Disclosure Manual

Revised: 26 February 2018

Contents

Foreword

"The fact that an item of information cannot be put in evidence […] does not mean that it is worthless."

– Lord Mustill, *R v Preston and Others* [1993] All ER 638

"It is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation."

– LJ Gross, Review of Disclosure in Criminal Proceedings, 2011

"Full compliance with the duties of disclosure must be seen as fundamental for investigators, prosecutors and defence lawyers and advocates. Each person engaged in the process has an individual responsibility."

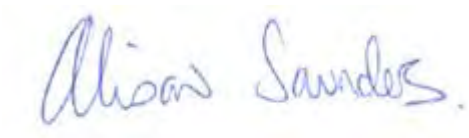
– Rt. Hon. LJ Goldring QC, 2013

Dealing with disclosure is a fundamental part of an investigation and prosecution. It is essential that it is dealt with competently and fairly, **ensuring a thinking approach throughout**. The scheme set out in the Criminal Procedure and Investigations Act 1996, and the Code of Practice which accompanied it, aimed to provide a fair system for the disclosure of relevant unused material in criminal proceedings. The intentions of that scheme remain the same today; principally, to assist the defence in the timely preparation and presentation of its case, and to enable the court to focus on all the important issues in the trial.

But while the principles remain unchanged, our working practices have had to respond to a number of significant developments since this manual was last reviewed. Criminal justice system-wide initiatives and, other changes, such as the unprecedented rise in the volume of digital material created in criminal investigations, could not easily have been foreseen, and a fundamental review of the manual has been undertaken.

This updated edition better reflects modern practices by linking to other resources wherever possible, rather than reproducing large chunks of text. The use of links, and the removal or annexing of peripheral or repetitive text, has enabled an overall shortening of the manual (in keeping with one of the recommendations of Gross LJ in his 2011 review). This edition also incorporates learning points to have arisen from various widely reported cases and other relevant material.

To maintain public confidence in the criminal justice system, it is essential that the relevant disclosure regime is complied with in every case, and all duties performed to a high standard. I hope that this manual will continue to offer practical guidance to criminal justice practitioners, and give the lay reader a degree of reassurance that the prosecution team is fully committed to meeting its obligations in this hugely important area.



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26 February 2018

Chapter 1

Introduction

These instructions explain how investigators and the Crown Prosecution Service (collectively, 'the prosecution team') have agreed to fulfil their duties to disclose unused material to the defence. These duties arise under statute and at common law. It is important that the prosecution team adopt consistent practices across England and Wales.

This manual contains practical as well as legal guidance relating to disclosure. This is designed to ensure that the statutory duties are carried out promptly, efficiently and effectively. The templates for letters and documents referred to can be found elsewhere on the police and CPS case management systems.

The current law is set out in:

- the Criminal Procedure and Investigations Act 1996 as amended ('the CPIA');
- the Code of Practice issued under section 23 of the CPIA 1996 ('the Code of Practice');
- Part 15 of the Criminal Procedure Rules 2015, as from 5 October 2015 ('the CPR');
- the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 issued under section 12 of the CPIA 1996 ('the Regulations');
- The Criminal Procedure and Investigations Act 1996 (Notification of Intention to Call Defence Witnesses) (Time Limits) Regulations 2010 [SI 2010/214];
- Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997/703;
- Covert Surveillance and Covert Human Intelligence Sources Code of Practice.

In addition, there are the 'Attorney General's Guidelines on Disclosure 2013' and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (3 December 2013), which build upon the existing law.

Interpretation

For the purpose of these instructions, references to unused material are to material that may be relevant to the investigation, which has been retained but does not form part of the case for the prosecution against the accused.

The Code of Practice assumes that criminal investigations (as defined in the CPIA) are primarily conducted by police officers. However, its provisions apply equally to persons other than police officers who are charged with the duty of conducting an investigation (see 1.1). For that reason, references in this manual to a police officer, or 'the police' should be interpreted as applying equally to other investigators.

Relevant Material is defined in the Code of Practice as anything that appears to an investigator, or the officer in charge of an investigation or the disclosure officer to have some bearing on any offence under investigation or any person being

investigated or on the surrounding circumstances, unless it is incapable of having any impact on the case.

Revelation refers to the police alerting the prosecutor to the existence of relevant material that has been retained in the investigation. Revelation to the prosecutor does not mean automatic disclosure to the defence.

Disclosure refers to providing the defence with copies of, or access to, any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed. The application of this test to relevant material is referred to in this manual as 'the Disclosure Test'. Prosecutors should note that this test does not include an assessment as to whether the material is or could be admissible in a trial, or the merits of a defence.

Triggers for statutory disclosure

The prosecutor's statutory duty to disclose unused material to the accused is triggered by:

- a plea of not guilty in the magistrates'court;
- the sending for trial at the Crown Court;
- the preferment of a voluntary bill of indictment, or;
- the service of the prosecution case following the sending of an accused to the Crown Court under section 51(1) Crime and Disorder Act 1998.

Consequences of non-disclosure

Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. A failure by the prosecutor or the police to comply with their respective obligations under the CPIA or Code of Practice may have the following consequences:

- the accused may raise a successful abuse of process argument at the trial;
- the prosecutor may be unable to argue for an extension of the custody time limits;
- the accused may be released from the duty to make defence disclosure;
- costs may be awarded against the prosecution for any time wasted if prosecution disclosure is delayed;
- the court may decide to exclude evidence because of a breach of the CPIA or Code of Practice, and the accused may be acquitted as a result;
- the appellate courts may find that a conviction is unsafe on account of a breach of the CPIA or Code of Practice; or
- disciplinary proceedings may be instituted against the prosecutor or a police officer.

It is therefore important to ensure that the duties imposed by the CPIA and Code of Practice are scrupulously observed. If the prosecutor is satisfied that a fair trial cannot take place because of a failure to disclose which cannot or will not be

remedied, including by (for example) making formal admissions, amending the charges or presenting the case in a different way so as to ensure fairness or in other ways, he or she must not continue with the case.

The accused has responsibilities under the CPIA, and failure to comply with them may have the following consequences:

- loss of entitlement to make an application under section 8 of the CPIA for disclosure of additional material;
- appropriate comments on any faults by the accused in disclosure, or;
- the court drawing inferences from any failure in deciding whether the accused is guilty of an offence.

The proper application of the provisions of the CPIA by the prosecution team will ensure that only material required to be disclosed by the CPIA is disclosed. There is no place in law or otherwise for 'blanket' disclosure. Such practice leads to inconsistency and uncertainty, unnecessary work, and unnecessary costs to the prosecution, defence and public funds.

The link between disclosure and the investigation

The prosecution team' s duties under the CPIA are not simply about compiling schedules of unused material as part of preparation for court. At the heart of every investigation is the obligation, in the CPIA and Code of Practice, to pursue all reasonable lines of enquiry, whether these point towards or away from the suspect.

In the early stages of the investigation, it may not be clear whether an offence has been committed, whether a prosecution is likely to follow and whether material obtained may be used in evidence or will be unused. Following reasonable lines of enquiry and recording and retaining relevant material involves the exercise of professional expertise and considerable thought.

The CPIA and Code of Practice determine the extent of the enquiries that should be made, the material that should be discarded or retained, and the material that is considered relevant, revealed and, where required, disclosed. The distinction between evidential and unused material often only becomes apparent as the investigation progresses. The prosecution team should take the opportunity to confirm or rebut potential and proffered defences, and should be aware of the extent to which any disclosable material might weaken the case. A safe prosecution requires a dedicated, professional and 'thinking' approach which continues throughout the case as the evidence becomes apparent and issues develop.

The applicable disclosure provisions

The obligations in relation to unused material and disclosure are determined by the date on which the investigation began.

The date on which the investigation began will determine:

- whether the CPIA applies at all;

- whether the amendments to the CPIA as a result of Part 5 of the Criminal Justice Act 2003 and section 60 of the Criminal Justice and Immigration Act 2008 apply;
- which edition of the Code of Practice (i.e. the 1997 2005 or 2015 edition) should be referred to; and
- whether the 2002 edition of the Joint Operational Instructions (JOPI) should be referred to.

Therefore:

- where the investigation began before 1 April 1997, the common law disclosure rules will apply. Investigators and prosecutors should refer to the 2000 Guidelines, the 1997 Code of Practice and the 2002 JOPI;
- where the investigation began on or after 1April 1997 but before 4 April 2005, the un-amended CPIA will apply, and investigators and prosecutors should refer to the above editions of the Code of Practice and the JOPI;
- where the investigation began on or after 4 April 2005, then the CPIA, as amended by the CJA 2003, applies – investigators and prosecutors should therefore refer to the 2005 or the 19 March 2015 edition of the Code of Practice, and this edition of the manual (formerly the JOPI);
- Section 6A(1)(ca) inserted by section 60 of the 2008 Act applies where the investigation began on or after 4 April 2005 and where a plea of not guilty has been entered (in the magistrates' court) or where the case has been committed, transferred (now allocated) or sent to the Crown Court on or after the 3 November 2008.

All judicial interpretations of the CPIA 1996 and Code of Practice from time-to-time will continue to apply (for example, *R v H and C* (2004) UKHL 3).

The investigator should inform the prosecutor of the date when the investigation began. In cases of any doubt, the prosecutor should check the date with the investigator. It may be that separate investigations were commenced either side of one of the relevant dates, as a result of which an accused is charged with separate offences. This may mean that two different disclosure regimes will apply to different charges in the same proceedings.

Chapter 2

General Duties of Disclosure Outside the CPIA 1996

General principles

The duties of revelation and disclosure do not only arise under the CPIA. Further legal obligations arise which assist:

- the prosecutor, in determining whether a person should be charged with an offence, and with which offence; and
- the accused, by providing certain material during the early stages of a prosecution.

Revelation and charging

The investigator or disclosure officer must inform the prosecutor as early as possible whether any material weakens the case against the accused. An evidential report to a prosecutor for a charging decision must contain the key evidence upon which the prosecution will rely, together with any unused material which satisfies the disclosure test.

In some cases referred to prosecutors for a charging decision, the officer may submit an expedited report. This report must be accompanied by any other information that may have a bearing on the evidential stage of the Code Test which includes whether there is unused material which affects the strength of the prosecution case.

Disclosure and early stages of a prosecution

Section 3 of the CPIA envisages the possibility that some disclosure may already have been made before the statutory duty to make initial disclosure arises. This early disclosure is known as "common law disclosure", on which detailed guidance is given in *R v DPP ex parte Lee* [1999] 2 All ER 737.

After charge the officer in the case is required to certify on the initial file (on form MG6) that, to the best of the officer's knowledge and belief, no information has been withheld which would assist the accused in the preparation of the defence case, including the making of a bail application.

From the start of any prosecution, the prosecutor should consider what (if any) immediate disclosure should be made in the interests of justice and fairness in the particular circumstances of the case. Examples of what should be disclosed are:

- any previous convictions of the victim or a key witness if that information could reasonably be expected to assist the accused when applying for bail;
- material which might enable an accused to make an early application to stay the proceedings as an abuse of process;
- material which might enable an accused to make representations about trial venue on a lesser charge; or

- material which would enable an accused to prepare for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye witnesses whom the prosecution do not intend to use).

This list is not exhaustive and disclosure prior to the statutory duty arising will not exceed the disclosure which would be required under the CPIA.

The investigator or disclosure officer must reveal to the prosecutor any material that is relevant to sentence (for example, information which might mitigate the seriousness of the offence or assist the accused in laying some blame upon a co-accused or another).

Appeals

The duty of disclosure continues as long as proceedings remain, whether at first instance or on appeal (*R v Makin* [2004] EWCA CRIM 1607. See also section 7 CPIA). While the Court of Appeal in Makin did not purport to lay down any general test to be applied for disclosure on appeal, prosecutors should consider the interests of justice. The defence case should be assessed as that advanced at trial or, if matters are raised on appeal that were not raised during the trial process, as set out in the appellant's draft or perfected grounds of appeal.

Post conviction disclosure

The interests of justice will mean that where material comes to light after the conclusion of the proceedings that might cast doubt upon the safety of the conviction, there is a duty to consider disclosure. Any such material should be escalated in accordance with local arrangements. The principle was considered and the importance of finality in criminal proceedings was reaffirmed in *Nunn v the Chief Constable of Suffolk Constabulary and the Crown Prosecution Service (Interested Party)* [2012] EWHC 1186 Admin.

For general guidance in respect of post-conviction requests for prosecution case papers from third parties or from individuals who have been the subject of criminal proceedings, please refer to the CPS legal guidance Disclosure of Material to Third Parties under the heading Post Conviction Disclosure.

Chapter 3

Roles and Responsibilities

The CPIA Code of Practice requires investigators to record and retain material obtained in a criminal investigation which may be relevant to the investigation. In particular:

- all police officers have a responsibility to record and retain relevant material obtained or generated by them during the course of the investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original, if the original is perishable, or the retention of a copy rather than the original is reasonable in all the circumstances;
- the officer in charge of the investigation has special responsibility to ensure that the duties under the Code are carried out by all those involved in the investigation, and for ensuring that all reasonable lines of enquiry are pursued, irrespective of whether the resultant evidence is more likely to assist the prosecution or the accused;
- it creates the roles of disclosure officer and deputy disclosure officer, with specific responsibilities for examining material, revealing it to the prosecutor, disclosing it to the accused where appropriate, and certifying to the prosecutor that action has been taken in accordance with the Code;
- the disclosure officer is required to create schedules of relevant unused material retained during an investigation and submit them to the prosecutor together with certain categories of material; and
- non-sensitive material should be described on form MG6C and sensitive material should be described on form MG6D.

Under the Transforming Summary Justice (TSJ) initiative, a Streamlined Disclosure Certificate (SDC) should be used in all cases in which a not guilty plea is anticipated, which is reasonably expected to be suitable for summary trial. Full guidance on scheduling can be found in chapter 6 of this manual.

The Chief Officer of each police force is responsible for putting in place arrangements to ensure that in every investigation the identity of the officer in charge of an investigation and the disclosure officer is recorded. It is his or her duty to ensure that disclosure officers and deputy disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively. The rulings from the Court of Appeal in the cases of *R v DS and TS* [2015] EWCA Crim 662 and *R v Boardman* [2015] EWCA Crim 175, reinforces the personal responsibility of the Chief Constable (or equivalent) as well as the Chief Crown Prosecutor, for ensuring that amongst other things, officers appointed to act as disclosure officers are trained and competent to fulfil this role and are appropriately supervised by the investigative authority.

An officer in charge of an investigation (OIC), an investigator and a disclosure officer perform different functions. The three roles may be performed by different people or by one person. Where the three roles are undertaken by more than one person,

close consultation between them will be essential to ensure compliance with the statutory duties imposed by the CPIA and the Code of Practice.

