular considerations which should be addressed.

34. Where the complainer has a mental health condition or learning disability, the nature of the condition may be a particular focus for the defence if there is a suggestion that the condition is such that it may affect the complainer's credibility or reliability. Relevant health records should, therefore, be obtained where there is any suggestion that the complainer had, at a material time, a condition which, it could be argued, affects or affected their credibility or reliability as a witness.

35. However, not all mental health conditions will trigger the need to obtain the complainer's health records. For example, the simple fact that a complainer had a depressive illness at a material time does not mean that the complainer's health records will require to be obtained. Rather, initial enquiries should be made to discover the nature of any such condition and its effect on the complainer before deciding whether a fuller investigation into the condition requires to be made.

Where evidence is likely to be admitted in terms of s275 of the Criminal Procedure (Scotland) Act 1995

36. Section 274 of the 1995 Act prohibits evidence that the complainer is not of good character; evidence of sexual behaviour; or evidence of other behaviour or a predisposition or condition which might found the inference that the complainer is likely to have consented to the sexual act in question or is not a credible or reliable witness. However, such evidence may be admissible if it is admissible at common law, and can be shown to meet the three-part admissibility test provided in section 275. The courts have held that evidence of a complainer's psychological, psychiatric and general medical history can be relevant and admissible, meaning that complainers' medical and, where relevant, social work histories are often a legitimate focus of the evidence at trial. (HMA v Ronald 2007 SCCR 451).

Evidence about a complainer's psychological, psychiatric and medical background is therefore potentially relevant and material to the defence where it is likely to be admissible in terms of section 275 of the 1995 Act.

37. Guidance on what kind of evidence is likely to be admissible in terms of section 275 is provided in Chapter 9 of the Sexual Offences Handbook. That guidance should be considered when determining the type of information which it will be necessary to recover from sensitive, personal records.

Where an inference can be drawn from a complainer's criminal justice history

38. Where there is scope for an inference on credibility to be drawn from a complainer's significant criminal justice history (either as a complainer or as an accused in sexual offence cases) for example previous convictions for dishonesty, consideration should be given to obtaining social work, health or educational records. This may also arise in cases where there is a history of previous allegations of a similar nature by the complainer.

39. In the first instance investigation should be made to establish the circumstances of the previous allegations and the outcome of any investigation or proceedings. The investigation should be focussed on whether there is any basis for an adverse inference to be drawn. Records should be obtained in such cases where the investigation discloses facts or

circumstances relevant to the complainer's credibility or reliability which would support an adverse inference being drawn.

40. If, after investigation, it is clear that previous allegations are of no possible relevance to the allegation before the court, records should not be sought.

Where the defence are likely to draw an adverse inference from the complainer's behaviour following the crime

41. Where there is scope for an adverse inference to be drawn from the complainer's behaviour *following* the crime consideration should be given to leading evidence to rebut that inference. It may be that the complainer has responded counter-intuitively to the assault by delaying before reporting the crime to the police or by suppressing signs of distress immediately following the incident.

42. In the first instance the complainer's explanation of any potentially relevant behaviour should be obtained. In some cases the complainer may articulate an explanation which is sufficient in its own terms to rebut any adverse inference which the defence might seek to draw but it may also be necessary to seek an opinion from a psychologist or psychiatrist on the significance of the complainer's behaviour where it is regarded as relevant to the prosecution of the case. Such evidence is admissible in terms of s275C of the 1995 Act. Reference should be made to the directory of professionals which provides a list of recommended experts that can be instructed.

43. If after investigation there remains scope to draw an adverse inference, then it will be necessary to examine any records to determine whether they disclose evidence which either supports or refutes the adverse inference which the defence may seek to draw.

Evidence which demonstrates that the complainer's history is consistent with having been the victim of a sexual crime

44. Even where section 275C does not apply because there is no behaviour from which an *adverse* inference might be drawn, consideration should be given to whether there may be evidence which is *consistent with* or supportive of the Crown case. There may be evidence to demonstrate that the complainer's behaviour or mental health was affected by the crime. For some victims this may have manifested itself in the victim withdrawing from relationships and becoming introverted while others may have resorted to more anti-social behaviour involving displays of strong emotion, anger or offending behaviour. It may be that the complainer has received treatment or therapy as a result of the psychological impact of the crime on them. If so, evidence of the impact of the crime on the complainer's mental health may lend support to their account of events.

