

Guidance to Specialist Reporting Agencies - Disclosure of Evidence in Criminal proceedings.

1. Background

1.1 Since the cases of Holland¹ and Sinclair² the Crown in Scotland has been obliged to disclose all relevant and material evidence to the defence. This duty arises from Article 6 of the European Convention on Human Rights which enshrines the right to a fair trial, which includes the principle of equality of arms between the Crown and the defence.

1.2 To ensure that the Crown can comply with its disclosure obligations, all agencies who report cases to the Crown must comply with obligations to disclose relevant and material information to the Crown. This is known as the principle of revelation.

1.3 On 6 June 2011 a new statutory framework for disclosure was introduced in Part VI of the Criminal Justice and Licensing Act 2010 (The 2010 Act). This applies to all summary cases where a plea of not guilty (PNG) is entered after 6 June and for all solemn cases where the first appearance of the accused is after 6 June. Section 117 provides for revelation in solemn cases and section 119 provides for revelation in summary cases.

1.4 This statutory framework is supported by the Code of Practice - Disclosure of Evidence in Criminal Proceedings (www.copfs.gov.uk/Publications/2011/06/Code-Practice-Disclosure-Evidence-Criminal-Proceedings) issued by the Lord Advocate in terms of section 164 of the 2010 Act. All police, prosecutors and specialist reporting agencies **must** have regard to the code of practice when carrying out their functions in relation to the investigation and reporting of crime.

Note: This guidance is intended to be a practical summary of the requirements contained in the Code of Practice which should be referred to for full guidance.

2. Principles of Revelation and Disclosure

2.1 Part A of the Code of Practice outlines the Principles of Revelation which must be followed by police and SRAs. These Principles have related Principles of Disclosure which must be followed by the Crown.

The duty on **Specialist Reporting Agencies**

2.2 The primary duty on reporting agencies is to provide the prosecutor

¹ Holland v HMA 2005 SCCR 417

² Sinclair v HMA 2005 SCCR 446

with details of all the information that may be relevant to the case for or against the accused that they are aware of, whether obtained by them or otherwise, in the course of its investigation.

3. What Information must be Revealed

3.1 The following definitions will assist in deciding whether the information in the possession of the SRA should be revealed to the prosecutor.

Relevant Information

3.2 Includes anything that appears to have some bearing on

- ◆ any offence under investigation,
- ◆ any person being investigated,
- ◆ the surrounding circumstances, unless it is incapable of having any impact on the case.

Material Information

3.3 Materiality of the information is the test the Crown applies when considering disclosure of information to the defence. It is worth bearing in mind this test as all material information will be relevant information.

3.4 Material Information includes anything which

- ◆ forms part of the prosecution case or
- ◆ would otherwise materially weaken or undermine the prosecution case or
- ◆ materially strengthen the accused's case.

Exculpatory Information

3.5 This information must also be revealed as this would inevitably be likely to materially strengthen the accused's case. It includes **anything** that is obtained or generated during the course of an investigation that could exculpate the accused or otherwise materially weaken the prosecution case or materially strengthen the defence case

3.6 Although not exhaustive, examples of information which could **materially weaken** the prosecution case, **materially strengthen** the defence case, or otherwise have the potential to **exculpate** the accused include:

- ◆ Information which may point to the conclusion that no crime has been committed or that no crime was committed on the date or at the place libelled.

- ◆ Information which may contradict other information on which the Crown case will rely.
- ◆ Information which may cast doubt on the credibility or reliability of the Crown witnesses.
- ◆ Information which may be inconsistent with scientific or other expert evidence on which the Crown will rely or with inferences which may be drawn from such evidence.
- ◆ Information which may point to another person as perpetrator.

Information Which Always Needs to be Revealed

3.7 The following information will always require to be revealed:

- ◆ All witness statements,
- ◆ All criminal history information
- ◆ Existence of productions
- ◆ any other information that is likely to be material and therefore disclosable.

4. Revelation in Summary Cases

4.1 Section 119 of the 2010 Act places a duty on the investigating agency to **inform** the prosecutor of the existence of all the information that **may be relevant** to the case for or against the accused that the agency is aware of as soon as practicable after a plea of not guilty is tendered.

4.2 The Standard Prosecution Report (SPR) plays a crucial role in relation to revelation in summary cases as a copy of the summary of facts is served on the accused with the complaint. Chapter 18 of the Code of Practice explains how the SPR ensures that the Crown meets its disclosure obligations. Please refer to paragraph 18.3 of the Code of Practice for detail of the information which must be included in the SPR. It is therefore crucial that any exculpatory information is contained in the SPR.

4.3 The duty is a continuing duty and therefore if further information comes to light then that must be assessed for relevancy and if relevant revealed to the prosecutor in terms of section 120 of the Act.