The responsibilities of the officer in charge of the investigation are to:

- account for any general policies followed in the investigation;
- ensure that all reasonable steps are taken for the purposes of the investigation and, in particular, that all reasonable lines of enquiry are pursued;
- ensure that proper procedures are in place for recording and retention of material obtained in the course of the investigation;
- appoint the disclosure officer;
- ensure that where there is more than one disclosure officer, that one is appointed as the lead disclosure officer who is the focus for enquiries and who is responsible for ensuring that the investigators' disclosure obligations are complied with;
- ensure that an individual is not appointed as disclosure officer, or allowed to continue in that role, if that is likely to result in a conflict of interest; for instance, if the disclosure officer is the victim of the alleged crime which is the subject of the investigation. The advice of a more senior officer must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as disclosure officer. If thereafter the doubt remains, the advice of the prosecutor should be sought;
- ensure that tasks delegated to civilians employed by the police force or to other persons participating in the investigation under arrangements for joint investigations have been carried out in accordance with the requirements of the Code of Practice;
- ensure that material which may be relevant to an investigation is retained and recorded in a durable and retrievable form;
- ensure that all retained material is either made available to the disclosure officer, or in exceptional circumstances revealed directly to the prosecutor; and
- ensure that all practicable steps are taken to recover any material that was inspected and not retained, if as a result of developments in the case it later becomes relevant.

All police officers or Police Support Employees (PSE) involved in the conduct of a criminal investigation have a responsibility for carrying out the duties imposed under the Code of Practice. All officers must retain material which is either created or discovered during the investigation, and which may be relevant to the investigation.

The investigator must notify the disclosure officer of the existence and whereabouts of material that has been retained.

Officers and PSEs have a personal responsibility to reveal all relevant misconduct relating to them, using form MG6B.

The disclosure officer and any deputy disclosure officer have a statutory duty to:

- examine, inspect, view or listen to all relevant material that has been retained by the investigator and that does not form part of the prosecution case;
- create schedules that fully describe the material;
- identify all material which satisfies the disclosure test using the MG6E;
- submit the schedules and copies of disclosable material to the prosecutor;
- at the same time, supply to the prosecutor a copy of material falling into any of the categories described in paragraph 7.3 of the Code of Practice and copies of all documents required to be routinely revealed and which have not previously been revealed to the prosecutor;
- consult with and allow the prosecutor to inspect the retained material;
- review the schedules and the retained material continually, particularly after the defence statement has been received, identify to the prosecutor material that satisfies the disclosure test using the MG6E and supply a copy of any such material not already provided;
- schedule and reveal to the prosecutor any relevant additional unused material pursuant to the continuing duty of disclosure;
- certify that all retained material has been revealed to the prosecutor in accordance with the Code of Practice; and
- where the prosecutor requests the disclosure officer to disclose any material to the accused, give the accused a copy of the material or allow the accused to inspect it.

The disclosure officer may be a police officer or a civilian and will need to become fully familiar with the facts and background to the case. The investigator(s) and the OIC must provide assistance to the disclosure officer in performing this function.

In some cases it will be desirable to appoint a disclosure officer at the outset of the investigation. In making this decision, the OIC should have regard to the nature and seriousness of the case, the volume of material which may be obtained or created, and the likely venue and plea. If not appointed at the start of an investigation, a disclosure officer must be appointed in sufficient time to be able to prepare the unused material schedules for inclusion in the full file.

Deputy disclosure officers can be appointed to examine parts of the material and reveal it to the prosecutor. For instance, where a police investigation has been intelligence led, there may be one appointed just to deal with intelligence material which, by its very nature, is likely to be sensitive.

Where the prosecutor consults with the lead disclosure officer, for example, when he provides a copy of the defence statement, the lead disclosure officer should inform any deputy disclosure officer who has provided schedules to the prosecutor.

The OIC may delegate certain tasks to civilians employed by the police such as fingerprint officers but must ensure that those tasks have been carried out in accordance with the Code of Practice.

Chapter 4

Relevance, Recording and Retention

The CPIA Code of Practice requires that material of any kind (including information and objects) obtained in the course of a criminal investigation as defined by CPIA, and which may be relevant to the investigation, must be retained.

Material which may be relevant to the investigation is defined in the Code of Practice as anything that appears to an investigator, or the OIC or the disclosure officer, to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances, unless it is incapable of having any impact on the case. If there is any doubt, officers should include the item or ask the prosecutor for guidance.

This includes not only material coming into the possession of the investigator (such as documents seized in the course of searching premises) but also material generated by the investigator (such as interview records).

A criminal investigation is defined in the CPIA as an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it. This will include investigations into crimes that have been committed, to those investigating whether a crime has been committed or proactive investigations.

This means that information and material arising out of operations conducted purely for intelligence purposes might become disclosable (subject to Public Interest Immunity (PII) considerations). Officers involved in intelligence operations should regularly and actively consider whether the information that they have has a bearing upon any live investigations or prosecutions, and if so, act quickly to ensure it is brought to the attention of the disclosure officer and prosecutor. Material which is prohibited from being disclosed under section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA) must not be disclosed.

In discharging their obligations under the CPIA, the Code of Practice, the Attorney General's Guidelines, the common law and this manual, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant.

Material includes information given orally. Where relevant material is not already recorded, it will need to be reduced into a suitable form. It is the responsibility of the officer in charge of the investigation to ensure that the material is recorded in a durable or retrievable form, for instance, in writing, on video or audiotape, or on computer disk.

The issue of relevance is especially important where an investigator is considering whether:

- to throw something away;
- to return an item to the owner;

- not to record information; or
- where not keeping material or not recording information would result in the permanent loss or alteration of the material (as with reusable control room tapes, shop videos etc).

As a general rule, pure opinion or speculation, for example police officers 'theories about who committed the crime, is not unused material. However, if the opinion or speculation is based on some other information or fact, not otherwise notified or apparent to the prosecutor, that information or fact might well be relevant to the investigation and should be notified to the prosecutor in accordance with these instructions.

Reports, advices and other communications between the CPS and investigators in themselves will usually be of an administrative nature, generally having no bearing on the case, and thus not relevant. If the content of any such document is relevant and not recorded elsewhere, then the material should be described on the appropriate schedule and considered in the normal way.

Disclosure officers, or their deputies, must inspect, view or listen to all material that is or may be relevant. However, occasionally the extent and manner of inspection, viewing or listening may be affected by the nature of material and its form. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip-sampling. The use of appropriate search and sampling techniques has been validated by the Court of Appeal in *R v R and Others* [2015] EWCA Crim 1941. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The extent and manner of its examination must also be described together with justification for such action.

It may not be possible to make a considered decision on the relevance of an item until later in the case when the facts are clearer. However, at all times the considerations that the investigator should bear in mind will include:

- whether the information adds to the total knowledge of how the offence was committed, who may have committed it, and why;
- whether the information could support an alternative explanation, given the current understanding of events surrounding the offence; and
- what the potential consequences will be if the material is not preserved.

Negative information can sometimes be as significant to an investigation as positive information; that which casts doubt on the suspect's guilt or implicates another person must also be included. Examples of negative information include:

- a CCTV camera that did not record the crime/location/suspect in a manner which is consistent with the prosecution case;
- where a number of people present at a particular location at the particular time that an offence is alleged to have taken place state they saw nothing unusual;
- where a finger-mark from a crime scene cannot be identified as belonging to a known suspect; and

- any other failure to match a crime scene sample with one taken from the accused.

It should also be noted that where victim communication and liaison meetings occur before a case is finalised, CPS notes of these meetings should be agreed as far as possible and enter the disclosure process through the police disclosure officer (see Chapter 20).

It is important to record promptly any information from any source, which might be considered relevant to the investigation. A record should be made at the time the information is obtained, or as soon as practicable after that time.

Sometimes it is not practicable to retain the initial record because it forms part of a larger record which is to be destroyed, for example, control room audio tapes, custody suite video tapes, traffic car videos of speeding offences, or other similar recordings. Where this is the situation, the officer in charge of the investigation should identify information that should be retained, and ensure that it is transferred accurately to a durable and retrievable form before the tapes are destroyed.

Investigators should be alert to the potential relevance and evidential value of information contained in messages that might not normally be retained; for example, running commentaries and details of a pursuit. Investigators should make a record of conversations with experts and other investigators, where the information discussed is likely to be relevant to the case and is not recorded elsewhere.

Whether in original or copy form, details of preserved messages should be listed on the schedule(s) in the normal way.

Information recorded on computer

Many computer systems generate material in the form of a hard copy. This should be treated in the same way as relevant material from any other source.

The investigator or disclosure officer will need to inform the prosecutor of the use of such systems, and the disclosure officer should describe any hard copies produced on the schedules. Arrangements may need to be agreed so that the prosecutor can inspect material held on computer systems. Where material is to be disclosed to the defence under the CPIA, supervised access to a terminal screen may be appropriate. Material may be supplied on a disk where this is acceptable to the accused and the disclosure officer.

Information contained in emails may be relevant unused material, particularly if the information is not recorded elsewhere. It should be recorded, retained and revealed in the same way as other relevant material. (Where however, emails are intercepted under section 5 of RIPA, revelation and disclosure is specifically prohibited.)

Further guidance may be found in Chapter 30.

Retention

Where material was obtained in the course of an investigation because the investigator originally considered it potentially relevant, but it has in fact no bearing on the offence, the offender or the surrounding circumstances, it need not be retained further. However the investigator should err on the side of caution in coming to this conclusion and seek the advice of the prosecutor as appropriate, noting that in the early stages of a case all of the issues may not be apparent.

If during the lifetime of a case, the officer in charge of an investigation or the prosecutor becomes aware that material previously examined but not retained may have become relevant as a result of new developments, paragraph 5.3 of the Code of Practice will apply. The officer should take steps to recover the material wherever practicable, or ensure that it is preserved by the person in possession of it if it has been returned.

Whatever the source, if the material is relevant, it must be retained. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original if the original is perishable; if the original is returned to its owner; or the retention of a copy rather than the original is reasonable in all the circumstances. If the disclosure officer is in any doubt then they should seek advice from the prosecutor.

There are particular categories of material that must be retained are listed in paragraphs 5.4 and 5.5 of the Code of Practice. Examples of items which fall into these categories are listed in Annex A.

Material seized under the provisions of PACE will be subject to the retention provisions of section 22 PACE and PACE Code B.

Chapter 5

Reasonable Lines of Enquiry and Third Parties

Lines of enquiry

Duties of disclosure under the CPIA are imposed upon two categories of persons only: the investigator and the prosecutor. All other categories of persons are to be treated as third parties, rather than as belonging to the prosecution team. Third parties frequently encountered will include:

- owners of CCTV material;
- social services departments;
- forensic experts;
- police surgeons; and
- GPs and hospital authorities.

There is a duty under the CPIA Code of Practice for an investigator to pursue all reasonable lines of enquiry, whether these point towards or away from a suspect. What is reasonable will depend upon the circumstances of a particular case.

Where police and another investigating agency undertake a joint investigation, material obtained within the remit of that joint investigation should be treated as prosecution material and dealt with in accordance with this manual. This similarly applies to joint investigations with overseas authorities.

Investigators, disclosure officers and prosecutors must have regard to whether relevant material may exist in relation to other linked investigations or prosecutions. Reasonable enquiries must be carried out to establish whether such material exists and, if so, whether it may be relevant to the instant prosecution.

Reasonable lines of enquiry may include enquiries as to the existence of relevant material in the possession of a third party. It is not necessary to make speculative enquiries, but frequently the existence of the material will be known or can be deduced from the circumstances. Where local protocols exist, for example, for social services material, prosecutors should access and handle material in accordance with its terms.

A third party has no obligation under the CPIA to reveal material to the investigator or to the prosecutor, nor is there any duty on the third party to retain material which may be relevant to the investigation. In some circumstances, the third party may not be aware of the investigation or prosecution.

If the OIC, the investigator, or the disclosure officer believes that a third party holds material that may be relevant to the investigation, that person or body should be told of the investigation and alerted to the need to preserve relevant material. Where appropriate, access to the material and steps taken to obtain such material particularly if the material or information might satisfy the disclosure test. The disclosure officer should inform the prosecutor of the identity of the third party and the nature of the material the third party is believed to possess by way of the MG6.

Consideration should be given to whether the third party should be approached and further material sought or inspected. If relevant material held by third parties is inspected by the police but not retained, a record of its content must be made. Where the investigator has not obtained the material, the prosecutor should consider whether it is appropriate to advise the police to seek access to the material as part of their duties to explore all reasonable lines of enquiry.

If material relevant to the investigation comes to the knowledge of the investigator and is obtained from a third party, it will become unused material or information within the terms of the Code of Practice and must be handled accordingly.

In *R v Alibhai* [2004] EWCA Crim 681, the Court of Appeal held that under the CPIA the prosecutor is only under a duty to disclose a third party's material if that material had come into the prosecutor's possession and the prosecutor was of the opinion that such material satisfied the disclosure test. Before taking steps to obtain third party material, it must be shown that there was a suspicion that the third party not only had relevant material and that the material was not merely neutral or damaging to the accused but satisfied the disclosure test. In *R v Flook* [2009] EWCA Crim 682 the Court found that there cannot be any absolute obligation on the Crown to disclose relevant material held overseas outside the European Union. The obligation is therefore to take reasonable steps to obtain the material.

Obtaining access to third party material

Before applying for the witness summons it may be appropriate to make a formal request directly to the third party. A suitable time should be given for a response before making the application for the witness summons. However, where the third party refuses to co-operate, the prosecutor should consider whether to make an application for a witness summons. A prosecutor should only make an application where the statutory conditions are satisfied as set down in section 97 of the Magistrates' Court Act 1980 or in the Crown Court, section 2 Criminal Procedure (Attendance of Witnesses) Act 1965 as amended. Applications for witness summonses must be in accordance with Part 17 of the Criminal Procedure Rules.

Where access to the material is declined or refused by the third party and the investigator believes that it is reasonable to seek production of the material before a suspect is charged because he or she believes it is likely to be relevant evidence and of substantial value, the investigator may consider making an application under Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE), (Special Procedure Material), a search warrant and/or the Bankers Books Evidence Act 1879. The investigator may seek advice of the prosecutor before such an application is made.

The statutory requirements in section 97 of the Magistrates' Court Act 1980, and section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 as amended, are more stringent than the disclosure test. Items sought under the summons procedure must be 'likely to be material evidence, '(which the House of Lords in *R v Derby Magistrates 'Court ex parte B* [1995] 4 All ER 526 has construed to mean 'immediately admissible per se'.) Accordingly, there should be consultation between the investigator and the prosecutor before any application to the court is

made to assess whether it can properly proceed. (The transcript of *R v Brushett* (2001) Crim LR 471, illustrates an approach, commended by the Court of Appeal, where a pragmatic and co-operative stance was taken by social services and material revealed to the prosecution).

If the prosecutor believes there is relevant material which the third party has declined to reveal, but grounds for witness summons are not made out, the prosecutor should notify the court and, where appropriate, the defence.

Where material is obtained from third parties, the investigator should discuss with them whether any sensitivities attached to the material that might influence whether it is used as evidence, or otherwise disclosed to the defence, or whether there may be public interest reasons that justify withholding disclosure. The third party's view must be passed to the prosecutor using the MG6D.

Section 63 of the Serious Organised Crime and Police Act 2005 is concerned with the production and retention of material obtained from third parties by way of a disclosure notice under section 60 of that Act. Full guidance on the power to issue a disclosure notice under the act can be found in the CPS legal guidance Director's Investigatory Powers.

Public bodies as third parties

Where it appears to an investigator, disclosure officer or prosecutor that a government department or other Crown body has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material. Although what is reasonable will vary from case to case, prosecutors should inform the department or other body of the nature of the prosecution case and of the issues in respect of which the department or body might possess relevant material, and ask whether the department or other body has such material.