45. It may be that the complainer will be able to explain any link between such aspects of their history and the crime or it may be that an

expert would be required to give evidence about the link between the complainer's history and the crime.

46. It should also be borne in mind that, while in some cases there will be considerable merit in seeking to overcome an adverse inference which will inevitably be drawn from behaviour of the complainer following the crime (for example, a delay in reporting to the police or the absence of any signs of distress) (See paragraph 4.3 to 4.5 above), it will not always be necessary or appropriate to lead as part of the Crown case what might be regarded as evidence of "bad character" where the sole purpose is to demonstrate the impact of the crime on the complainer. Where sexual abuse is given as a factor which has led the complainer to develop an addiction to controlled drugs or engage in other offending behaviour, evidence of that history will generally be inadmissible and should only be led by the Crown where is likely to be relied upon by the defence. While the complainer might be able to mitigate the adverse impact of such a history by explaining any link between the offending and the alleged abuse, it may not be necessary or in the complainer's interest to explore that link at trial unless the history is to be put in issue by the defence or will be evidence from the Crown case. Such matters will require careful analysis in the precognition.

Evidence to corroborate aspects of the complainer's account such as the timing of incidents

47. As well as the need to identify relevant evidence about a complainer's behaviour or psychological or psychiatric background, records should also be examined for the presence of independent evidence which might provide corroboration of the essential elements of the charge. Accordingly, evidence which corroborates the timing of historical crimes such as the dates between which the complainer resided at a particular care home, or which discloses other witnesses who may be able to speak to the facts of the case is likely to be relevant and material evidence.

ENGAGING THE COMPLAINER

48. 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 an understanding of the process and the implications of recovery.

49. The Procurator Fiscal should establish with the senior investigation officer whether or not the Police have previously discussed the issue of recovery of personal and sensitive records with the complainer, the outcome of those discussions and whether any such sensitive, personal records have previously been obtained by the Police with the consent of the complainer.

50. An information leaflet has been produced to explain the operation of the COPFS Policy on Sensitive and Personal Records to victims of Sexual Crimes. The leaflet is aimed at victims whose personal records are to be obtained by COPFS as part of the investigation. It will not be printed centrally but will be available on the Sexual Offences Homepage of PF Eye to be printed off by staff. COPFS has also provided copies of the leaflet to victims groups and the police.

51. It is intended that the leaflet is sent to victims of rape and other serious sexual offences, when it is determined by the solemn legal manager that the records of the victim should be obtained. The solemn legal manager should instruct on the allocation note, or if appropriate at an earlier stage, that the leaflet is sent to the victim.

52. VIA are responsible for sending the leaflet out to the identified victims in the case. The point of contact named in the leaflet is the VIA Officer. The leaflet will be accompanied by the letter from VIA appropriate to the stage of the case, which should be tailored to add a paragraph about the leaflet.

53. The letter from VIA will also invite the victim to a meeting to discuss the reasons for obtaining the personal records and to ascertain the views of the victim on that proposal. At the meeting the victim will be provided with information on the reasons the records are required and the extent to which their use will be restricted. The precognoscer will also be in a position to ensure all the concerns of the victim are explored and addressed and that all information required is gathered for reporting to NSCU. Full consultation on the issues should continue between VIA and the precognoscer throughout the case.

54. Where it has been decided that records require to be obtained, that decision and the approach which will be taken should be explained to the complainer at a meeting with the precognoscer. Evidential matters should not be discussed at this meeting. VIA should be kept fully informed of the progress of this aspect of the investigation to ensure that the complainer can be provided with accurate information about the matter. It is important that the victim is given an opportunity to consider their position and to ask questions about the procedure. In particular, where the victim has concerns about supporting the recovery of certain records, it is important that efforts are made to explore those concerns with the victim and to identify how they might be addressed. It may be, for example, that the victim is concerned about a very particular aspect of their social work history which may be irrelevant to the investigation or beyond the scope of the inquiry which the Crown requires to make. A degree of reassurance can be given to the victim that, while the full records may require to be obtained, the Crown has a duty to ensure that only relevant and material evidence is disclosed.

