

PROTOCOL

CROWN OFFICE & PROCURATOR FISCAL SERVICE

and

SCOTTISH ENVIRONMENT PROTECTION AGENCY

for

**SUBMISSION, PROCESSING AND MONITORING OF
PROSECUTION REPORTS**

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Foreword

The Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Environment Protection Agency (SEPA) are committed to ensuring effective liaison so that reports from SEPA achieve the best outcome for the environment and the public interest.

This Protocol has been agreed between COPFS and SEPA to set out the framework for effective liaison, communication and co-operation in the investigation and prosecution of environmental crime.

We believe that the introduction of the Protocol will contribute to the effectiveness of our partnership in dealing with environmental offences and help deliver the high standards deserved and expected by the public.



Norman McFadyen
Crown Office and
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June 2006

Introduction

1. The Lord Advocate and Procurators Fiscal (PF) are committed to ensuring that reports from the Scottish Environment Protection Agency (SEPA) in relation to environmental offences are dealt with appropriately and effectively. The Crown Office & Procurator Fiscal Service (COPFS) has a senior management tier, the Area PF in each of its 11 Areas, whose responsibilities include dealing efficiently with cases and increasing partnership working with non-police specialist reporting agencies.
2. Each Area will have a depute PF whose speciality is dealing with SEPA cases and arrangements will be made for specific training and development in environmental law and related issues. It is hoped that the specialist depute will deal personally with every SEPA case, but it is accepted that this will not always be possible. It is likely that cases will be submitted in the normal way to the Procurator Fiscal in the relevant District or to the Initial Case Processing Team and will be routed from there to the specialist depute. The specialist depute will normally mark the case (or advise in the marking of the case) and prepare it for prosecution (or give advice on the preparation). Depending on the nature of the case the specialist depute may prosecute personally or provide assistance and guidance for another depute to carry out the prosecution. Much will depend on the nature of the case and the workload. The extent to which the specialist depute deals with any particular case will be a matter for discussion between the depute and senior staff in the appropriate District or Area.
3. SEPA is committed to contributing effectively to achieving an outcome in reported cases that best serves the wider purposes of SEPA, meets its policies on enforcement and best serves the public interest. SEPA's Environmental Protection & Improvement Directorate has a Head Solicitor responsible for regulatory and enforcement matters, and in each of its 3 regions a Regional Solicitor, whose responsibilities include dealing efficiently with cases and working closely with the PF service in their regions.
4. Together, COPFS and SEPA have identified that enhanced clarity in liaison arrangements will help to achieve a closer match between SEPA reporting cases in a manner which meets the needs of COPFS and COPFS dealing with cases in a way which best serves the purposes of SEPA.
5. A document, "Reports to the Procurator Fiscal - a Guide for Specialist Reporting Agencies", has been produced by COPFS to provide advice for specialist reporting agencies which will enable them to contribute effectively to achieving an outcome in reported cases which best serves the public interest. This document is revised periodically. A copy of each new edition will be supplied electronically to SEPA within a week of publication.
6. This Protocol supplements that Guide and deals only with SEPA cases. Cases of difficulty in the application of this Protocol can be referred in the first instance to the Area PF and SEPA Regional Solicitor to deal with or ultimately to the Crown Office Policy Group and SEPA Head Solicitor for resolution.

Submission and Processing of Reports

Investigation Phase

7. It is the role of SEPA to investigate and report potential offences in accordance with its enforcement policy. Potential offences may come to light reactively or as SEPA goes about its normal proactive inspection and advisory work.
8. If it appears to SEPA that a potential offence may meet the criteria for prosecution then it will make further enquiries in accordance with its internal practices and procedures and prepare a Prosecution Report (PR) recommending prosecution for submission to the PF.
9. Before the PR is prepared, SEPA may judge that a case conference with the relevant PF would assist. If this is the decision, a SEPA solicitor should request such a conference with the specialist depute. The specialist will have experience of how issues are viewed in court; SEPA officers will contribute on the basis of their expertise and on evidential and factual matters. This could be the situation where it is a matter of tactics and balance over submitting charges against individuals as well as or instead of companies; or libelling alternative charges; judgements about whether a case would meet the COPFS public interest test (e.g. no risk of re-offending as company has gone into liquidation); how many charges to libel to demonstrate a general management failure etc.