5. Revelation in Solemn Cases and Disclosure Schedules

Who will be Responsible for Revelation- Reporting and Reviewing Officers.

5.1 Section 117 of the 2010 Act places a duty on the investigating agency to **provide** the prosecutor with details of all the information that **may be relevant** to the case for or against the accused as soon as practicable after the accused's first appearance in court in respect of the proceedings. 'Information' includes information that the agency is aware of which was obtained by another agency. If the Procurator Fiscal

requires the information itself, rather than just the details, the investigating agency must provide it as soon as practicable.

5.2 Chapter 17 of the Code of Practice introduces the concept of the Reviewing officer who will be responsible for reviewing information, assessing relevance and submitting the disclosure schedules to the crown. In most cases the Reporting Officer will also be the Reviewing Officer. The reviewing officer must be trained on the obligations of revelation and disclosure.

5.3 The Reporting Officer is defined in the Code of Practice as the person with overall responsibility for the conduct of an investigation

5.4 The Reviewing Officer is defined in the Code of Practice as being the person who is responsible for

- reviewing and assessing all information obtained or generated during an investigation;
- determining what may be relevant;
- recording that information on the appropriate schedules
- submitting schedules to the Crown and
- ensuring that information is submitted to the Crown when requested to do so.

5.5 The responsibilities of the Reviewing Officer are to

- Ensure that there is a record of all information obtained or generated during the investigation;
- Review and assess all such information to determine whether it may be relevant and if so, assess whether it is sensitive and whether it is information likely to materially weaken or undermine the prosecution case or materially strengthen the defence case.
- Conduct early liaison with the Crown in complex or large volume cases;
- Where the Reviewing Officer is also the Reporting Officer, ensure that the SPR is accurately and comprehensively completed; and
- Thereafter to comply with their continuing duties to provide information as laid down in sections 118 and 120 of the 2010 Act.

6. Timescales for PF Request for Disclosure Schedules.

6.1 In cases which are raised by petition proceedings, the PF must intimate this to the reporting agency. The PF will inform the reporting officer of this decision and request that full statements and schedules be prepared and submitted. This will be in the form of a written request to the Reporting officer.

7. Timescales for submission of Disclosure Schedules by the SRA

Submission of the Initial Schedules

7.1 The reviewing officer must complete Disclosure schedules listing all the information obtained or generated during the investigation that may be relevant and provide that to the PF within 21 days of the first appearance of the accused on petition, unless the scale of the case renders this impractical. In such cases there should be early discussion with the Procurator Fiscal to discuss the appropriate time limit.

7.2 Please note in custody cases the obligation on the SRA to submit statements in advance of schedules to the Procurator Fiscal within 7 days of the accused's first appearance remains.

Timing of Submission of Additional Schedules

7.3 Additional schedules containing any information obtained or generated after the submission of the first schedules, or which was available previously, but is only now considered relevant should be submitted at the following stages of proceedings:

- ◆ 14 days before the case is reported to Crown Office;
- ◆ 14 days before the preliminary hearing or first diet;
- ◆ 14 days before the trial diet or sitting; and
- ◆ As soon as reasonably practicable thereafter where additional information is identified after that date.

These dates will be intimated to the Reporting Officer by the PF office,

7.4 At each of these key stages, the Reviewing Officer should also submit an undertaking confirming that to the best of their knowledge and belief all relevant information of which they are aware at the date of the undertaking, has been listed in one of the schedules submitted to the Procurator Fiscal. The template for this undertaking can be accessed on SRAWEB2.

7.5 If there is no additional information that requires to be placed on a schedule then an undertaking confirming that should be submitted to the Procurator Fiscal at these times. The template for this undertaking can be accessed on SRAWEB2.

8. Completion of the Disclosure Schedule by the Reviewing Officer

8.1 Each item of information must be categorised and listed in one of 3 categories of schedule:

- Non-sensitive;
- Sensitive; or
- Highly sensitive

9. What is non-sensitive information

9.1 The non sensitive schedule includes general non contentious information that could be disclosed to the defence after assessment by the Procurator Fiscal. The type of information which could be contained in the non sensitive schedule are listed below

- Witness statements
- Notes of interviews with witnesses
- Fingerprint forms
- Forensic Reports
- Detention Forms
- Arrest Forms
- Post Mortem Reports
- Plans/Videos of crime scenes
- Production Logs
- Incident logs
- Questionnaires
- Hospital Records relating to the accused
- Medical examinations Forms for suspects
- Surveillance/Observation Logs³
- PI Tapes and Transcripts
- Visually recorded interviews with witnesses or accused
- ID Parade forms
- TSU Examination Reports
- Voluntary Attendance Forms
- Expert Reports
- Custody records (for accused)
- Records of Searches
- Crime report
- Media releases
- DNA or other forensic material
- Video Operator's certificate re video/digital evidence
- Dental Records relating to the accused

9.2 This list is not prescriptive or exhaustive and, depending on the actual information contained within each individual item, it may, on occasion, be appropriate for it to be listed on the sensitive schedule. However, this list will act as a guide to assist reviewing officers in determining the appropriate schedule.