55. It is, however, very important to be realistic with the complainer and to make very clear that decisions about disclosure can only be taken once records have been obtained and considered; similarly decisions

about what is allowed at trial are for the court to decide and as such no firm or misleading assurances should be given about the prospect of maintaining the confidentiality of information which is obtained. It is also important that the complainer understands that even where relevant records are not obtained by the Crown, the defence may at some future point seek their recovery and in that situation the matter will be decided by the Court.

56. Where the victim is advised that records will be recovered, the precognoscer should complete a record of the discussion recording the complainer's view (completing the template at Annex A).

57. At the conclusion of the discussion the precognoscer should submit a report of the discussion (completing the template at Annex B) to the NSCU making any further recommendations which are required.

Recovering records against the victim's wishes

58. Where the necessity of recovering the records and the process has been explained to the victim and the victim has had an opportunity to consider the matter but has expressed strong views that they do not want the records to be recovered, recovery should be undertaken only in exceptional cases and under the instructions of the Head of the National Sexual Crimes Unit or Principle Advocate Depute. **Recovering records against the victim's wishes should be regarded as a last option.** When deciding whether to recover records against the wishes of the victim, consideration will require to be given to:

- The purpose of obtaining the sensitive, personal records;
- How likely it is that the inquiry will result in relevant or disclosable material being recovered; sensitive, personal records should not be sought unless it is possible to specify the relevance to the investigation of the material to be recovered;
- The prospects of the case resulting in a prosecution. Records should not be sought where, notwithstanding the question of obtaining the records, it is anticipated that the case will result in no proceedings for example due to insufficient evidence or there being no realistic prospect of a conviction;
- The implications for the prosecution of not obtaining the records in question. In this regard it will be necessary to consider the purpose of the line of inquiry:
    - Where the purpose of the inquiry is general in nature (for example to establish whether there has been a change in behaviour) it may be possible for the prosecution to continue without insisting on the recovery of the records in question – recognising, of course, that the defence may in due course seek their recovery;
    - Where the purpose of the inquiry is specific in nature it will be necessary to consider how important it is that the line be pursued. If it is considered that the specific inquiry is necessary to address a significant weakness in the case, or where it is considered that it is essential to pursue the inquiry

to achieve a fair prosecution, then it may be concluded that failure to recover records would result in a decision being made that the prosecution cannot continue in the public interest. For example if the defence draw attention to a medical condition which is associated with a tendency to confabulate, clearly this would, if established, create a significant weakness in the case which the prosecutor would have a duty to investigate;

- What efforts have been made to address any concerns which influenced the complainer's decision not to agree to recovery of the records.

59. Where it is decided that the only option is to recover records against the wishes of the victim, the complainer should be advised of the decision to recover the records and the scope of the recovery. VIA should consult with the solemn legal manager and a decision should be reached as to who will advise the complainer of the decision and meet the complainer to explain the decision, if necessary.

THE PROCESS OF OBTAINING RECORDS FROM THE RELEVANT AUTHORITY

60. Records which may require to be considered will usually be held by some other public authority, normally a Local Authority or an NHS Health Board. Those responsible for records within such Authorities will require to be satisfied about the basis on which they are being asked to disclose any records or the information contained in them. In particular, Authorities will want to be satisfied that they are neither breaching their obligations in terms of the Data Protection Act nor the State's obligation to protect the private life of the person to whom the records relate (Article 8 of the ECHR). It is important, therefore, that Crown Counsel, Procurator Fiscals and precognoscers are clear about the basis on which any request to obtain records is being made.

What is the purpose of the request?