Departments in England and Wales should have identified personnel as established enquiry points to deal with issues concerning the disclosure of information in criminal proceedings.

Investigators, disclosure officers and prosecutors cannot be regarded to be in constructive possession of material held by government departments or Crown bodies simply by virtue of the status as government departments or Crown bodies.

In cases where the victim of a crime is an organisation or institution, it is likely that the organisation will hold both evidential and unused material. It is unsafe to assume that the marshalling of material may be left until after a charging decision has been made (as the organisation may not have fully considered the potential importance of its material to the case, and/or understood the obligations set out in the CPIA). A pro-active approach is required, with early engagement between the disclosure officer and organisation in question where possible.

Further guidance for CPS prosecutors has been made available on the CPS Infonet.

Chapter 6

Scheduling

Preparation of schedules for cases in the magistrates'court

For the preparation of schedules for any case which is summary only, or which, on a reasonable assessment of the case, is likely to remain in the magistrates' court, please refer to the CPS legal guidance Streamlined Summary Disclosure.

Preparation of schedules for cases in the Crown Court

The disclosure officer is responsible for preparing the schedules and submitting them to the prosecutor. The schedules, signed and dated by the disclosure officer, accompanied by an MGC6E, should be submitted to the prosecutor with a full file. Any comments, observations or explanations regarding the contents of the schedules should be made on the MG6, which should accompany the submission of the MG6C (non-sensitive unused material, see Chapter 7) and MG6D (sensitive unused material, see Chapter 8). All items of material relevant to the investigation must be described on one of the above schedules for the prosecutor.

If the schedules or descriptions are not sufficient for the prosecutor to carry out his/her disclosure duties properly, they should be returned at the earliest opportunity with a request to rectify the issues and resubmit them.

The disclosure officer must also indicate on the MG6 whether the investigation started on or after 4 April 2005. This will tell the prosecutor which provisions to apply.

The officer in charge of the investigation will need to consider at what stage the schedules should be prepared, and when to appoint a disclosure officer. It is not always necessary to maintain schedule(s) of unused material from the start of all investigations, however, disclosure issues should be an integral part of a good investigation and not something that exists separately.

It should also be noted that the principles of Better Case Management (BCM) envisage that the prosecution team will have at an early stage an agreed strategy and plan, with sufficient resources attached, for completing the disclosure exercise. The CPS prosecutor is expected to lead on the expeditious management of cases towards trial and to enable the judge to make sensible directions to the parties to achieve this.

BCM with the Plea and Trial Preparation Hearing (PTPH) and related procedures provide a single national process to be used in all Crown Courts.

For scheduling in large scale cases, see Chapter 29.

Chapter 7

The Non-Sensitive Material Schedule

For cases in the Crown Court, non-sensitive unused material should be described on the MG6C. This form will be disclosed to the defence. Where continuation sheets are used, or additional schedules sent in later submissions, item numbering must be consecutive to all items on earlier schedules.

In the description column of every schedule, each item should be individually described and consecutively numbered. The schedule must be a clear record of the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether they need to inspect the material before deciding whether or not it should be disclosed. It is not sufficient merely to refer to a document by way of a form number. Where the disclosure officer is unsure whether an item is relevant to the investigation, the prosecutor should be consulted as soon as practicable.

Excessive detail should be avoided. Where appropriate, use should be made of the block listing provisions in para 6.12 of the Code and para A50 of the Attorney General's Guidelines, in particular when dealing with large volumes of electronic material or in cases where there are many items of a similar or repetitive nature. It is permissible to describe them by quantity and generic title, however, inappropriate use of generic listing is likely to lead to requests from the prosecutor and the defence to see the items, which may result in wasted resources and unnecessary delay. The preparation of properly detailed schedules at this stage will save time and resources, and will promote confidence in its integrity. When items are described generically, the disclosure officer must ensure that items which might meet the disclosure test are described individually.

Draft schedules or lists used to prepare the final schedule need not be retained or described. However, the disclosure officer must check the contents and consolidate the items into two schedules for the prosecutor (MG6C & MG6D).

The disclosure officer should keep a copy of the schedules that are sent to the prosecutor, in case there are any queries that need to be resolved and to assist him/her to keep track of the items listed should the schedules need to be updated.

Sometimes documents that fall to be disclosed may contain a mixture of sensitive and non-sensitive material. In these cases there may be no objection to the sensitive part being permanently blocked out on the copy document which is to be sent to the prosecutor. The original should not be marked in any way. The document should be described on the MG6C. (The unedited version should not be described on the MG6D, but made available to the prosecutor for inspection if required.) The prosecutor should be informed of the nature of the edited material, if not obvious, on the MG6. The disclosure officer should edit out issues of sensitivity on material that is routinely revealed. The responsibility to edit rests with the investigator, but the prosecutor should be consulted where editing or separating is other than straightforward.

Chapter 8

The Sensitive Material Schedule

Assessment of sensitivity and schedule preparation

This schedule should be used to reveal to the prosecutor the existence of relevant unused material which the disclosure officer believes should be withheld from the defence. The disclosure officer must describe on the MG6D any relevant material which he or she believes would give rise to *a real risk of serious prejudice to an important public interest if the existence of that material were revealed to the defence.* The disclosure officer must also state the reason for that belief. This form will not be disclosed to the defence.

In those cases where there is no sensitive unused material, the disclosure officer should endorse and sign an MG6D to this effect and should submit this together with the MG6C and MG6E.

Disclosure officers should familiarise themselves with paragraph 6.15 of the CPIA Code of Practice, which offers a non-exhaustive list of the kinds of material which, depending on the circumstances of the case, may be considered sensitive. Each item must be considered independently before it is included on the MG6D. Some items by their very nature will reveal why disclosure should be withheld. Others require more explanation. It is important that both the 'Description of item' and the 'Reasons for sensitivity' sections contain sufficient information to enable the prosecutor to make an informed decision as to whether or not the material itself should be viewed. Schedules containing insufficient information will be returned by the prosecutor. If there is any doubt about the sensitivity of the material, the prosecutor should be consulted.

In cases where it is not possible to describe the nature of the material in sufficient detail to enable the prosecutor to determine whether or not it should be viewed, the disclosure officer will need to make arrangements with the prosecutor to view the material with an appropriate level of security in place.

The police and the CPS must always take care to protect intelligence information and information given to the police in confidence. That will be so whether or not it is thought likely that the court will order its disclosure. If the investigator is unsure whether information was given in confidence, the position should be clarified with the person who provided the information.

When the schedule and any material are sent to the prosecutor, a protective marking should be applied to it consistent with the level of sensitivity of its contents. This will determine the manner in which the material is conveyed to, and stored by the CPS. Reference should be made to Cabinet Office guidance on government Security Classifications (2014).

Chapter 9

Highly Sensitive and CHIS Material

Handling Highly Sensitive Material

All relevant sensitive unused material should be included on the MG6D. In exceptional circumstances where the existence of the material is so sensitive that it cannot be listed on the MG6D, it should be listed on a highly sensitive schedule and revealed to the prosecutor separately. The material itself must be viewed by a unit head or a prosecutor specifically delegated to undertake such work.

If there is no sensitive material, the disclosure officer must record this fact on a schedule of sensitive material, or otherwise so indicate.

Highly sensitive material is that which, should it be compromised, would lead directly to the loss of life, or directly threaten national security.

The small number of such cases where this situation may arise are likely to involve investigations into organised crime or into terrorist offences. This material is likely to be **Secret** or **Top Secret**. Further guidance on Government Security Classifications is provided by the Cabinet Office.

Some police forces may wish to apply the same procedures to CHIS material as for highly sensitive material.

Chief Constables (or the authorising officer for RIPA activity) and Chief Crown Prosecutors or Deputy Chief Crown Prosecutors should agree local handling procedures for highly sensitive and CHIS material. The arrangements must ensure as a minimum that:

- where sensitive material is revealed to the prosecutor other than by detailing that material on the principal MG6D, that material must itself be scheduled on a separate 'highly sensitive' MG6D;
- this separate highly sensitive MG6D must contain the same level of detail as any other MG6D;
- the officer submitting this separate highly sensitive schedule, should also submit an MG6E; and
- only in the most exceptional circumstances will the lead disclosure officer not be told of the existence of the additional schedules and should record their existence (but not their content, of which he or she will be unaware) on the principal MG6D.

If highly sensitive material is brought to the prosecutor's attention by individual investigators without the details being known to the disclosure officer, the investigator must ensure it is recorded appropriately. Prosecutors should be alert to the possible existence of such material and ask questions if in any doubt.

The material and all schedules, statements of sensitivity and any other documents bearing highly sensitive material will remain at all times under the control of the

police. Inspection should be at an appropriate location having regard to the sensitivity of the material.

Where there is material that falls within this chapter, consultation between the police and the CPS should take place as soon as possible. Initial contact with the CPS should be at unit head level unless the responsibility has been specifically delegated to another lawyer. The consideration of highly sensitive material obtained from the intelligence or security services should not normally be delegated (save for on the counter terrorism teams).

Prosecutors should take care to ensure that file or Disclosure Record Sheet endorsements relating to the consultation do not inadvertently identify the nature of the material.

It should be noted that there are special provisions for handling material gathered under Part 1 Chapter 1 of RIPA (Interception of Communications) as it is not CPIA material and no reference to the authorities for, and the product of, communications intercepts should be made in any unused material schedule.

Handling and security arrangements

During consultation on material which has the potential to be highly sensitive, any copies of the items discussed or notes taken which could identify the material should be kept separate from the file and handled in accordance with its sensitivity. Access to the material or notes should be restricted to those prosecuting the case or advising upon it and if the material is taken to court or advice of the prosecution advocate is sought, appropriate storage and handling arrangements must be made to ensure the security of the material at all times.

At the conclusion of a case, all sensitive material retained by the CPS should be returned to the police and a receipt should be maintained. The police officer authorised to collect the items should be handed all copies of the material, together with any notes that may refer to the nature of the material. Before the file is sent to be archived, the prosecutor must be satisfied that it does not contain anything that may identify the nature of the material.

Chapter 10

The Disclosure Officer's Report

The contents of the MG6E

The disclosure officer should use the MG6E to bring to the prosecutor's attention any material that could reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused. This also applies to sensitive material. Examples include:

- records of previous convictions and cautions for prosecution witnesses;
- any other information which casts doubt on the reliability of a prosecution witness or on the accuracy of any prosecution evidence;
- any motives for the making of false allegations by a prosecution witness;
- any material which may have a bearing on the admissibility of any prosecution evidence;
- the fact that a witness has sought, been offered or received a reward;
- any material that might go to the credibility of a prosecution witness;
- any information which may cast doubt on the reliability of a confession. Any item which relates to the accused's mental or physical health, his intellectual capacity, or to any ill-treatment which the accused may have suffered when in the investigators custody is likely to have the potential for casting doubt on the reliability of a purported confession; and
- information that a person other than the accused was or might have been responsible or which points to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence.

The disclosure officer should also explain on form MG6E (by referring to the relevant item's number on the schedule) why he or she has come to that view. The MG6C should not be marked or highlighted in any way, as it will be provided to the defence.

Any material that supports or is consistent with a defence put forward in interview or before charge or which is apparent from the prosecution papers, should be supplied to the prosecutor. It also includes anything that points away from the accused, such as information about a possible alibi. If the disclosure officer believes that material satisfies the disclosure test it should be brought to the prosecutor's attention even if it suggests a defence inconsistent with or alternative to any already advanced by the accused. Items of material viewed in isolation may not satisfy the test; however, several items together can have that effect. In applying the disclosure test, disclosure officers and prosecutors should not be judgmental about the merits of a defence and any doubt should be resolved in favour of disclosure.

Such material should be brought to the prosecutor's attention regardless of any views about the accuracy or truth of the information, although where appropriate the disclosure officer may express a reasoned opinion on whether in fact the prosecutor should disclose it. A wide interpretation should be given when identifying material that might satisfy the disclosure test and may well save resources later. The disclosure officer should consult with the prosecutor where necessary to help identify material that may require disclosure, and must specifically draw material to the

attention of the prosecutor where the disclosure officer has any doubt as to whether it might satisfy the disclosure test.

Dealing with sensitive material that investigators believe may satisfy the disclosure test

To assist the prosecutor to decide how to deal with sensitive material which the investigator believes may meet the disclosure test, he/she should provide detailed information dealing with the following issues:

- the reasons why the material is said to be sensitive;
- the degree of sensitivity said to attach to the material, in other words, why it is considered that disclosure will create a real risk of serious prejudice to an important public interest;
- the consequences of revealing to the defence
    - i. the material itself
    - ii. the category of the material
    - iii. the fact that an application may be made
- the apparent significance of the material to the issues in the trial;
- the involvement of any third parties in bringing the material to the attention of the police;
- where the material is likely to be the subject of an order for disclosure, what the police view is regarding continuance of the prosecution, and;
- whether it is possible to disclose the material without compromising its sensitivity.

To assist in determining the degree of sensitivity as above, consideration should be given to the fact that the public interest may be prejudiced either directly or indirectly through incremental or cumulative harm. Examples of direct harm are:

- exposure of secret information to enemies of the state;
- death of or injury to an intelligence source through reprisals;
- revelation of a surveillance post and consequent damage to property or harm to the occupier; and
- exposure of a secret investigative technique.

Examples of incremental or cumulative harm include:

- exposure of an intelligence source that does not lead to a risk of death or injury, or any reprisal, to that intelligence source, but which discourages others from giving information in the future because they lose faith in the system;
- revelation of a surveillance post leading to a reluctance amongst others to allow their premises to be used;
- exposure of an investigative technique that makes the criminal community more aware and therefore better able to avoid detection;
- exposure of material given in confidence, or for intelligence purposes, that may make the source of the material, or others, reluctant to cooperate in the future; and

- an active denial that a source was used in the instant case, leading to the inability to deny it in future cases where one was used, thereby impliedly exposing the use of a source. The Crown should neither confirm nor deny the use of a source.

Revelation of the material to the prosecutor

Revealing material to the prosecutor does not mean automatic disclosure to the defence. The prosecutor will only disclose material to the defence if it satisfies the disclosure test. If the material is sensitive, and satisfies the disclosure test, the prosecutor will either disclose the material after consultation with police, apply to the court for a ruling as to whether the public interest requires disclosure or withdraw the prosecution.

The disclosure officer should:

- promptly send the completed schedules to the prosecutor;
- identify on form MG6E any material which might satisfy the disclosure test;
- copy material to the prosecutor, for example material which in the opinion of the disclosure officer satisfies the disclosure test, and material which is required routinely to be revealed, and;
- allow the prosecutor to inspect material.

As an aid to prosecutors in their case review function, copies of the crime report and the log of messages should be routinely copied to the prosecutor in every case in which a full file is provided. These documents are known in different police forces by different names, for example the incident record report or CAD for the log of messages. These should be edited (if necessary) by the police before they are sent to the prosecutor. This should include editing personal data. If it is impossible to edit any sensitive parts of the material, then it should be listed on and sent with the MG6D. The requirement routinely to reveal these documents does not prejudice any other locally agreed arrangements between the investigator and the CPS that allow for the similar treatment of other additional categories or types of document.

In large or complicated cases or in any case where particular difficulties are anticipated, an early discussion between the disclosure officer and/or OIC, and the prosecutor may be extremely beneficial. The disclosure officer or the officer in charge of the investigation should not hesitate to contact the prosecutor for early advice.