Reporting Phase

10. SEPA aims to submit the PR to the PF within 6 (4)¹ months of the date of the incident to ensure there are no undue delays in its investigations and reporting. It is recognised that technically complex investigations, especially those requiring specialist evidence may take longer. SEPA's aspirational target is to report 90% of cases in 6 (4)¹ months.
11. Any difficulties about reporting in any particular case should be discussed as early as possible with the specialist and the reason for any delay explained.
12. SEPA will prepare its PRs in accordance with the Guide for Specialist Reporting Agencies and SEPA internal guidance.
13. SEPA will work to submit cases electronically in an agreed format in accordance with full membership of ISCJIS (see the Guide for Specialist Reporting Agencies) at the earliest opportunity.
14. SEPA will also prepare and make available to the PF visual aids to help the understanding of the court – e.g. sketches, videos, etc, where appropriate.
15. Meantime, SEPA will submit the PR via SRAWEB and the reporting solicitor (RS) will notify the Area Specialist of submission. Any productions and visual aids

¹ Timescales shown in brackets relate to offences carrying a 6 month statutory time bar, e.g. failure to comply with a section 59 EPA notice.

should be sent straight to the Area Specialist with a covering letter from the reporting solicitor (RS), and a copy of the covering letter only should be sent to the PF in the relevant District.

16. In the event that SRAWEB is not available, SEPA will submit the PR to the Area Specialist with a covering letter from the reporting solicitor (RS), and send a copy of the covering letter only direct to the PF in the relevant District. Any productions should be submitted together with the PR unless this is impracticable, when they should be sent as soon as possible to the Area Specialist, or in accordance with local arrangement.

Case Progress Liaison Phase

17. When a case is reported, a letter of acknowledgement will be sent to the RS within 14 days. The acknowledgement will contain the PF reference, confirmation of who is dealing with the case (this will normally be the specialist) and the contact telephone number.

18. All SEPA enquiries about the progress of the case should be directed to the specialist (or the depute to whom the case has been allocated) and contain the PF reference number. If any further information is required from SEPA, this will be directed to the RS, who will arrange to provide it as soon as practicable.

19. When making a decision, the PF will take the views of SEPA as expressed in the PR and covering letter and give them proper consideration.

20. The decision to take action or not will generally be communicated to the RS within 5 weeks of the report being received by the specialist (or allocated PF). In complex cases, or cases which require further investigations, this period may be extended. In these circumstances the PF will indicate a revised timescale to the RS.

21. Where the PF decides to take no proceedings or to deal with the case other than by a prosecution, the RS will be advised in writing, with details of any reasons that the PF is able to disclose. No intimation of a decision not to proceed will be made by SEPA to an accused without the written consent of the PF.

22. Where the PF decides to take proceedings, the forum and charges will be discussed with the RS. The final decision will be intimated in writing with a copy of the complaint or petition, together with a note of when the case will call in court, if known. (See Appendix 2 for details of the calling diets.) Where the date of calling is not known then this will be intimated as soon as it becomes known.

23. The PF will give notice to the RS of the calling dates so that the SEPA reporting officer or RS may attend for information and to assist the PF in court. The RS should make him/herself known to the PF in court so that any issues concerning his/her presence in court can be discussed with the defence.

24. The outcome of the initial calling of the case will be intimated to the RS as soon as practicable, and in any event within 5 working days, together with the date of any further hearing set for the case and a brief explanation, where appropriate, of the

nature of that hearing (e.g. debate, or intermediate diet and trial diet). If the accused pleads guilty at the first calling, this will be intimated the same day if possible.