61. First, the Crown must be satisfied that the recovery of the information is required for the investigation or prosecution of crime. As a matter of COPFS policy, the request should meet the purpose detailed at paragraphs 4 and 5 of this guidance above. If the request cannot be said to be for one of these purposes, the precognoscer and Crown Counsel should agree the purpose of the request with the NSCU before proceeding further. If it becomes clear that it is not possible to articulate clearly the purpose for which records are sought, it is likely that the request is ill-focussed and unnecessary, in which case it should not be made.

Specifying the Request

62. Where it has been agreed that records require to be recovered, the letter requesting the records should specify:

- the purpose of the request;
- which records are likely to meet that purpose;
- how the records should be described;
- if appropriate, for what period records are required.

Style letters to the haver, requesting recovery of records, are attached at Annex C, Annex D and Annex E

63. Where it is appropriate to restrict the inquiry to a discrete part of the complainer's history, care should always be taken to ensure that only those records which are within the scope of the stated purpose are recovered. For example, where the purpose is to enquire into a particular medical condition which the complainer has or has had, then the request should be to recover all records which relate to that particular condition or any related condition.

What is the authority for the request?

64. Where it is clear that the request has a proper purpose, disclosure of the documents to the Crown by the haver will not contravene the Data Protection Act providing the information is either:

- provided voluntarily by the haver;
- recovered under the authority of the petition warrant.

Voluntary disclosure

65. The haver (usually a Local Authority) may be prepared to provide records voluntarily and this approach should be encouraged wherever possible as it avoids the need for the haver to attend for precognition. The Information Commissioner for Scotland has indicated that, wherever possible, Data Controllers and COPFS should work together to agree what information can and should be disclosed to COPFS. It is, of course, entirely for the data controllers to decide whether they wish to produce the relevant records voluntarily and they will require to be satisfied that doing so will not breach either their obligations in terms of the Data Protection Act or the ECHR. The existence of the petition warrant and the potential for the Data Controller to be cited to produce the relevant records at precognition means that producing relevant records will not breach the Data Protection Act.

Under the authority of the petition warrant

66. The Procurator Fiscal should engage in discussion with the haver as to the means of securing disclosure of the records. In all cases it will be desirable to reach agreement with the haver to secure voluntary disclosure. Should consultation fail to secure voluntary disclosure, the petition warrant grants authority to cite the haver of records for precognition and to produce the records. The Procurator Fiscal requires to cite the haver to attend for precognition and produce the required records at precognition. In such cases the haver is obligated under the authority of the petition warrant to attend and produce the records requested.

Recovering records under the authority of the Petition Warrant provides a lawful basis for the processing of data in terms of the Data Protection Act. An extract of the relevant authority from the petition warrant is attached at Annex G. This is the only option when the haver is not, after consultation, prepared to disclose the records voluntarily but separate consideration requires to be given to the need to avoid breaching the victim's right to privacy in terms of ECHR. Establishing a lawful basis for the processing of data in terms of the Data Protection Act does not necessarily mean that processing the information will be in accordance with the complainer's right to privacy in terms of the ECHR. Interference with the Article 8 rights of a victim does not necessarily preclude recovery if it is in accordance with law and is justifiable under the second paragraph of Article 8 as "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, **for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others**

67. In any case where the circumstances are being investigated by pre-petition precognition, the Procurator Fiscal or precognoser should in the first instance seek consent of the complainer for recovery of the sensitive, personal records considered to be relevant and material and the guidance contained at paragraphs 40-45 (engaging the complainer) should be followed. The precognoscer should complete a record of the discussion recording the complainer's view by completing the style template at Annex A. In any case where the complainer is not willing to consent to recovery of the records at pre-petition precognition stage, the Procurator Fiscal should consider whether it is appropriate to petition the Sheriff for a warrant to recover said records as indicated in paragraph 41 above. Where the necessity of recovering the records and the process has been explained to the victim and the victim has had opportunity to consider the matter but has expressed strong views that they do not want the records to be recovered, recovery should be undertaken only in exceptional cases and under the instructions of the Head of the National Sexual Crimes Unit or Principle Advocate Depute. **Recovering records against the victim's wishes should be regarded as a last option.** The disclosure page must be updated with the outcome of all such decisions so that an accurate record is held by the Crown and is available for review.