Certifications by the disclosure officer

The OIC must ensure that all relevant material that has been retained is either revealed to the disclosure officer, or in exceptional circumstances, revealed on a highly sensitive schedule directly to the prosecutor. If the disclosure officer is uncertain whether all the relevant retained material has been revealed, enquiries should be made of the OIC to resolve the matter.

The disclosure officer must provide different certifications in the course of the disclosure process, to cover:

- revelation of all relevant retained material;
- whether material satisfies the disclosure test; and
- whether material satisfies the disclosure test following a defence statement as part of continuing duty.

The case against each accused must be considered and certified separately.

The purpose of certification is to provide an assurance to the prosecutor on behalf of the investigating team that all relevant material has been identified, considered and revealed to the prosecutor. Where the disclosure officer (or deputy disclosure officer) believes there is no material that satisfies the disclosure test, the officer should endorse the MG6E in the following terms: "*I have reviewed all the relevant material which has been retained and made available to me and there is nothing to the best of my knowledge and belief that might reasonably be considered capable of undermining the prosecution case against the accused or assisting the case for the accused*."

Subsequent actions

Disclosure officers must deal expeditiously with requests by the prosecutor for further information about material which may lead to it being disclosed.

A prosecutor may ask to inspect material, or request a copy of material where one has not been sent. The disclosure officer is responsible for arranging this. Material should be copied to the prosecutor on request unless it is too sensitive or too bulky, or can only be inspected. This applies to disclosure throughout the life of the case.

After considering the schedule(s), the prosecutor will endorse them with the decisions as to whether each item described will be disclosed to the defence. A copy of the endorsed schedule(s) should be sent to the disclosure officer.

Amending the schedules

On occasions it may be necessary to amend the schedules. When the schedules are first submitted with a full file, the disclosure officer may not know exactly what material the prosecutor intends to use as part of the prosecution case. The prosecutor may create unused material by extracting statements or documents from the evidence bundle, in which case the prosecutor may disclose material that satisfies the disclosure test directly to the defence without waiting for the disclosure officer to amend the schedule. In the circumstances, the prosecutor must advise the officer accordingly so that the schedule can be amended correctly. Investigators should ensure that non-evidential material is not included in the evidence bundle.

The CPIA Code of Practice places the responsibility for creating the schedules and keeping them accurate and up to date on the disclosure officer. Consequently, the prosecutor should not amend schedules.

The prosecutor is required to advise the disclosure officer of:

- items described on the MG6C that should properly be on the MG6D and vice versa;
- any apparent omissions or amendments required;
- insufficient or unclear descriptions of items;
- a failure to provide schedules at all.

In circumstances where the schedules are wholly inadequate, the prosecutor will return them with a target date for resubmission. This is important that prosecutors do not deal with disclosure unless they are satisfied the schedules are adequate; to do so, risks undermining confidence in the prosecution. The disclosure officer must forthwith take all necessary remedial action and provide properly completed schedules to the prosecutor. Failure to do so may result in the matter being raised with a senior officer.

Continuing duty to disclose

After the prosecutor has purported to comply with s3 CPIA, the prosecutor has a continuing duty in relation to disclosure pursuant to section s7A CPIA. This duty continues whether or not the accused has served a defence statement in accordance with s6A(1) of the CPIA. The duties of the investigator also continue.

Any new material coming to light after initial disclosure has been completed should be treated in the same way as earlier material. The new material should be described on a further MG6C, MG6D or a continuation sheet. To avoid confusion, numbering of items submitted at a later stage must be consecutive to those on the previously submitted schedules.

A further MG6E should also be submitted irrespective of whether or not any of the new material is considered by the disclosure officer to satisfy the disclosure test.

Chapter 11

Receipt

Prosecutors must do all that they can to facilitate proper disclosure. Prosecutors must also be alert to the need to provide advice to disclosure officers on disclosure issues and to advise on disclosure procedure generally. **They must exercise a 'thinking' approach to disclosure; it is not just a process**.

The prosecutor must be in the driving seat at the stage of initial disclosure. In order to do this, the prosecutor must have a grip on the case and the disclosure requirements from the outset (see *R v R and Others* [2015] EWCA Crim 1941).

When a full file is submitted, the prosecutor should expect to receive from the police:

- an MG6, or Streamlined Disclosure Certificate (in applicable cases);
- an MG6B where required (see relevant section);
- a schedule of non-sensitive material (MG6C);
- a schedule of sensitive material (MG6D) or nil return;
- copies of disclosable sensitive material (where appropriate);
- copies of the crime report and log of messages (edited where appropriate);
- all material that the disclosure officer believes satisfies the disclosure test and a brief explanation for that belief (on the MG6E); and
- certification by the disclosure officer (on the MG6E).

The prosecutor should examine the schedules carefully to check for possible omissions from them. **If they are wholly inadequate, they should be returned**. If there are omissions, the prosecutor should ask the disclosure officer to provide a continuation schedule. Where there are apparent errors on the schedules, the prosecutor should seek further details from the disclosure officer, and return the schedules for correction. If, following this, the prosecutor remains dissatisfied with the quality or content of the schedules, the matter must be raised with a senior officer if necessary.

Disclosure Record Sheet (DRS)

The date of receipt of the schedules and any accompanying material must be recorded on the DRS. The DRS is designed to record chronologically all actions and decisions in relation to disclosure. It is required in all cases except in summary cases where the SDC may suffice. In serious cases, the Prosecution Strategy Document (PSD) or standalone disclosure strategy contains the strategy and the analysis underlying the approach to disclosure, together with the key decisions and stages. The element of duplication between the DRS and the PSD should therefore be minimal. The DRS can be linked to the PSD and can be used for quality assurance purposes. In very large cases, the DRS may be too long to be held within a PSD document, but can be hyperlinked. A single DRS should be completed in respect of all unused material, whether sensitive or non-sensitive.

The purpose of the DRS is to record events rather than reasons for disclosure. The reasons should be set out on the schedules themselves. It should not therefore

contain sensitive information. Notes of decisions and reasons should be endorsed on the MG6D, or if necessary, on a continuation sheet. Notes of discussions about sensitive material or of PII applications should be kept with the MG6D and the material itself, but there should be a cross-reference on the DRS.

The events and actions which should be included on the DRS will include the following:

- receipt of the MG6D;
- that a disclosure review has taken place (the outcome of such reviews will be recorded on the schedule itself);
- the receipt and review of any addenda to the MG6D;
- contact with the disclosure officer or investigating officer in relation to sensitive unused material;
- receipt of defence statements and further reviews;
- any consultation with the prosecution advocate;
- any discussions with any other parties regarding sensitive unused material such as the court, the defence advocate or third parties;
- receipt of the prosecution advocate's advice in relation to sensitive unused material;
- details of any informal disclosure, should it occur; and
- the fact of any PII applications.

Review

The prosecutor should carefully review the schedules for relevancy and apply the disclosure test. The test set out in the CPIA is an objective one. To comply, the prosecutor must disclose to the accused any prosecution material which might reasonably be considered capable of undermining the case for the prosecution, or of assisting the case for the accused, save to the extent that the court, on application by the prosecutor, orders it is not in the public interest to disclose it. Prosecution material is defined in section 3(2) of the CPIA.

The prosecutor should always inspect the material, whether sensitive or non-sensitive, where:

- it satisfies the disclosure test;
- the description (or the reasons given as to its sensitivity) remain inadequate despite requests for clarification; or
- the prosecutor is unsure if the material satisfies the disclosure test.

A record should be made of all decisions, enquiries or requests and the date upon which they are made, relating to:

- the disclosure of material to the defence;
- withholding material from the defence;
- the inspection of material;
- the transcribing or recording of information into a suitable form.

This information should be noted on the DRS which should also be used to record all actions and events that occur in the discharge of prosecution disclosure responsibilities.

Reviewing sensitive material

Where the sensitive material has been given a protective marking of **Secret** or **Top Secret**, the material and/or schedule should be kept securely off file and handled in accordance with CPS Guidance. A note should be made on the DRS identifying the existence and location of the material stored off file.

If copies of sensitive material are sent by the disclosure officer with the MG6D, care must be taken to ensure that the material is handled in accordance with its protective marking category. Appropriate arrangements will need to be made for the handling of any sensitive material that is given to the prosecution advocate.

Where the prosecutor considers that material that has been described on the form MG6D is not in fact sensitive and should be described on the form MG6C, the disclosure officer must be consulted and move the item, if appropriate, to the MG6C. When considering information about sensitive material which the police identify as potentially disclosable (see Chapter 10), the prosecutor must be satisfied that the risk is real, not fanciful, and that the prejudice anticipated from disclosure of a document is serious, not trivial. If an application needs to be made to withhold material, the prosecutor must be in a position to explain to the court the ground upon which it is asserted that there is a real risk of serious prejudice to an important public interest. This is an assessment that must be made on an individual basis, having regard to the risk of incremental or cumulative damage to the public interest.

Where material is disclosed having been edited to protect the public interest the original itself should not be marked. The defence should be informed of the action taken, although this will normally be clear from the appearance of the document itself. Application will have to be made to the court to withhold the remainder if it requires disclosure.

It may be possible to separate non-sensitive from sensitive parts of documents and describe them on different schedules. For example, RIPA authorities may be capable of separation.

Where the prosecutor decides:

- that sensitive material requires disclosure to the accused because it satisfies the disclosure test;
- in consultation with the police, that it is not possible to disclose in a way that does not compromise the public interest in question, and
- that disclosure should be withheld on public interest grounds,
- the ruling of the court must be sought or the case abandoned.

Neutral material or material damaging to the accused need not be disclosed and, unless the issue of disclosability is truly borderline, should not be brought to the attention of the court (per the House of Lords in *R v H and C*). This places a heavy

onus on the police and prosecutors to be aware of all factors which might affect the legal admissibility of evidence from sensitive sources or procedures.

Consultation

Before an application is made to the court, the prosecutor will need to consult the police. This should take place at a senior level, and a senior officer (who may be independent of the investigation) should be involved. Others may also be consulted, including the OIC and the prosecution advocate.

Consultation will include a careful examination of the circumstances of the case and the nature of the sensitive material. The prosecutor may be able to disclose the material in a way that does not compromise the public interest in issue. The OIC should ensure that the prosecutor is provided with the information necessary to make a proper decision on how any application is to be made. This should be in documentary form, unless the information is so sensitive that it would be inappropriate to fully describe it in writing. See Chapter 9 for further details. On the basis of the information provided, the prosecutor will decide whether an application should be made, and the form of application required.

Where the prosecutor considers that the sensitive material should be disclosed to the defence because it satisfies the disclosure test, the police (or any person having an interest in the material) should be consulted before any final conclusions are reached. If any third party has an interest in the sensitive material, the prosecutor must ensure that the third party is consulted by the police before a final decision is made. Local protocols may impose further obligations on the prosecutor. The prosecution advocate should also be consulted.

Material may be edited, summarised or formally admitted without compromising its sensitivity. If however anything which meets the disclosure test needs to be held back, an application to the court should be made and the approval of the court obtained for any such partial disclosure. Where the prosecutor decides that a Public Interest Immunity (PII) application is required, see Chapter 13. Prosecutors should also ensure that a PII log is completed.

There will always be a need to consult regarding sensitive material unless the prosecutor is satisfied on the basis of the information provided on the schedule that the material clearly could not satisfy the test for disclosure. Notes should be made of any consultations and their existence noted on the DRS, with short conclusions reached, taking care that this does not elevate the classification of the DRS beyond the level of 'Official'.

Responding to defence requests for disclosure of sensitive material is dealt with in Chapter 16 of this manual.

Chapter 12

Applying the Disclosure Test

Material which satisfies the disclosure test is likely to be different in each case, and different for each accused. The courts have emphasised the need for prosecutors to adopt a "thinking approach" towards disclosure, and to maintain a flexible approach (see *R v Olu and 2 Others* [2010] EWCA Crim 2975 and *R v R and Others* [2015] EWCA Crim 1941.

The prosecutor must inspect, view or listen to any material that could reasonably be considered capable of undermining the prosecution case against the accused, or of assisting the case for the accused. The increase in digital material means that careful thought needs to be given to how communications, devices and social media material are dealt with. See Chapter 30.

In deciding what material satisfies the disclosure test, the prosecutor must pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. This will include anything that goes toward an essential element of the offence charged, and that points away from the accused having committed the offence with the requisite intent.

What amounts to material which might satisfy the disclosure test will always involve considering:

- the nature of the case against the accused;
- the essential elements of the offence alleged;
- the evidence upon which the prosecution relies;
- any explanation offered by the accused, whether in formal interview or otherwise; and
- what material or information has already been disclosed.

Examples of material having the potential to weaken the prosecution case or to be inconsistent with it are:

- any material casting doubt upon the accuracy of any prosecution evidence;
- any material which may point to another person, whether charged or not (including the co-accused) having involvement in the commission of the offence;
- any material which may cast doubt upon the reliability of a confession;
- any material that might go to the credibility of a prosecution witness;
- any material that might support a defence that is either raised by the defence or apparent from the prosecution papers. If the material satisfies the disclosure test, it should be disclosed even though it suggests a defence inconsistent with or alternative to one already advanced by the accused;
- any material which may have a bearing on the admissibility of any prosecution evidence;
- any material that might assist the accused to cross-examine prosecution witnesses, as to credit and/or to substance;

- any material that might enable the accused to call evidence or advance a line of enquiry or argument; and
- any material that might explain or mitigate the accused's actions.

Material can have an adverse effect by the use made of it in cross-examination and by its capacity to support submissions that could lead to:

- the exclusion of evidence;
- a stay of proceedings; or
- a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the Human Rights Act 1998.

Disclosure officers and prosecutors should give careful consideration to the type of material described below. Experience suggests that it has the potential to satisfy the disclosure test where it relates to the defence being put forward either at the initial stage, or in particular, following receipt of a defence statement:

- recorded scientific or scenes of crime findings retained by the investigator which relate to the accused, and are linked to the point at issue, and have not previously been disclosed;
- all previous inconsistent descriptions of suspects, however recorded, together with all records of identification procedures in respect of the offence(s) and photographs of the accused taken by the investigator around the time of his arrest (especially in cases where identification is in issue);
- information that any prosecution witness has received, has been promised or has requested any payment or reward in connection with the case;
- plans of crime scenes or video recordings made by investigators of crime scenes;
- names, within the knowledge of investigators, of individuals who may have relevant information and whom investigators do not intend to interview; and
- records which the investigator has made of information which may be relevant, provided by any individual (such information would include, but is not limited to, records of conversation and interviews with any such person)
- any previous statements or contact with witnesses.

Experience suggests that any material which relates to the accused's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered when in the investigator's custody is likely to have the potential for casting doubt on the reliability of an accused's purported confession, and prosecutors should pay particular attention to any such material in the possession of the prosecution.

Prosecutors are reminded that there is no category or class of material which is subject to "automatic" disclosure and the disclosure test must be applied on a case by case basis. This principle was highlighted in the case of *R v Olu and 2 others* [2010] EWCA Crim 2975.

If material substantially undermines the prosecution case, assists the accused or raises a fundamental question about the prosecution, the prosecutor will need to

reassess the case in accordance with the Code for Crown Prosecutors, and decide after consulting with the investigator whether the case should continue.