25. Where the case has been allocated to another depute for advance notice preparation (for trial or debate) then the details of that individual, and a contact telephone number, will be communicated to the RS with a request for a pre-trial case conference (see para. 9).

26. Where SEPA staff are cited to attend at court, they should immediately contact the Area specialist, which failing the RS, if there are any problems of availability. Where their attendance is subsequently not needed (e.g. change of plea) they will be promptly informed. However the SEPA reporting officer or RS is encouraged to attend the diet to assist the PF.

27. Where the charges submitted by SEPA are to be substantially changed or the PF is considering a plea adjustment that will result in not guilty pleas being accepted to charges, the RS should be advised and any views expressed by him or her taken into consideration. Ultimately, it is for the PF to decide on the appropriate charges in any given case and whether any plea offered is acceptable.

28. The outcomes of all callings of the case, including the final disposal, will be intimated to the RS as soon as practicable, and in any event within 5 working days, except where there is a conviction, in which case intimation should take place on the same day as far as possible.

29. Where there is a possibility of any Crown appeal following the conclusion of a case SEPA, bearing in mind the legal time limits for lodging of an appeal, should make immediate representations to the PF, which can then be taken into account by the Appeals Unit and Crown Counsel when considering the merits of an appeal.

30. For significant cases, or at the request of either party, a post-disposal assessment meeting may be called to learn lessons for the future, which can be reported back via the general SEPA/COPFS liaison arrangements (see para. 46).

Calling to Court Phase

31. When the case has been allocated to a depute for advance notice preparation (for trial or debate) then s/he will contact the RS to discuss case presentation in court:

- Use of visual aids to help explain the case in court;
- How evidence will be taken from witnesses: especially how expert witnesses will be taken through their reports.
- Plea adjustment strategy;
- How SEPA officers may assist the PF in court.

32. Although not a witness in the case, it may be appropriate for the RS to assist the PF in court, with consent of the Sheriff if necessary. In particular, the RS may be able to:

- prompt the PF on any factual matters which rebut mitigation or lines of defence (e.g. in cross-examination);
- support the PF from their knowledge of environmental case law and statute.

33. The specialist reporting agencies guide explains the various court procedures and at what stages SEPA officers might support the PF in court.

Disclosure

34. Pre-submission, SEPA can disclose to the accused or potential accused or their representative the stage of progress of the investigation, without reference to the PF. In no circumstances will SEPA disclose details of evidence to the accused or potential accused or their representative.

35. Once a report has been submitted to the PF, all questions of disclosure in prosecutions or potential prosecutions are matters for the Crown. Where SEPA reporting officers are asked to disclose anything to an accused or potential accused or their representative, SEPA should refer the enquirer to the PF. The disclosure regime places duties squarely on the PF and the Crown rather than on reporting agencies and if the PF is in difficulty s/he will take Crown Counsel's instructions.

36. Broadly stated, the PF's duty is to disclose evidence to the defence that may support the defence case or undermine the Crown case.

Publicity

37. The purpose of publicity is to raise awareness that environmental law is enforced and prosecuted as a deterrent and to inform duty holders which risks are serious, and how to control them. Example cases are taken to make other duty holders aware that non-compliance on a particular matter may be commonplace but needs to change.

38. Where these were some of the factors in recommending the case in the first place, SEPA should try to secure that wider impact through post-conviction publicity. This may be immediately after the case or by periodically linking similar issue cases together.

39. In considering publicity, SEPA must at all times have regards to the provisions of the Contempt of Court Act 1981. Prejudicial pre-trial publicity must be avoided at all costs but there is nothing to prevent SEPA from making public statements after conviction (subject to any order under section 4 of that Act which may be in place) unless there are outstanding proceedings in respect of a co-accused.

40. Care must be taken to ensure any facts or details of the charges and background circumstances quoted are limited to those that came out in court. This need not be a limiting factor as the objectives of publicity are best served from generalising the issue anyway.