9.3 The appearance of items of information on this list above is **not** an indication that this type of information is routinely relevant. It remains the case that only witness statements and criminal history records are **always** routinely relevant.

9.4 All other information obtained or generated during the course of the investigation **must** be assessed by the Reporting Officer for relevance.

³ Except where the content of such logs is sensitive or the existence of such surveillance is itself sensitive, having regard to the definition of sensitive set down in paragraph 34.1.1

Thereafter, if it is deemed to be information that may be relevant, this table will assist in determining the appropriate schedule in which to list the information.

9.5 A sample schedule is attached at Annex A which shows the types of information and how it should be laid out.

10. What is Sensitive Information

10.1 Sensitive information includes any relevant information which if disclosed would be likely to;

- ◆ cause serious injury, or death, to any person; or
- ◆ obstruct or prevent the prevention, detection, investigation or prosecution of crime, or
- ◆ cause serious prejudice to the public interest.

10.2 Examples of sensitive information can be found in the table below. This list is not prescriptive and, depending upon the actual information contained within each individual item, it may, on occasion, be more appropriate for it to be listed on the non-sensitive schedule. This would be by way of a sanitised version of the sensitive item.

- | | |
|---|---|
| • Criminal History Records | • Misconduct material |
| • SIO Policy Log | • Family Liaison Logs |
| • Operational briefings | • Debriefing sheets |
| • Vulnerable witness profiles | • Crimestoppers Records |
| • Internal Wanted/ Missing reports | • Warrant application reports (for both search & arrest warrants) |
| • Dental Records for witnesses | • Medical Records for witnesses |
| • Information from Social Services/ Local Authorities | • Force Intelligence bureau information |
| • Policy Files | • Custody Records for witnesses |
| • Port Warnings | • Sanitised Covert Human Intelligence Source reports |
| • RIPSAs supporting documentation | • Information held by Social Services/ Local Authorities |
| • Offender profiles | |

11. What is Highly Sensitive Information

11.1 Highly sensitive information includes any information which, if compromised, is likely to:

- Lead directly to the loss of life;
- Directly threaten national security; or
- Lead to the exposure of a CHIS[76]

11.2 There may be information that might not fall within this definition, but which due to the GPMS marking that the information attracts, it cannot be revealed to a precognoscer or legal manager because they do not hold the required security clearance. Such information must be included in the Highly Sensitive schedule and revealed to a member of Crown Office and Procurator Fiscal Service with the required level of security clearance, i.e. Area Fiscal, Divisional Fiscal or District Fiscal.

11.3 Where it is unclear whether an item of information may be relevant or not, it should be treated as if it might be and, accordingly, should be listed in the appropriate schedule.

12. Submitting Disclosure Schedules to the Procurator Fiscal

12.1 All non-sensitive and sensitive schedules must be submitted electronically using the SRAWEB2 system. Highly sensitive schedules must be completed on SRAWEB2 and then delivered by hand to an appropriately vetted member of COPFS staff. If there is a highly sensitive schedule in a case then the investigating agency must contact the PF's office to confirm who is dealing with the case and is able to accept this information. You must be registered to access the SRAWEB system. If you are not registered please contact the Criminal Justice and Disclosure Team in Crown Office on 0131 226 2626.

13. Defence Statements and Review of Information

13.1 Section 124 of the Act introduces mandatory defence statements in solemn proceedings. These statements require to be lodged by the defence 14 days before a first diet in the Sheriff Court or if the case is a High court case, 14 days before the preliminary hearing. The statement can contain a request for disclosure of information setting out the reasons why the defence agent considers that the disclosure of the information is necessary.

13.2 On receipt of the defence statement, the Procurator Fiscal will provide the Reviewing Officer with a copy. The Reviewing Officer must then review all the decisions relating to the relevancy of the items of information to determine whether any information not previously considered to be relevant is now relevant in light of the information in the defence statement. .

13.3 If the information is now deemed relevant then it should be submitted to the Procurator Fiscal on a new schedule as soon as practicable.

13.4 The Crown will also review all relevant information not disclosed to the defence including any new information submitted by the SRA to determine whether the information is material and should be disclosed.

13.5 It is important to emphasise the need for good communication between the reporting officer and the PF Office to ensure that

consideration of relevancy can be reviewed on an informed basis. This process will need to be prioritised as there will be very little time in most cases to address the issues raised in the defence statement.