Normally, the result of applying the disclosure test will mean that material disclosable to one accused is likely to be disclosable to all co-accused in the same proceedings. However, disclosure must be considered separately for all accused. Where the particular circumstances dictate, disclosure of different material may have to be made. If one accused seeks disclosure of material given to a co-accused, he or she can apply to the judge in the usual way (see Chapter 16).

Prosecutors should also bear in mind that, while items of material viewed in isolation may not satisfy the disclosure test, several items together could have that effect. Care should also be taken to ensure that all apparent defence themes are identified when taking into account disclosure decisions, including those that are apparent from cautioned interviews, correspondence and other sources. If a potential defence is apparent, the prosecutor should not wait for the defence statement before disclosing material that might assist.

Prosecutors should resolve any doubt they may have in favour of disclosure, unless the material is sensitive and falls properly to be placed before the court in a PII application. There is no requirement to disclose material which is either neutral or adverse to the accused: see Lord Bingham in *R v H and C* [2004] 2 AC 134 at [35] [L903] and the disclosure test does not involve consideration of admissibility.

Disclosure procedure

Disclosure to the accused can be achieved by either copying the item, or where this is not practicable or desirable, by allowing the accused to inspect it. Where the item to be disclosed is an item that has been copied by the disclosure officer to the prosecutor, it will usually be appropriate for the prosecutor to copy the item on to the defence. However, there may be circumstances where this is not appropriate. For example where:

- the quality of the copy supplied to the prosecutor is inadequate;
- it is in a form which requires specialist copying equipment (for example, audio or video tapes, see below);
- the prosecutor considers that the material is not suitable for copying for other reasons (for example, sexual content); or
- where the material has yet to be edited by the police.

Where supplying copies may well involve delay, or otherwise not be practicable or desirable, the investigator should make reasonable arrangements for the video recordings or scientific findings to be viewed by the defence. The prosecutor and disclosure officer should agree how disclosure can be best made and the decision should be endorsed by the prosecutor on the MG6C and on the Disclosure Record Sheet (DRS). It is important that a careful record is kept by the disclosure officer (and by the prosecutor on the DRS) of what items are inspected by or copied to the accused and where the disclosure officer copies something direct, a copy should also be sent to the prosecutor.

For information that is not recorded in writing, the disclosure officer may decide in what form the material should be disclosed. Transcripts should be endorsed by the transcriber as accurate. Disclosure of non-sensitive material should be made promptly and the prosecution and defence should engage early.

The disclosure process should be subject to robust case management by the judge and investigating and prosecuting agencies, especially in large and complex cases, should produce a disclosure management document or raise disclosure strategy in the early stages. The defence will be expected to play their part in defining the real issues in the case. In this context, the defence will be invited to participate in defining the scope of the reasonable searches that may be made of digitally stored material by the investigator to identify material that might reasonably be expected to undermine the prosecution case or assist the defence.

Schedule endorsements

When considering the initial duty to disclose, the prosecutor should record decisions on the MG6C, giving brief reasons for the decisions in the reasons column where:

- the disclosability or otherwise of the material may not be apparent from the description;
- the prosecutor has decided to disclose material not identified by the disclosure officer on form MG6E as satisfying the disclosure test, or
- reasons might otherwise be helpful.

The MG6C should be signed and dated by the prosecutor upon completion and the DRS noted accordingly.

Where an item satisfies the disclosure test and is to be disclosed, the prosecutor should in the appropriate column of the MG6C enter either:

- a 'D', and indicate in the reasons section whether a copy is attached; or
- an 'I' where the item is to be disclosed and the prosecutor considers that inspection is more appropriate.

Items that have an adequate description and can be deemed 'clearly not disclosable' based on the schedule description should be marked 'CND'.

However, where there is insufficient time for the schedule to be amended prior to the trial and a small number of schedule descriptions may be inadequate, the item should be viewed and then marked 'ND' (for 'not disclosable') and the prosecutor must note in the reasons column that the disclosure test has been fully applied and that the item neither undermines the prosecution case nor assists the case for the defence.

An item which is available to the defence under the provisions of the Police and Criminal Evidence Act 1984 should be marked as 'CND'or 'ND' and whilst a note may be made that it is available under PACE, there should not be confusion between automatic entitlement and disclosure under the CPIA.

In large cases with substantial amounts of unused material, items may be block marked where appropriate. Further guidance is provided in Chapter 29.

Occasionally, items of unused material may be incorporated into the prosecution case. This should be identified on the schedule by endorsing the word 'evidence' alongside the item.

Copies of the endorsed MG6C should be sent to the defence as soon as possible after a not guilty plea in the magistrates' court or immediately after allocation/transfer or service of the prosecution case in cases sent to the Crown Court for trial.

In addition, in cases before a Crown Court, rule 15.2(2) of the Criminal Procedure Rules requires that at the same time as serving initial disclosure upon the defence, the prosecutor must notify the court officer that this has been done.

A second copy of the endorsed MG6C should be sent to the disclosure officer together with a copy of the letter sent to the defence. Under no circumstances should the MG6D, MG6E or the DRS be copied to the defence.

The MG6D should be used throughout the life of the case. The prosecutor should record the decision and any observations relating to the material on it. In particular the prosecutor's endorsement should contain the following:

- whether the scheduled item has been viewed;
- whether the item satisfies the disclosure test (with reasons);
- whether PII attaches to the scheduled item (with reasons); and
- whether an application to the court is required (with reasons).

The prosecutor should attach a continuation sheet where there is insufficient space on the MG6D for a full endorsement. Any subsequent endorsements on the schedules should be separately signed and dated.

Where the police have supplied an MG6D stating that there is no sensitive unused material in the case, the prosecutor should note, sign and date it.

Where there are changes, such as statements taken out of the evidential bundle or new material created, the MG6C, D and E must be updated by the disclosure officer and the DRS updated by the prosecutor.

Chapter 13

Making a PII Application

Where sensitive material is identified as meeting the disclosure test, and the prosecutor is satisfied that disclosure would create a real risk of serious prejudice to an important public interest, the options are to:

- disclose the material in a way that does not compromise the public interest in issue;
- obtain a court order to withhold the material;
- abandon the case; or
- disclose the material because the overall public interest in pursuing the prosecution is greater than in abandoning it.

If the disclosure test is applied in the robust manner endorsed by the House of Lords in *R v H and C* [2004] UKHL 3, applications to the court for the withholding of sensitive material should be rare. Fairness ordinarily requires that material which weakens the prosecution case or strengthens that of the defence should be disclosed. There should only be derogation from this golden rule in exceptional circumstances.

Following *R v H and C*, PII applications should only be made where:

- the prosecutor has identified material that fulfils the disclosure test, disclosure of which would create a real risk of serious prejudice to an important public interest, and the prosecutor believes that the public interest in withholding the material outweighs the public interest in disclosing it to the defence;
- the above conditions are not fulfilled, but the police, other agencies or investigators, after consultation at a senior level, do not accept the prosecutor's assessment on this, or;
- **in exceptional circumstances,** the prosecutor has pursued all relevant enquiries of the police and the accused and yet is still unable to determine whether sensitive material satisfies the disclosure test and seeks the guidance of the court.

Categories of PII application

The Criminal Procedure Rules (Part 15) distinguish between three classes of case:

Type one: the prosecutor must give to the defence notice of application and indicate at least the category of the material held. The defence must have the opportunity to make representations, and there is an inter partes hearing conducted in open court.

Type two: the prosecutor must give to the defence notice of application, but the nature of material is not revealed because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed. The defence have the opportunity to address the court on the procedure to be adopted but the application is made to the court in the absence of the defendant or representative.

Type three: the prosecutor makes an application to the court without notice to the defence because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed - a "highly exceptional" class.

To maintain the confidence of the court, care must be taken to ensure that the appropriate form of application is made. For further instruction on the making of a PII application, including guidance on preparing the application, prosecutors should refer to Annex C and the Casework Hub.

Prosecution appeals

Part nine of the Criminal Justice Act 2003 provides an interlocutory right of appeal against certain rulings by a Crown Court judge. The CPS legal guidance on Appeal Prosecution Rights includes instruction on appealing a public interest ruling.

Miscellaneous issues

Investigators and prosecutors should take all reasonable steps to ensure that they are aware of all factors which might affect the legality or admissibility of evidence from sensitive sources or procedures.

Occasionally the defence may challenge the admissibility of prosecution evidence on the basis of lack of proof of an officer's belief, such as reasonable grounds for arrest, or a fact such as integrity of the source of evidential material. Where such background evidence might be too sensitive to give in the presence of the defence, a voire dire, rather than a PII application should be held (*H & C*). An independent senior officer must be used in observation post cases – *R v Johnson (Kenneth)* [1988] 1 WLR 1377. The officer may be required to give evidence in support of its use in the case.

There may be cases where the prosecutor identifies material which satisfies the disclosure test and to which PII attaches but the continuation of the prosecution would demand disclosure having regard to the overriding duty to ensure fairness in the trial process. If it is not possible to disclose the material in a way that does not compromise its sensitivity, it should either be disclosed in full or the proceedings abandoned. Before such action is taken there must be consultation between the CPS (Unit Head or above) and police (ACC or above) and when appropriate, the owners of sensitive third party material at a senior level. Where agreement cannot be reached, the material should be placed before the court for a ruling.

Sensitive material and summary trials

If a case before a magistrates' court raises complex and contentious PII issues and the court has discretion to send the case to the Crown Court, the case may not be suitable for summary trial. Magistrates' court files containing sensitive material should normally be handled by CPS prosecutors, unless specific approval is given by the unit head for the case to be handled by a particular agent. The agent will have no

authority to make an application to withhold disclosure without approval of the unit head.

If material in a summary trial satisfies the disclosure test, the procedure for application to the court is as per Part 15 of the Criminal Procedure Rules. Under section 14 of the CPIA, the accused may ask the court to review any earlier order for non-disclosure. Otherwise, this guidance will be equally relevant to sensitive material in summary trials, and similar considerations and processes apply.

Ex parte notifications to a judge

In *R v H and C* [2004] UKHL 3, the House of Lords set out that neutral material or material damaging to the defendant should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands (see paragraph 35).

However, it is recognised that other **exceptional circumstances** may arise in which the judge should be notified *ex parte* of otherwise non-disclosable sensitive material, such as where not to reveal non-disclosable sensitive information to the judge would create a risk that the judge's fair management of the trial or a wider public interest would be prejudiced. The judge must be told that the purpose of the hearing is to prevent the inadvertent mismanagement of the trial and that therefore he or she is not being asked for any ruling on disclosure.

In such circumstances, the prosecution advocate should only put before the judge such information as is necessary to enable him or her to properly manage the trial process or protect the wider public interest and should be used to do no more than flag areas of potential concern or sensitivity. Only such revelation as is strictly necessary should be made to the judge and only in very rare circumstances should the revelation go beyond the category of material and headline information. The judge should determine how much of the material, if any, needs to be viewed before he or she is in a position to best ensure the fair management of the trial.

The following are examples of circumstances in which an *ex parte* notification could be conducted, so long as the criterion set out above is applied:

- where there is a CHIS whose name or identity appears on the face of the papers;
- where the defendant is a CHIS, particularly a participating CHIS; and
- where there are details of observation posts or the product from them that has been edited.

Notice of the intention to notify the judge *ex parte* should be given to the defence in all but exceptional circumstances. The process should reflect that applicable to the different types of PII hearings.

A suitable form of notice to the defence is suggested as follows:

> "*The prosecution are in possession of material [categorise where appropriate] which does not satisfy the disclosure test and which at present cannot be*

> *disclosed in the public interest. It is the prosecution's intention to alert the judge to the existence of material in this category so as to ensure that he/she is able to manage the trial in a way which is fair to all parties.*"

Except in **Type Three** cases the prosecution advocate should invite the judge to consider making it clear in open court that:

- the *ex parte* 'hearing' was not one where he or she was requested to rule on PII or decide a truly borderline issue of disclosability, but was necessary for the fair management of the trial;
- (further) submissions from the defence were not required; and
- he or she is aware of the basis on which material would be disclosable under the CPIA and when PII would justify withholding it; and
- nothing done was contrary to principles in *Edwards and Lewis v UK* and *R v H and C.*

Chapter 14

Continuing Duty to Review Disclosure

Section 7A of the CPIA imposes a continuing duty upon the prosecutor to keep the question of disclosure under review. This duty arises after the prosecutor has complied with the duty to disclose, or purported to comply with it, and before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case. If such material is identified, then the prosecutor must disclose it to the accused as soon as is reasonably practicable, subject to Public Interest Immunity considerations.

In particular, following the giving of a defence statement, the CPIA requires that the prosecutor keeps under review whether there is any prosecution material that satisfies the disclosure test. The actions and procedures required upon receipt of a defence statement are dealt with more fully in Chapter 15.

Sections 5 and 6 of the CPIA provide for a defence statement to be given when the prosecutor has complied/purported with section 3, but progress can and should be made even where it is apparent that further prosecution disclosure might be required in the future (for further guidance see *R v R and Others* [2015] EWCA Crim 1941).

Continuing duty to disclose: procedure

If any new material is obtained or generated after the schedules have been submitted by the investigator, the disclosure officer should submit a fresh schedule or a continuation sheet with material consecutively numbered together with an additional MG6E. The prosecutor should apply the same principles and follow the same process as before, ensuring letters are sent in a timely manner and the Disclosure Record Sheet is updated.

There may be further material, which may help or hinder the prosecution, in the hands of third parties. The police may seek advice on the need to obtain further material, even after a prosecution has reached the stage where there is a duty to disclose unused material to the defence. Further guidance on third parties generally can be found in Chapter 4 and Annex B.

If it is a case where a Disclosure Management Document (DMD) is appropriate, the DMD should be updated.

Chapter 15

Defence Disclosure

In proceedings before the Crown Court, where the prosecutor has provided, or purported to provide, initial disclosure, the accused must serve a defence statement on the prosecutor and the court. Since 1 May 2010, the accused has also been required to provide details of any witnesses he or she intends to call at the trial (in cases sent or transferred to the Crown Court for trial on or after that date).

In the magistrates' court, the accused is not obliged to serve a defence statement but may choose to do so, in which case the statutory provisions apply. However, it is a mandatory requirement for the accused to provide details of his or her witnesses.

Defence disclosure:

- assists in the management of the trial by helping to identify the issues in dispute;
- provides information that the prosecutor needs to identify any material that should be disclosed; and
- prompts reasonable lines of enquiry, whether they point to or away from the accused.

The judge's aim, apart from seeking to hold the prosecution to its duty of giving initial disclosure and insisting on defence engagement, must be to drive the case as expeditiously as possible towards the stage where a defence statement is required, the issues can be crystallised, and questions of further disclosure dealt with on a reasoned and informed basis pursuant to sections 7A and 8 of the CPIA (see para 47 *R v R and Others* [2015] EWCA Crim 1941).

Applicable time limits

Following service of initial disclosure by the prosecution, the time limit for service of the defence statement and service of the details of any defence witnesses is 14 days in the magistrates'court and 28 days in the Crown Court, unless that period has been extended by the court. For cases in which Part 1 of the CPIA applied prior to 28 February 2011, the 1997 and 2010 Regulations apply, a time limit of 14 days applies for both. Part 1 applies when there is a not guilty plea in the magistrates' court, or when a case is sent to the Crown Court as per section 1(1) and (2) CPIA 1996.