41. Care must be taken not to express a view on the penalty. In Scotland that is solely a matter for the courts.

42. It is permissible to inform the media of upcoming court cases and why they might be interested to attend to hear and report for themselves but the PF should be advised if media interest is likely.

43. There is, equally, no prohibition on limited publicity necessary following an incident, to ensure that others are made aware of the nature of a risk so they may control it elsewhere.

44. For such pre-case publicity, if SEPA is in any doubt as to how much it can publicise the RS will contact the PF to discuss this first. Post-conviction publicity is principally a matter for SEPA although, in significant cases, joint publicity may be appropriate.

Training and Mutual Understanding

45. There will be 6-monthly joint SEPA/COPFS in-depth training events, programmed and organised through the regular SEPA/COPFS liaison meetings. All specialist deputies should attend an introductory training event if possible, and should make every effort to attend the twice-a-year in-depth training sessions. Relevant SEPA staff will attend. Feedback will be invited from all participants to inform future programming and content of training.

General SEPA /COPFS Liaison Arrangements

National Liaison

46. COPFS and SEPA will meet at least twice a year to discuss national policies, priorities and the operation of the Protocol. They will also keep under review the statistics of case disposal so as to ensure that the intentions of SEPA's Enforcement Policy and the COPFS Prosecution Code are, in general, being achieved. They will typically oversee:

- alignment of case submission and disposal statistics and procedures to achieve this;
- analysis of the statistics to identify if there are general areas warranting further examination e.g. balance of prosecution of individuals, ratio of cases submitted to conviction etc;
- presentation of statistics in e.g. the SEPA Annual Report.

This will also be the forum at which the joint training programme is agreed and planned, with efforts being made to vary the location in order to share the travelling burden across participants and involve different specialist deputies. (See Appendix 1 for a model agenda.)

Local Liaison

47. SEPA will meet with Area specialist deputies at least once per year to discuss individual cases, local priorities, the operation of the Protocol, the overall match between SEPA and COPFS objectives and policies, and any improvements that might be helpful. Any learning points from individual cases that are of wider interest should

be fed into the national meetings. (See Appendix 2 for a model agenda.) Informal e-mail and telephone contact should be encouraged.

48. In the event of difficulty over applying the Protocol or in reaching agreement, both pre- and post-court, either party can refer the issue upwards as described in the introduction to the Protocol.

49. SEPA solicitors, Crown Office Policy Group and the specialist deutes will monitor the operation of the Protocol, and report their findings respectively to the SEPA Regional Solicitor and the Area PF for discussion at local liaison meetings. Any outstanding issues will be referred for discussion at national liaison meetings.

MODEL AGENDA: NATIONAL LIAISON MEETING

- 1 Welcome
- 2 Apologies
- 3 Minutes of last meeting
- 4 Matters arising
- 5 Operation of Protocol
- 6 National initiatives
- 7 Area liaison
- 8 Casework
- 9 Training programme
- 10 Action Points
- 11 AOB
- 12 Date of next meeting

MODEL AGENDA: AREA LIAISON MEETING

This model agenda is to help identify core issues for local discussion.

Meetings may take place either in relation to one of SEPA's 3 regions or, by agreement, on a more local level in relation to one or more of the 11 COPFS Areas within a SEPA region.

SEPA would normally be represented by its Regional Solicitor for the SEPA region so as to be consistent with the overarching Crown Office meetings.

The relevant Area PF(s) would attend as required with the specialist depute(s) who handle(s) SEPA cases in the relevant region.

1. Local Liaison

Review of casework throughout the region in the period since the last meeting; results achieved; difficulties encountered; improvements that can be introduced at local level within the national procedures/format, e.g.

- PR presentation: adherence to format.
- timing of submission.
- effectiveness of dialogue on individual cases.
- liaison during case marking, charge drafting, pre Court preparation, support in Court, post-trial wash up.

2 Local operation of protocol

3 Regional or local initiatives

4 Action points

- For national liaison.
- For local action.

5 AOB

6 Date of next meeting