14. Submission of the Actual Information to the Procurator Fiscal

14.1 The actual information listed on the schedules must be submitted by the SRA to the Procurator Fiscal if requested in terms of sections 117(3) and 118(3) of the 2010 Act.

14.2 The following information will always require to be submitted where the case is being prepared for trial-

- All witness statements,
- All criminal history information
- location of all productions
- Any other information that is likely to be material and therefore disclosable.

15. Continuing Obligations – Summary and Solemn Cases

Continuing Duty to Consider New Information

15.1 Sections 118 and 120 of the 2010 Act make it clear that there is a continuing duty to submit any further information to the Procurator Fiscal that may be relevant to the case, for or against the accused which they may obtain during their investigation.

15.2 The information must be submitted to the Procurator Fiscal as soon as practicable after becoming aware of it.

15.3 Any new information received by the SRA must be assessed for relevance and consideration should be given as to whether it sheds a different light on the relevance of information not previously revealed.

15.4 In summary cases this must be done in writing. This can be by way of a subject report, a letter or memo.

15.5 In solemn cases this will be done by the submission of the information on a schedule.

16. Duty on receipt of new information to consider if it has an effect on information already held.

16.1 When new information is received the SRA has a duty to review the information already held and consider where there is information not considered relevant which should now be provided to the Procurator Fiscal in light of this new information. Any further revelation will require the

submission of additional schedules in solemn cases. In summary cases this should be done by way of a subject report, letter or memo.

16.2 As before if the Procurator Fiscal subsequently requests the item of information itself rather than just its details then reporting agencies must provide this as soon as practicable.

17. When does the Obligation End

17.1 The obligation to consider relevancy continues until the proceedings are deemed to be concluded. Proceedings are taken to be concluded if -

- ◆ A plea of guilty is recorded against the accused,
- ◆ the accused is acquitted,
- ◆ the proceedings against the accused are deserted *simpliciter*,
- ◆ the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,
- ◆ the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
- ◆ the proceedings are deserted pro loco et tempore for any reason and no further trial diet is made, or the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are being contemplated.

It must be remembered that the Common Law and Convention law obligations continue to exist in relation to any new information which comes to light at any stage even after conclusion of proceedings in terms of the legislation.

18. SRA Duties and Responsibilities

18.1 Part B of the Code of Practice outlines the core duties of the SRAs which will ensure compliance with the statutory obligations and the principles of revelation.

Note: The Code of Practice should be referred to for the full guidance, but a summary is provided here of the main points of the guidance.

18.2 There are 5 Core duties and responsibilities as follows: -

1. Recording, retaining and reviewing information;
2. Conducting reasonable lines of enquiry, identifying and investigating exculpatory information;
3. Revealing and where appropriate providing information to the Crown;
4. The submission of accurate Standard Prosecution Reports (SPR's);
and
5. The taking and submission of witness statements

19. Recording, Retaining and Reviewing of Information- Chapter 14 of the Code of Practice

19.1 In terms of sections 117 and 119 of the 2010 Act reporting agencies must provide the Crown with all information obtained or generated during an investigation that may be relevant and thereafter must keep decisions regarding relevancy under review. To comply with this obligation it is essential that **all** information obtained or generated during an investigation is accurately recorded and retained.

19.2 This obligation extends to information that has been assessed as manifestly irrelevant, as that decision must be kept under review throughout the life of the case.

19.3 The SRA must therefore retain an accurate record of this information and the reasoning for deciding that the information is irrelevant.

20. Reasonable lines of Enquiry and Exculpatory Information – Chapter 15 of the Code of Practice

20.1 An essential element underpinning the duty of disclosure is the obligation on the SRA to pursue all reasonable lines of enquiry. This includes any line of enquiry that might point towards the accused as the perpetrator, as well as that which points away from the accused as the perpetrator of the offence or mitigates the accused's involvement in the offence.

20.2 The Crown has an obligation to ensure that all reasonable lines of enquiry are pursued and, accordingly, may instruct the reporting agency to carry out particular lines of enquiry where this has not already been identified.

20.3 Guidance on what might form exculpatory information is contained in Chapter 4 of the Code of Practice. This Chapter explains what constitutes exculpatory evidence and outlines the principal categories of information which should be regarded as exculpatory and thus material.

20.4 Any decision which is taken in respect of a particular line of enquiry in any investigation must be accurately recorded and retained. This includes decisions not to pursue a particular line. Reasons for such decisions must also be recorded and retained.

20.5 The details of all witnesses who can speak in support of the accused's position should be recorded, retained, reviewed and, where appropriate, revealed to the Crown in the same way as for witnesses who speak in support of the prosecution case.