Receipt should be acknowledged in writing to the accused and brought to the attention of the prosecutor as soon as possible. The date should be recorded on the Disclosure Record Sheet (DRS).

Statutory requirements

In the defence statement, the accused should:

- set out the nature of the defence, including any particular defences on which the accused intends to rely;
- indicate the matters of fact on which the accused takes issue with the prosecution;
- outline, in the case of each such matter, why the accused takes issue with the prosecution;
- set out particulars of matters of fact on which he intends to rely for the purposes of his defence;
- indicate any point of law (including any point as to the admissibility of evidence or an abuse of process) which the accused wishes to take, and any authority on which he or she intends to rely for that purpose; and
- comply with any regulations made by the Secretary of State as to the details of matters that are to be included in defence statements.

If the defence statement discloses an alibi, the accused must give particulars of the alibi in the statement, including:

- the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given; and
- any information in the accused's possession which might be of material assistance in identifying or finding any such witness if the above details are not known to the accused when the statement is given.

Where an accused's solicitor purports to give a defence statement on behalf of the accused, the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

Review of defence statements

Prosecutors must:

- review defence statements on receipt, and prior to sending to the police, to assess whether they are adequate; this enables guidance to be provided to the officer on action(s) to be taken.
- be responsive to requests for disclosure of material where the request is supported by a comprehensive defence statement. Prosecutors should bear in mind that in *R v H and C* [2004] UKHL 3 the House of Lords deprecated defence statements which make "general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good" be proactive in identifying inadequate defence statements. It is not sufficient for the accused only to describe his defence in widely worded, ambiguous or limited terms, such as, self-defence, mistaken identity, alibi or consent. An adequate defence statement must - where the defence differs from the facts on which the prosecution is based - state those

differences and the reasons for them in the defence statement, and set out particulars of fact on which the defendant intends to rely on in his/her defence. This will ensure that the prosecution has a proper opportunity of investigating the facts giving rise to any differences.

Where there is no defence statement, or it is considered inadequate, the prosecutor should write to the defence indicating that further disclosure may not take place or will be limited (as appropriate) and inviting them to specify or clarify the defence case. Where the defence fails to respond, or refuses to clarify the defence case, the prosecutor should consider raising the issue at a pre-trial hearing to invite the court to give a statutory warning under section 6E(2) of the CPIA.

Section 6A of the CPIA states that the defence is required to set out any positive assertions to be relied on, namely the details of the actual defence. Where further details are provided late, and substantial additional costs are incurred (for example, where a trial has been adjourned or witnesses inconvenienced) an application for a wasted costs order against the accused should be considered.

Defence statements: CPS procedure

Once it has been reviewed by the prosecutor, the defence statement should be sent to the lead disclosure officer. The prosecutor should draw the attention of the disclosure officer to any key issues raised within the defence statement, and actions that should be taken.

The prosecutor should give advice to the disclosure officer in the MG6(E) as to the sort of material to look for, particularly in relation to legal issues raised by the defence. Some of these issues may be known to the prosecutor as a result of matters mentioned by the defence during the progress for the case, for example, at bail hearings or committal proceedings.

Advice to the disclosure officer may include:

- guidance on what material might have to be disclosed;
- advice on whether any further lines of enquiry need to be followed (for example where an alibi has been given);
- suggestions on what to look for when reviewing the unused material;
- suggestions on whether an alibi witness be interviewed;
- the appropriate use of a defence statement in conducting further enquiries, particularly when this necessitates additional enquiries of prosecution witnesses, and;
- The re-review of any material previously determined to be not relevant

The DRS should be noted with the date on which the defence statement is sent to the disclosure officer.

Defence statements: police actions and certification

The defence statement gives a valuable opportunity for the prosecution to confirm or rebut defence allegations, and it is likely to point the prosecution to other lines of

inquiry. The disclosure officer should share the information with any deputy disclosure officer and the officer in charge of the investigation. Further investigation in these circumstances should be considered and reasonable lines of inquiry followed.

Following receipt of a defence statement, the disclosure officer should promptly look again at the retained material and must draw the attention of the prosecutor to any material that satisfies the disclosure test. Both sensitive and non-sensitive material must be considered, including material previously determined to be not relevant.

An investigator should not show a defence statement to a non-expert witness. The officer should seek guidance from the prosecutor if there is any doubt as how the defence statement should be used in conducting further enquiries. Guidance is likely to be required if a police officer is the victim in the instant case.

Whenever enquiries are carried out in response to the defence statement, the disclosure officer (or deputy) in consultation with the officer in charge of the investigation should notify the prosecutor of the results on an MG20, with any additional schedules as appropriate and a further MG6E. If no enquiries were made, the disclosure officer should explain why.

If there is no material that the disclosure officer believes satisfies the test, the disclosure officer should endorse the second MG6E in the following terms:

> *"I have considered the defence statement and further reviewed all the retained relevant material made available to me and there is nothing to the best of my knowledge and belief which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused."*

Any items that satisfy the disclosure test should be identified by item number and a copy sent with the MG6E (except where the material is considered to be too sensitive to copy and arrangements are to be made for the prosecutor to inspect the material).

Defence statements: further actions for additional revealed material

The prosecutor must consider whether any further prosecution material supplied by the police satisfies the disclosure test following the same principles and processes as before.

The defence statement of one accused may be disclosable to co-accused in the same prosecution. A defence statement should be supplied to co-accused if it satisfies the disclosure test. It is important to keep in mind the continuing duty of disclosure as a defence statement which may not at first sight help a co-accused may meet the disclosure test once the co-accused's defence statement is received. A duty to disclose may also arise when the accused gives evidence, for example where there is a cut-throat defence and an accused departs from his defence statement.

Notification of intention to call defence witnesses

Section 34 of the Criminal Justice Act 2003 inserted section 6C in the CPIA. It requires the accused to give the prosecutor and the court advance details (i.e. name, address and date of birth) of any witnesses he or she intends to call at trial. It applies in any case in which the accused pleads not guilty in the magistrates' court, or any case which is sent, or transferred to the Crown Court for trial on or after 1 May 2010. This requirement is mandatory in both the Crown Court and the magistrates.

The defence requirement under section 6C of the CPIA is in addition to the defence requirement to provide details of alibi. The defence must provide the details of any witnesses, irrespective of the reason why they are calling them at trial. In Crown Court cases the defence must disclose details of an alibi in the defence statement (section 6A). In the magistrates' court, under section 6A of the CPIA there is no requirement to give details of an alibi unless the defence serve a defence statement. Under section 6C, the defence will have to serve details of witnesses they intend to call, whether or not they provide an alibi defence.

The prosecutor must forward the details of any witnesses to the police as quickly as possible, so that a decision can be made whether to seek to interview any of the witnesses.

The CPIA Code of Practice for arranging and conducting interviews of witnesses notified by the accused can be found at http://www.opsi.gov.uk/acts/acts1996/related/ukpgacop_19960025_en.pdf. Investigators should ensure that they are familiar with this Code of Practice, and the accompanying ACPO Position Statement on Interviewing Defence Witnesses.

There is no requirement for the defence to supply any statement from the witness to the investigator or the prosecutor before the interview. The investigator and the prosecutor are unlikely to know what evidence the witness may give. In deciding whether to seek to interview any witness, the investigator should take into account all the circumstances of the case. Previous convictions should be obtained and if appropriate, bad character considered.

Where an accused fails to comply with the requirements to provide details of any witness the sanctions are the same as for a failure to comply with a defence statement.

Faults in defence compliance

The prosecutor should at all times consider the way in which the defence are fulfilling or purporting to fulfil their obligations in relation to disclosure, to see whether there is a fault or faults in disclosure by the accused. Such fault or faults may attract an adverse inference under section 11 of the CPIA at trial. When considering whether there are faults in disclosure by the accused, the prosecutor should refer to section 11 of the CPIA, as amended.

Pursuant to section 11, the prosecutor should remember that the court and any other party may make such comment as appears appropriate and the court or the jury may

draw such inferences as appear proper in deciding whether the accused is guilty of the offence where the accused is required to provide a defence statement and

- fails to do so;
- does so out of time;
- sets out inconsistent defences in the defence statement;

Or, at trial:

- puts forward a defence not mentioned in or different from that in the defence statement;
- relies on a matter which should have been mentioned in the defence statement but was not;
- adduces alibi evidence not previously given particulars in the defence statement, or;
- calls an alibi witness of whom the required details have not been supplied.

Leave of the court is not required for the prosecutor to cross examine on the contents (see *R v Tibbs* (2000) 2 Cr App R 309) however it is necessary before comment can be made where the accused seeks to rely on a matter which should have been mentioned in the defence statement, but was not, and that matter is a point of law (whether on admissibility, abuse of process, an authority or otherwise).

Seeking inferences at trial

It should be noted that a court or jury must consider what inference would be appropriate in the course of their deliberations as to whether the accused is guilty of an offence. The prosecution advocate must take account of the overall circumstances and reasons put forward when deciding whether to seek an inference under section 11(5) of the CPIA.

Responding to defence requests for a time limit extension

If a defence statement is required or is to be given, a 14-day time limit applies from the time when the prosecution complies with, or purports to comply with, the duty to make initial disclosure. The defence must apply for an extension before the time limit has expired. The court will not grant an extension unless it is satisfied that the accused cannot reasonably give a defence statement within the specified time. There is no limit to the number of applications that may be made.

The Criminal Procedure Rules at Part 15 require that the defence should make written application for extension to the appropriate officer of the court, and at the same time, serve a copy of the notice upon the prosecutor. The prosecutor then has 14 days from service of the notice to make written representations to the court. The court will consider representations and may require a hearing, although there is no obligation for a court to hear oral representations.

The prosecutor should respond to any application to extend the time limit for the service of a defence statement. The response should assist the court with any pertinent observations or other relevant points.

Factors relevant to the reasonableness of the defence application and whether to oppose it are:

- the amount of material served as part of the prosecution case and as unused material;
- the complexity of the issues;
- the timing of service of material upon the defence; and
- the time the prosecution would have left, before trial, to properly carry out its duty to re-review prosecution material and deal with any subsequent applications.

Chapter 16

Defence Applications For Further Disclosure

If at any time after the accused has provided a defence statement (and the prosecutor has complied, purported to comply or failed to comply with the obligations relating to further disclosure), and the accused has reasonable cause to believe that there is prosecution material that satisfies the disclosure test, the accused may apply under section 8 of the CPIA to the court for an order requiring the prosecutor to disclose it.

Upon receipt of the notice of application, the prosecutor should consider afresh the items requested by the defence, in consultation with the disclosure officer. If necessary, the prosecutor should ask for copies of the items or inspect the material, as appropriate. The defence may make application to the prosecution informally first and if possible this should be resolved applying the usual principles without the need for a court hearing.

If, after considering the requested material, the prosecutor concludes that all or part of it should be disclosed, the decision should be communicated and the usual process followed.

Where the prosecutor decides that the material requested remains not disclosable and the accused does not accept that decision, (provided the accused has given a defence statement under section 5 or 6 of the CPIA), the accused may apply to the appropriate court under section 8(2) of the CPIA for an order requiring the prosecutor to disclose it.

The prosecutor should ensure that any such application complies with the Criminal Procedure Rules requiring the accused to serve notice on the court and the prosecutor by specifying:

- the material to which the application relates;
- that the material has not been disclosed to the accused;
- the reason why it might not be expected to satisfy the disclosure test; and
- the date of service of the notice on the prosecutor.

The prosecutor has 14 days to give notice to the court that he either wishes to make representations to the court (specified in the notice) or he is willing to disclose the material.

If the prosecutor considers that the defence statement is inadequate and a proper view as to what satisfies the disclosure test cannot be formed, this should be brought to the attention of the court in the notice.

The court may determine a defence application at a hearing (in public or in private) or without a hearing. However, the court cannot determine the issue without either giving the prosecutor 14 days to make representations, or having a prosecutor present.

In the event that a court asks for the matter to be determined without notice particularly if material has to be re-reviewed, the prosecutor should not allow the court to expedite timescales without good reason; and should be firm in obtaining the necessary time to consider the matter properly.

Responding to defence requests for disclosure of sensitive material

The accused may seek access to material which may attract Public Interest Immunity (PII). If the material has already been the subject of a PII ruling, the prosecutor should where possible remind the accused to use the proper procedures under section 14 or 15 of the CPIA, and Part 15.6 of the Criminal Procedure Rules, to apply for a review of PII without jeopardising the confidentiality of the material.

The defence may request information about the nature and extent of sensitive material that exists in the case. At whatever stage such a request is made, the defence are not entitled to information about the existence or nature of undisclosed sensitive material except where the law requires it.

If requests are made, the standard response is to adopt an approach of neither confirm nor deny (NCND). Generally, this will mean the prosecutor can say that:

- material to which the accused is entitled will be disclosed under the CPIA and Criminal Procedure Rules at the appropriate time;
- the prosecutor is satisfied that the duties under the CPIA and Rules have been complied with; and
- disclosure will be the subject of continuing review.

Chapter 17

File and Information Management

Unused material folder

For purposes of efficient file management, and to assist in maintaining a clear disclosure audit trail in every case, documents relating to unused material should be kept in a separate digital folder.

This documentation should include:

- all unused material, where volume allows (and depending on security classification);
- non sensitive disclosure schedules (unless of a higher classification than 'Official');
- any defence statements;
- Disclosure Record Sheet (DRS), and
- disclosure management document, in cases where it is required.

The DRS should be completed to record all actions taken in discharging disclosure responsibilities. As such, it should be in a readily accessible position within the unused material folder as it will require periodic endorsement throughout the life of the case. In those cases where the large volume of unused material copied to the CPS does not allow for its storage in a digital unused material folder, a note of its location should be made on the DRS.

Confidentiality

All unused material that has been disclosed to the defence is subject to the provisions of section 17 of the CPIA. The effect is to prevent the use of the disclosed material by the accused in anything other than the criminal proceedings that the material was originally disclosed (including appeals or any further criminal proceedings arising out of the original case). The only exceptions are where the permission of the court is obtained, or where the material has been displayed or communicated to the public in open court.

The case of *Taylor v SFO* [1998] 4 All ER 801, provides some protection to material which is disclosed other than under the CPIA.

If the disclosed material is used outside these circumstances, an offence under section 18 of the CPIA may have been committed. The Criminal Procedure Rules part 15 govern the procedure where the court is to consider the exercise of power to punish for contempt for an unauthorised disclosure under section18.

Part 15.7 of the Criminal Procedure Rules sets out the procedure for the notification and determining of applications by the accused to use the material for other purposes.

Instructions to the prosecution advocate

The prosecutor has responsibility to ensure that the prosecution advocate is properly instructed on all disclosure issues. Instructions should address fully:

- any decision the prosecutor has made about the disclosure of material which satisfies the test where the reasons for disclosure are not readily apparent, and enclose copies of any such material or explanatory correspondence;
- any decision the prosecutor has made about sensitive material. In any case where Public Interest Immunity is or may be an issue, the instructions should refer to *R v H and C* [2004] UKHL 3 for its valuable analysis of the law;
- the prosecutor's comments on the defence statement; and
- the obligation for the prosecution advocate to consider the DRS at all conferences and before all court hearings. (The DRS should not be copied but should be made available accordingly).