68. The serious nature of the crime under investigation and the balance of the accused's article 6 rights to a fair trial are relevant to the aims enumerated in paragraph 2 of Article 8.

69. The purpose of this guidance is to ensure that records are only obtained against the wishes of the victim where recovery is justifiable in terms of the test set out in Article 8(2) and in line with the processing of sensitive personal data as laid out in paragraphs 5 and 6 above.

DISCLOSURE TO THE DEFENCE

70. The general principles of disclosure as described in the disclosure manual apply equally to the disclosure of sensitive personal records and should be followed accordingly.

71. Obtaining health, social work or other sensitive personal records does not mean that those records will necessarily be disclosed to the defence or that the information contained in them will be admissible evidence at trial.

72. Where sensitive records have been obtained, they will require to be examined carefully to determine whether they contain information which is relevant, whether that is evidence for or against the accused. Evidence which is material will require to be disclosed to the defence. The principal purpose of disclosure is to secure the fair disposal of criminal proceedings and ensure that justice is done. The Crown is obliged to disclose all material information for or against the accused (subject to any public interest considerations) and relates to all information of which the Crown is aware.

73. The review of any records obtained in the course of the investigation is likely to yield information which will fall within one of three categories:

(a) The precognoscer discovers only information which clearly is not relevant and material and which should not be disclosed; or
(b) The precognoscer discovers information which is material and which should be disclosed to the defence; or
(c) The precognoscer cannot conclude whether the information recovered should be regarded as relevant and material. In these circumstances Crown Counsel's instructions should be sought. In such cases, the precognoser should prepare a report for Crown Counsel's Instructions to NSCU. A style report is attached at Annex F. This should include a summary of the sensitive records, highlighting the relevant pages or parts of the records to be considered by Crown Counsel. The report together with **copy** personal records referred to therein should be sent **hard copy** to NSCU for the attention of the PH/Trial Advocate Depute

Information which is disclosable

74. In reviewing any available records it is necessary to decide whether they contain any information which requires to be disclosed to the defence. The Crown has a subsisting duty to provide to the defence all material evidence for or against the accused (McDonald v HMA 2008 S.C.C.R. 154, paragraph 40. This includes information obtained during the course of the investigation and any criminal proceedings, of which the Crown is aware, which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt on it, and which is of positive assistance to the accused (ibid, paragraph 41).

75. The nature of sexual crimes is such that often the Crown case is particularly reliant on the testimony of the complainer. Often the defence will be that the complainer consented to the sexual act or that their testimony is incredible or cannot be relied upon. Accordingly, information which may support the assertion that the complainer is not a credible or reliable witness or consented to the sexual act will be regarded as relevant and material and should be disclosed to the defence. However, this does not mean that the evidence will necessarily be relevant and admissible at trial.

76. The question of disclosure to the defence should be considered fully and carefully and should go no further than the Crown's obligations to secure a fair trial in terms of Article 6 require. Disclosure which is not necessary in order to prove the charges or for the protection of the Article 6 interests of a fair trial would risk breaching the victim's Article 8 rights to privacy. Information which is clearly material and relevant should be disclosed to the defence in accordance with the guidance contained in the Disclosure Manual

77. The information contained in health, social work and other sensitive, personal records is likely to be particularly sensitive and before deciding to disclose it is also important to consider the likely direction of the case. If it is known that there is a real prospect that the case will not result in a prosecution, either because there are grave and substantial concerns about the quality of the evidence or because there are concerns about the impact which prosecution may have on the victim, those issues should be resolved, where possible, before sensitive information is disclosed to the defence. The nature of such information means that it is important that unnecessary disclosure is avoided.

78. Where information is to be disclosed, only material parts of the records obtained should be disclosed to the defence. Records should not be disclosed in their entirety unless it is considered that the entire contents of the records are material; this will rarely, if ever, be the case. Irrelevant or non-material information should be withheld or redacted.

Information which is not disclosable

79. Information which is not material should not be disclosed to the defence. For cases where the first appearance of the accused is on or after 6 June 2011, the defence will be obliged by Section 70A of the 1995 Act to lodge a defence statement. That should detail the nature of any information they require to be disclosed and why. The Crown must in light of the statement review all the material information that may be relevant of which it is aware and disclose it where not already disclosed.