Instructions to the prosecution advocate in cases where there is sensitive unused material should, subject to Chapter 24 of this Manual, include the following:

- the MG6D;
- the MG6E;
- copies of any items of sensitive unused material supplied to the prosecutor;
- any notes made by the prosecutor in relation to sensitive unused material;
- any specific instructions to the prosecution advocate in relation to sensitive unused material;
- specific instructions on the handling and security of sensitive material consistent with its protective marking; and
- a note that the prosecution advocate should always check the DRS prior to any hearings and at any case conference. The DRS itself should not be copied to the prosecution advocate.

If the document contains relevant information that must be disclosed to the accused because it satisfies the disclosure test, the prosecutor and the disclosure officer will need to consider whether the document can be edited if it contains sensitive material.

Retention periods

Paragraphs 5.7 to 5.10 of the Code of Practice provide for the period of retention. This is the minimum period of retention, and individual force policy may provide for a longer period.

Material seized under the provisions of PACE will be subject to the retention provisions of section 22 of that act.

Chapter 18

Revelation and Disclosure of Police Misconduct

Material containing details of misconduct or criminal proceedings against police officers who are witnesses in a prosecution might be disclosable under the CPIA (as amended by Part 5 of the Criminal Justice Act 2003). Misconduct, in this context, covers a wide range of behaviour, from minor discreditable conduct when off duty to being dishonest or untruthful.

Some findings by their nature will be incapable of having an impact on the investigation in a future case. However, where a misconduct finding relates to an officer's honesty or integrity, this should always be revealed as it is capable of affecting credibility.

It is important to note that the test for disclosure is the same as for all other material.

Statutory framework

The Police (Conduct) Regulations 2012 (referred to in this chapter as "the regulations"), which came into force on the 22nd November 2012, establish a statutory framework for the police misconduct regime. They relate only to misconduct matters and do not change an officer's duty to reveal and disclose criminal convictions and cautions. Misconduct proceedings which were started before this date will continue to be dealt with under the previous regime (the Police (Conduct) Regulations 2008).

Roles and responsibilities

Police Professional Standards Departments (PSDs) have final responsibility for the value judgment on whether information relating to the misconduct of police officers should be revealed to the prosecutor. This decision must be made on a case by case basis and guidance may be sought from the prosecutor if required.

In addition to managing and reviewing their own obligations to reveal, PSDs will provide advice to officers on their obligations to reveal. At the conclusion of misconduct proceedings, PSDs will assist in determining whether information should be revealed, for how long and the nature of proceedings in which the obligation exists.

Responsibility to reveal relevant misconduct findings, or criminal convictions or cautions, rests with the police officer concerned and revelation will be carried out by the individual officer using form MG6B, unless the officer has been suspended or dismissed. The officer, assisted by the PSD, should ensure that there is a sufficient level of detail on the MG6B to enable the CPS to make an informed decision about disclosure of the information in the proceedings in question.

The duty to reveal will usually be confined to complaints or allegations that result in a criminal conviction/caution and/or relevant misconduct findings of guilt. However, there may be exceptional occasions where the interests of justice require PSDs to

reveal other relevant material: for instance, when it might affect the credibility of an officer where that credibility is or might be in issue.

Police officers making statements should inform the prosecutor, using form MG6B, of the existence of:

- criminal convictions for recordable offences, whether spent or otherwise;
- criminal cautions for recordable offences; and
- penalty notices for disorder for recordable offences.

There is no need to include this material on the schedule of unused material, although a brief reference to any criminal conviction or caution should be made on form MG6C if it meets the "relevance" test.

The prosecutor should inform the officer as soon as reasonably practicable, following receipt and review of the MG6B, whether the information will be disclosed or withheld. The decision to disclose or withhold information must be made or approved by a CPS Unit Head or equivalent. The decision and details must be recorded on the Disclosure Record Sheet.

Consultation before disclosure

The CPS should not disclose to the defence details of pending misconduct matters, or matters such as information short of a misconduct finding, without consulting the force PSD head or his or her nominee. That consultation should be undertaken by a CPS unit head. Where a misconduct investigation is being supervised, managed or independently investigated by the Independent Police Complaints Commission (IPCC), the IPCC supervising member should also be consulted.

Officers under investigation

Information about officers suspended, but who have not been charged with a criminal offence or had the matter referred to misconduct proceedings, should be revealed to the prosecutor by the head of PSD. This applies to both criminal and misconduct matters.

Where an officer has been notified of allegations made against him/her, but is not suspended from duties, he/she is not required to reveal to the CPS the details of the allegations. However, the head of the PSD should consider, in liaison with the CPS unit head, whether the interests of justice require the revelation of that information and provide the prosecutor with the information if required.

Local arrangements should ensure that all prosecutions in which an affected officer is involved are identified and revealed to the prosecutor.

If an officer making a statement has been notified that they are under investigation in misconduct proceedings which are capable of having an impact on the particular case in which the officer is a witness, he/she should inform the prosecutor.

There may be circumstances where reliable adverse information comes to light about a police officer who has provided a statement or formed part of the investigation team, but at the same time, there is an on-going investigation against him or her. In such cases the police should reveal details to the prosecutor should the available information indicate that the adverse information is prima facie true.

Both the CPS and police will need to consider the nature of the information and any updating of it. There will usually be three possible courses of action:

- disclose the information known about the officer to the defence in order that the instant prosecution is not prejudiced. This will usually mean discarding the officer as a witness. Obviously, such disclosure might prejudice the ongoing (covert) investigation into the officer;
- abandon the instant prosecution in order to protect the ongoing covert investigation into the officer, or:
- delay disclosure, as far as possible without causing unfairness to the accused, to allow the on-going investigation into the officer to complete its covert phase.

Unit Heads should consult the CCP or Head of Central Casework Division where there is any doubt as to the correct course of action.

Criminal proceedings that have not been completed

Police officers making statements should inform the prosecutor, using form MG6B, of details of all criminal recordable offences with which they have been charged, or reported for summons, but in which proceedings have not been completed.

Credible allegations

Very occasionally, there may be exceptional circumstances in which an allegation is made against an officer by a credible witness (for instance, a resident informant) in circumstances in which a prosecution of that allegation cannot take place because of a lack of corroboration or supporting evidence. In such a case, the issues of revelation and disclosure need to be particularly carefully addressed. It may be that the account of the witness, although not formally adjudicated, is so credible that it should be revealed.

Adverse judicial findings

There is a duty to reveal and disclose adverse judicial findings. An adverse judicial finding is a finding by a court, expressly or by inevitable inference that a police witness has knowingly, whether on oath or otherwise, misled the court. This includes, in civil cases, answers from a civil jury.

A validated adverse judicial finding is a serious judgment on the integrity of an officer, with consequences for the officer's future deployment and career.

The decision to confirm whether or not the judge's comments amount to an adverse judicial finding is one for the CPS. The CCP/head of the CPS Complex Case

Unit/head of the Central Casework Division, or a person(s) nominated by the CCP or HQ Director with the necessary knowledge and expertise must be consulted by the officer's PSD on receipt of reports of comments which might amount to an adverse judicial finding. The CPS may take into account any representations made by the head of the force's PSD (and this may include any representations or explanations made by the relevant officer) and any advice should be given in writing. If there is any doubt in the meaning of the comments from a court, then it is unlikely that the comments would amount to an adverse finding although all decisions need to be considered in light of the disclosure test.

If the CPS decides that the comments do amount to an adverse judicial finding, forces will need to manage the consequences including consideration of a criminal investigation or misconduct proceedings, future deployment of the officer, the wording of form MG6B, and any further review of the finding.

There is no mechanism for rescinding an adverse judicial finding, but if a subsequent enquiry is held and it reveals information that exonerates the officer or casts doubt on the finding, this should be reflected in the wording of the MG6B and the prosecutor will decide whether to disclose the information.

Change of circumstances

It is essential that the prosecutor can, so far as it is possible, be confident that the information provided on the MG6B is up to date as the CPIA imposes a continuing duty on the prosecutor to disclose material that satisfies the disclosure test. Individual police officers must inform the prosecutor of any changes of circumstances regarding their misconduct and/or criminal records but the prosecutor must check the up to date position in relation to any officer prior to trial

Where, during the lifetime of a case in which the officer is a witness, he or she becomes subject to a misconduct outcome or is charged, cautioned or convicted of a criminal recordable offence, advice should be sought from the PSD.

The prosecutor should be notified of any change in circumstances that makes the previous notification of a misconduct matter no longer appropriate i.e. a successful appeal. The officer concerned should inform the prosecutor on an updated MG6B or form MG6. If the prosecutor forms the view that the misconduct information would not meet the disclosure test taking account of the nature of the officer's evidence and what is known of the defence or likely defence, details of the misconduct finding should not be disclosed but must be kept under review and reconsidered in the light of any defence statement.

Confidentiality

Information revealed to the CPS under this procedure should be dealt with in accordance with Chapter 24. MG6B forms should normally be treated as 'Official Sensitive'.

Chapter 19

Operational and Therapeutic Debriefing

If information is relevant to an investigation, it may have to be disclosed, irrespective of the circumstances in which the information is given. The only privilege which the law recognises is that which exists between lawyer and client. Communications between the doctor and patient and medical records do not attract privilege and therefore cannot be relied upon to withhold disclosure of material in relation to therapeutic debriefing.

Wherever possible, debriefings should not take place until after a pocket book entry or a full witness statement has been completed by those participating. The nature of the record required depends on the type of the debriefing. Where a debriefing takes place to facilitate the preparation of a summary of events for the information of an incident commander (an immediate debriefing), a pocket book record of information which is likely to be supplied to the incident commander may suffice. However, if a potential witness is required to recount his or her evidence in detail in a later and fuller debriefing, a full witness statement should be made beforehand. This would not usually take place in a period of 24 to 36 hours from the conclusion of the incident, in order to give officers an opportunity to recover from the initial trauma.

Practice and procedure for debriefing and counselling will differ from force to force, as will the type and quantity of material to which it gives rise. What passes in a debriefing exercise may be disclosable to the defence if the disclosure test is satisfied and PII does not apply. Therefore, personnel should be informed that confidentiality cannot be guaranteed. This means that participants in a traumatic incident may be discouraged from seeking the benefits of a debriefing or counselling if the confidentiality of the transaction cannot be guaranteed.

If inconsistencies arise between accounts given before and during debriefing, they should be recorded and revealed to the prosecutor. It may be that any inconsistency is a symptom of the complaint that counselling is designed to address, that is, psychological reaction to trauma; the prosecutor should be fully informed, so that the proper decision on the disclosure test can be made. The fact of a debriefing should be noted on form MG6 and records should be listed on form MG6C (or form MG6D if appropriate). If there is an inconsistency between a witness's accounts before and during a debriefing, the disclosure officer should record it on the MG6E and copies of the record should be given to the prosecutor.

Child witnesses and vulnerable or intimidated adult witnesses

Special provisions exist for pre-trial therapy for child witnesses. Prosecutors are reminded to follow the guidance set out in the 'Provision of Therapy for Child Witnesses Prior to a Criminal Trial'.

Additional guidance for dealing with vulnerable or intimidated adult witness may be found in the Practice Guidance Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal Trial.

Chapter 20

Victim Communication and Liaison

Members of the prosecution team are instructed to refer to the CPS legal guidance on the Victim Communication and Liaison Scheme, which reflects obligations placed on the CPS (and other service providers) in the Code of Practice for Victims of Crime.

VCL letters do not usually come within the ambit of unused material covered by the CPIA and it is unlikely that the letters would contain any material/information which will satisfy either of the disclosure tests set out under the CPIA.

However, prosecutors should be mindful, as part of their duty of continuing review, of the need to keep disclosure issues under consideration, particularly where a letter generates a response from a victim or witness, either orally or in writing. Any such response must be communicated to the disclosure officer to include on the appropriate schedule and thereafter handled in accordance with the CPIA.

A meeting held with the victim (or the victim's family) under the VCL scheme is not normally held until the case has been concluded although there will be occasions when meetings need to be held when proceedings are live. The prosecutor should tell those attending the meeting at the outset that he/she may be required to inform the defence of what was said during the meeting because of disclosure obligations and therefore notes will be taken. These should be agreed as far as possible and be included on the appropriate schedule in accordance with the CPIA. The fact of the meeting may be disclosable and the contents should be considered in accordance with the CPIA.

Where a victim is, or may potentially be, a witness in the case, a record must be kept of all contact with that person. The record of any contact between a prosecutor and a witness must be passed to the disclosure officer and scheduled accordingly. Any material arising out of the contact that assists or undermines must be disclosed to the defence.

Prosecutors dealing with complex cases are referred to the guidance on Speaking to Witnesses at Court and to the 'witness pack'guidance on the Casework Hub. This is good practice in cases where there have been a number of statements and/or contacts with the witness and provides guidance to assist the parties during a complex case. This is collated from the used and the unused material to ensure that all material is in one place.

Chapter 21

Disclosure of Unused Material Created in the Course of Financial Investigations

Financial investigations may fall into five categories:

1. those supporting a criminal investigation, i.e. obtaining financial intelligence and/or evidence to assist with the prosecution;
2. a confiscation investigation being carried out alongside the criminal investigation and prosecution of a suspect;
3. a confiscation investigation occurring after conviction;
4. a financial investigation supporting a detained cash investigation; and
5. a financial investigation supporting a civil recovery investigation or a taxation assessment by the National Crime Agency (NCA).

Where a financial investigation is supporting a criminal investigation, or is being conducted alongside a prosecution case, the financial investigator must ensure that revelation of all material is made to the prosecutor in accordance with the existing procedure set out within the CPIA, the CPIA Code of Practice and this manual. In normal circumstances this will be via the disclosure officer.

The underlying principles of the common law, the AG's Guidelines and the ECHR mean that prosecution material created or obtained following conviction should be dealt with in the same manner as set out previously. This will include the continuing duty to review the unused material, particularly, if appropriate, following the receipt of any response to a confiscation statement.

Financial investigations commencing after 24 February 2003 will generally be made by the police under the Proceeds of Crime Act 2002 (POCA), but may in some circumstances be made pursuant to the previous legislation; namely, the Drug Trafficking Act 1994, the Criminal Justice Act 1988 (as amended), the Criminal Justice (International Co-operation) Act 1990 and the Police and Criminal Evidence Act 1984 (PACE).

Such investigations will often result in the creation of a substantial amount of material. The duties of disclosure required by the CPIA will need to be considered in relation to this documentation. In POCA and Pre-POCA cases, CPS Proceeds of Crime (POC) will apply for restraint orders or for the appointment of a receiver in the Crown Court and the High Court respectively. Applications for confiscation orders will be dealt with by the reviewing prosecutor except for complex confiscation cases which are referred to CPS POC to deal with.

Financial investigation material should be recorded and dealt with under the normal rules of disclosure.

The paragraphs below set out the responsibilities of the Financial Investigation Officer (FIO), the disclosure officer, the prosecutor and CPS POC in dealing with financial investigation material. The procedures recommended below must be read in conjunction with the underlying principles and instructions in this manual.

Financial investigation officer actions

Material is obtained or created by the FIO in a number of ways. The most common are:

- material obtained under a POCA investigation;
- material obtained by virtue of an order or a search warrant under PACE 1984;
- material obtained by virtue of an order or a warrant obtained under section 93H or section 93I of the Criminal Justice Act 1988 or obtained by virtue of an order or a warrant obtained under section 55 or 56 Drug Trafficking Act 1994 (these powers have been repealed by POCA and will generally only be available to investigations that began prior to 24 March 2003);
- material obtained under a production order made under schedule 5 of the Terrorism Act 2000;
- information obtained as a result of enquiries overseas;
- notes and working papers as a result of any other enquiries, and;
- disclosures concerning suspected criminality from suspicious activity reports (SARs) and any other source.