80. Where the defence requests from the Crown disclosure of information that does not meet the disclosure test, and the Crown decides not to disclose the information, the appropriate course of action is for the defence to apply to the court under section 128 for a ruling on whether section 121 of the Criminal Justice and Licensing (Scotland) Act 2010

applies. A hearing will be appointed at which the parties may be heard. The court will rule on whether the information in question is disclosable, but it cannot order the Crown to disclose it.

81. The accused can apply for a review of the ruling, where the accused becomes aware of information that was unavailable to the court at the time it made its ruling, and considers that had it been available, the court would have ruled that disclosure should be made. Parties may appeal to the High Court against the ruling and any review of the ruling.

82. The procedures for defence statements and applications for hearings and rulings from the court replace the previous procedure of lodging a petition for recovery of documents. The lodging of such a petition is still open to the defence, but this is not a remedy against an adverse decision through the procedure outlined above. The defence cannot seek a recovery of documents following a ruling under section 128. The two courses of action are mutually exclusive.

83. Further guidance can be found in the Disclosure Manual.

84. Having obtained the victim's records, any decision not to disclose information, on the basis that it does not meet the disclosure test, and the reasons for that decision, must be clearly recorded in the case papers.

85. Where there is information which it is considered should be disclosed, but there are public interest considerations against disclosure, the matter should be referred initially to the District or Area Procurator Fiscal. Thereafter the matter should be reported by the District or Area Procurator Fiscal to the Deputy Crown Agent for the attention of the NSCU, with an appropriate recommendation, for a decision as to how the issue should be addressed.

86. In determining whether information is relevant and material (and therefore disclosable) regard should be had to the circumstances in which the courts have been prepared to admit evidence under the exception to the prohibition on character or sexual history evidence. Chapter 9 of the Sexual Offences Handbook provides detailed guidance on the law relating to sections 274 and 275 of the 1995 Act. The test for admissibility contained in section 275 of the 1995 Act allows prohibited evidence to be admitted where it can be shown to be specific, relevant and of significant probative value. This is similar, but not identical to, the test for disclosure; it is unclear whether the significant probative value test and the materiality test coincide and, if not, which sets the higher threshold. However, as a matter of policy, where there is an argument that the information would be admissible in terms of section 275 then it should be presumed that it is material and relevant for the purpose of disclosure.

87. It may be argued that where information is relevant and material (and therefore disclosable) it will also be relevant and of significant probative value and therefore admissible in terms of s275. It is important that it is understood that the decision to disclose information to the defence does not equate to an undertaking that the information disclosed

is necessarily relevant and of significant probative value in terms of section 275 of the 1995 Act. The Crown may oppose an application in terms of section 275 despite having decided that the evidence which the defence seek to admit was considered to be relevant and material for the purposes of disclosure.

Where the precognoscer cannot conclude whether the information recovered should be regarded as material

88. In some cases it will not be possible to determine with certainty whether information contained in health, social work or other sensitive, personal records meets the disclosure test. Given the sensitivity of the information contained within records of this nature, a delicate balance requires to be struck between ensuring that all material and relevant information is disclosed while also ensuring that irrelevant material is not unnecessarily disclosed to the defence. Where the investigation yields information and there is uncertainty about materiality, the advice of Crown Counsel / the NSCU should be sought. In such cases, the precognoser should prepare a report for Crown Counsel's Instructions to NSCU. A style report is attached at Annex F. This should include a summary of the sensitive records, highlighting the relevant pages or parts of the records to be considered by Crown Counsel. The report together with **copy** personal records referred to therein should be sent **hard copy** to NSCU for the attention of the PH/Trial Advocate Depute.

In cases in which it is considered that the information could be argued to be relevant but where, on balance, Crown Counsel consider that the information is not disclosable, consideration will be given to advising the defence of the general nature of the material held and intimating that a petition for the recovery of documents should be lodged with the court.

89. A flowchart summarising the above policy is attached at Annex H. A Summary of the Policy is attached at Annex I.

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