NCA has published guidance on its website regarding the treatment of SAR material and the need to protect the identity of the makers of SAR whenever permissible. This may require the SAR to appear on the MG6D schedule. NCA should be advised of any intention to disclose SAR material. The decision as to whether to disclose should be made by the prosecutor following the submission of a threat assessment by the officer in the case and after consideration of any representations made by the NCA.

The material above is prima facie relevant material under the CPIA. The FIO should fully describe the material on the appropriate schedule, which should be provided to the disclosure officer who will have the responsibility of notifying the prosecutor handling the case. The FIO should assist the disclosure officer in his or her assessment of the material against the disclosure test and the subsequent items required to be listed on the MG6E.

It is important that a separate schedule is provided for each accused. Financial investigation unused material should not be routinely disclosed to co-accused. It should only be disclosed if it satisfies the disclosure test. There is no requirement to copy the material. The prosecutor will provide the schedule to the relevant defence solicitor.

Particular care should be taken with respect to material created during the course of restraint and receivership proceedings. Documents lodged at High Court or Crown Court can only be disclosed to co-accused pursuant to an order of the relevant court and any disclosure made or information given by a defendant pursuant to a restraint order will have been made or given subject to an undertaking by the prosecution that there shall be no disclosure to any co-defendant in the criminal proceedings without further order of the court.

Sensitive material must be described fully on a separate schedule, which will not be disclosed to the defence by the prosecutor. This schedule should again be provided to the disclosure officer by the FIO and will be supplied to the prosecutor.

Disclosure officer actions

The disclosure officer will receive the schedules of unused material from the FIO. The disclosure officer should consider the FIO's schedules and append them to the relevant MG6C or MG6D schedule. Any material that satisfies the disclosure test should be itemised on a separate MG6E for onward submission to the prosecutor. The disclosure officer should seek the assistance of the FIO in this task. It is important to ensure that the defence case statement is provided to the FIO to ensure that the material held by the FIO is considered as part of the continuing duty to review.

CPS POC actions

CPS POC provides advice and support to CPS areas and the Central Casework Divisions in relation to confiscation matters. CPS POC will often be involved in proceedings in the Crown Court and High Court in relation to restraint and receivership provisions of POCA and the pre-POCA legislation mentioned above. Some of the material received by FIOs will be copied to CPS POC, but the responsibility for notifying the prosecutor of such material will remain with the FIO (via the disclosure officer) as set out above.

CPS POC will have the responsibility of revealing to the prosecutor the existence of any material created in the course of Crown Court and High Court restraint and receivership proceedings. Material that will commonly feature in such proceedings will include:

- witness statements in support of restraint and receivership orders along with any draft statements;
- restraint and receivership orders;
- witness statements in support of variation orders along with any draft statements;
- variation orders;
- witness statements of disclosure; and
- contempt motion papers along with any drafts.

All of these documents (other than drafts) will have been served on the accused in the course of the restraint and receivership proceedings, and there will therefore be no problem in relation to disclosure of this material to that accused. However, difficulty will arise in connection with disclosure of this material to any co-accused or to any third party. The orders and witness statements are prepared for the purpose of restraint and receivership proceedings and cannot be disclosed unless the permission of the Crown Court or the High Court is obtained prior to that disclosure taking place.

CPS POC prepares, or assists in the preparation of, financial statements to be served under the DTA 1994, the CJA 1988 or POCA for use in the Crown Court. The original statement is served on the relevant accused and again the question of disclosure of such statements to a co-accused as unused material is raised. It is considered that there should be no disclosure to a co-accused when the information in the statement has been supplied by the accused following an order by the Crown

Court or High Court unless the consent of the court has been obtained. In other circumstances, where information has been elicited in questioning sanctioned by paragraph C11.4 of the PACE Code of Practice, there can be no objection to disclosure to a co-accused.

It will be the responsibility of CPS POC to provide the reviewing prosecutor with a list of material held in connection with restraint and receivership proceedings and to inform the reviewing lawyer what material, on the list, has been disclosed to a particular accused and what should not be disclosed to any co-accused. There is no need to provide copies of documents unless the reviewing prosecutor considers it necessary. It will be the responsibility of the reviewing prosecutor to inform the solicitor of the co-accused of the position.

The CPS POC list of unused material will also include other unused material of which the prosecutor will not have been notified by the FIO, such as drafts of statements, and accountancy documents.

Reviewing prosecutor actions – CPS areas and Central Casework Divisions

In cases where there are restraint and receivership proceedings, the reviewing prosecutor will receive from CPS POC a list of material held by CPS POC, together with details of what has been served on the accused and what should not be served on any co-accused without the consent of the Crown Court or the High Court.

As with all other disclosure obligations in relation to unused material, the reviewing prosecutor will also have the responsibility for disclosing to the defence unused financial investigation material. The reviewing prosecutor will receive schedules of financial investigation material attached to the MG6C, MG6D and MG6E schedules. The reviewing prosecutor should ensure that a separate schedule is provided in relation to the financial investigation material for each accused.

Where material gathered in respect of an accused falls for disclosure to a co-accused applying the disclosure test, then where such material is confidential, disclosure should only be made following a court order. This application should be made on notice to allow all interested accused to make representations to the court. This will not apply to information elicited in questioning (sanctioned under paragraph C11.4 of the PACE Code of Practice) which should routinely be disclosed.

The solicitor for any co-accused should be informed in writing of the existence of material (for example, witness statement of disclosure, restraint order) relating to a co-accused and told that the material will not be disclosed without the consent of the High Court or Crown Court and that if the solicitor considers such material to be relevant, he or she must make application to the relevant court.

Chapter 22

Scientific Support Material: Fingermarks and Photographs

All scientific support departments should follow procedures and working practices which ensure compliance with the requirements of the CPIA Code of Practice. Accurate and full records must be kept of all scene examinations, including details of any items retained as potential exhibits. Where such items are submitted for further examination, for example by the fingerprint bureau, or other forensic service provider, the record should indicate that this has been done. Retention includes negative information such as no fingermarks being found at a scene, or where the fingermark cannot be identified as belonging to a known suspect. The minimum periods of retention are set out in paragraphs 5.6 to 5.10 of the Code, but local force policy may determine longer periods.

The records of scientific support units and any other forensic service providers in relation to a criminal investigation should be made available to the disclosure officer to enable him/her to carry out the task of scheduling unused material for the prosecutor. If necessary, scientific support staff should help the disclosure officer identify material which satisfies the disclosure test.

Fingermarks and photographs

All of the following must be recorded, retained and made available to the disclosure officer:

- All fingermarks lifted or photographed at the scene
- Exhibits examined in the fingerprint or other forensic laboratory. All relevant fingermarks must be recorded, and any lifts, photographic negatives or digital images retained;
- All marks and the results;
- Fingermarks eliminated from the enquiry because it is identified as belonging to a person having legitimate access and identity of that person. However once the elimination process has been completed, national elimination fingerprint forms should be disposed of by either returning to the donor or by destruction in accordance with force policy;
- Where photographs are taken, all the negatives, digital images or other media should be retained, even if the photographs are not intended to be used as evidence. A record should be kept of the total number of photographs made, and if a statement is provided, this information should be included in the statement.

Chapter 23

Disclosure of Unused Forensic Science Material

This chapter provides guidance on how unused material in the possession or control of a forensic science provider (FSP) should be revealed to the police and then to the prosecutor. It also reflects the agreement reached between the CPS, the National Police Chiefs' Council (NPCC formerly ACPO), and the FSPs as to the best way to comply with the legal duties of disclosure to the defence imposed under the CPIA.

Police and prosecutors should apply the instructions in this chapter in conjunction with the general instructions contained in part one of this manual, which continue to apply, and Part 19 of the Criminal Procedure Rules ('Expert Evidence'). FSPs should incorporate the guidance into their quality management systems.

The common law duty

Where the Common Law applies, 'the prosecution team' will include the prosecutor, investigator and any expert witness instructed by the prosecutor or the investigator e.g. forensic scientists, psychiatrists, pathologists, police surgeons. All must reveal the existence of all unused material to the prosecutor and the prosecutor will then decide whether it needs to be disclosed to the accused.

It should be noted that the case of *R v Ward* [1993] 1 WLR 619 placed a further important duty upon the expert, as follows:

> "… *an expert witness who has carried out or knows of experiments or tests which tend to cast doubt upon the opinion he is expressing is under a clear obligation to bring records of those tests to the attention of the solicitor instructing him* ..."

The experiment or test material should be supplied to the disclosure officer and prosecutor.

Duties under the CPIA

The CPIA Code of Practice does not apply to forensic scientists and other experts, although any material or information that they supply to or retain on behalf of the police will be subject to CPIA duties.

Unused material retained by forensic science organisations and not copied to the police can only be acquired by the defence through the witness summons procedures (see Chapter 4) unless the information is volunteered.

Preservation of material

Whilst the CPIA and its Code of Practice do not impose any specific duties upon forensic experts regarding the preservation of material, the following principles of good practice should be followed. It is vitally important that all material or information

which may be relevant to the investigation and to the outcome of the case is recorded and retained.

When expert opinion is sought from the FSP not all the circumstances may be known. It would therefore be unwise to speculate on what the defence might be when deciding what to record or what to keep.

In particular, the FSP should always record the following:

- the results of any tests or calculations, whether positive or negative;
- any information obtained in connection with the forensic examination whether this points towards or away from the suspect; and
- any information generated during the course of the examination that might have some bearing on any offence under investigation or any person being investigated.

Notes and records of the above should always be retained by the FSP, together with the following items in particular:

- notes and draft versions of reports or witness statements (especially where these differ from the final version); and
- any material gathered or generated in connection with the forensic examination, subject to specific arrangements to return material to the police following examination or to destroy it.

If there is any doubt as to whether material should be retained, or whether information should be recorded, discretion should be exercised in favour of preservation, recording and retaining.

Procedures: general

The FSP should inform the police of all material retained in their possession in accordance with the procedure set out below.

FSP actions: preparation of the index

The FSP should provide to the police an index of all material in their possession. The scientific reporting officer should prepare the index and submit this to the police investigator when the report or statement is supplied in all cases except where an analyst's certificate is supplied in drink-drive cases.

All material should be individually listed on the index and described clearly and accurately so as to allow an informed decision on disclosure. Where there are many documents or items of a similar type or repetitive nature, these may be described by quantity and a generic title but as with police schedules may be returned if there is insufficient information. However, any single item which is known to be of particular significance should be separately listed.

If not mentioned in the report or statement, the reporting officer should indicate on the index any material that satisfies the disclosure test, so far as this can be

assessed or is known. Wherever practicable, copies of material that satisfies the test should be sent to the police with the index.

The disclosure officer's duty of revelation to the prosecutor and the prosecutor's duty of disclosure to the defence are continuing obligations. Therefore the index must be kept up to date by the FSP. Where new material comes to light or is generated or received after the initial preparation and submission of the index, a supplementary index should be supplied to the police.

Police actions: dealing with the forensic index

Where a police officer receives an index from the FSP, this must be retained, together with any other report, statement or document supplied. Any relevant oral information received by the investigator, or by the disclosure officer relating to material held by the FSP should be recorded and retained in accordance with the CPIA Code of Practice.

Upon submission of a full file, the disclosure officer should check the material listed on the forensic index. The index should list all material retained in the possession of the FSP. The disclosure officer should list the index itself on the MG6C or Streamlined Disclosure Certificate (SDC) simply saying for example 'Forensic Science Service Index – compiled on xxx – list of all material in possession of FSS'.

Where the disclosure officer believes that any of the material appearing on the index, satisfies the disclosure test the item should be listed on form MG6E or SDC. The disclosure officer should consult the reporting officer where he or she is in any doubt. The schedules, the index and any undermining or assisting material should be sent to the CPS with the file in the usual way.

Where the prosecutor indicates that unused material in the possession of the FSP requires disclosure, the disclosure officer should send a copy of the index endorsed with the prosecutor's decision to the FSP.

CPS Actions: disclosure to the defence

Upon receipt of the index, the prosecutor should review the listed items in the same way as other unused material. The FSP should be notified of the prosecutor's disclosure decisions via the disclosure officer.

Upon receipt of a defence statement, the prosecutor should exercise the continuing duty of review under the usual principles.

Police actions: defence statements

When a defence statement is received, or where information comes to light from any source which might have a bearing on or otherwise affect any evidence supplied by a forensic expert, the disclosure officer should consider, in consultation with the investigator and the prosecutor, whether further enquiries need to be made.

The disclosure officer should send a copy of the defence statement to the forensic scientist together with instructions as to any further report or work required. A date should be given as to when a response is required. Situations where this should occur will include:

- where forensic evidence is challenged directly;
- where issues raised in the defence statement may have a bearing on the interpretation of scientific evidence;
- where the scenario put forward by the defence statement differs significantly from that upon which expert opinion is based; and
- whenever it is necessary to ask the FSP to review the forensic material or to conduct further tests in order to clarify the issues raised by the defence statement;
- where any issue is raised that might have a bearing on forensic material, either used or unused, and;
- where a new line of enquiry is indicated, and the officer in the case considers that it should be pursued.

Where the disclosure officer is not clear whether the defence statement has any bearing upon forensic material, the FSP should be contacted for advice on whether it may be desirable to review the material in the light of the defence statement.

In appropriate circumstances, it may be desirable to arrange consultation between the police investigators, the forensic scientist and the prosecutor to decide upon a suitable course of action. Whatever the nature of the case, it is important to maintain appropriate liaison between the FSP, the police and the CPS to ensure that the disclosure process is completed properly and clearly recorded. The prosecutor should ensure the DRS is updated.

CPS actions: defence requests for FSP material

Any requests received by the CPS for disclosure of unused material in the sole possession of FSP should be the subject of consultation between the prosecutor and the disclosure officer. Consideration should be given to obtaining the material.

If, following such a request and consultation, the prosecutor decides not to seek access to the material, the defence should be asked to refer their request directly to the FSP concerned who will decide whether they will provide voluntary access.

FSP actions: access arrangements for the defence

The FSP is a third party under the CPIA. The defence might make a direct approach to the FSP for access to case material, informally or by way of witness summons. The FSP will notify the police of such approaches. The FSP has discretion to allow voluntary access, but must comply strictly with the terms of any witness summons.

Whenever access is sought by the defence to used or unused material, the FSP will:

- notify the police of any requests by the defence for access, and of any arrangements made;

- advise the police where the defence seek to carry out further tests which may alter, damage or destroy the material;
- make arrangements for ensuring that the integrity of exhibits is maintained and a continuity record is made where these are subject to defence examination;
- keep a record of any defence examination, including the nature and extent of the examination, and any views expressed; and
- notify the police if the forensic scientist's views are likely to change as a result of the defence examination.

Where the prosecutor has indicated that unused material in the possession of the FSP should be disclosed, the disclosure officer will send a copy of the index, MG6C or SDC, and any letter to the defence to the forensic scientist so he/she is aware.

On production of a copy of the MG6C or SDC schedule or index (or covering letter, if the latter refers to the material directly) marked with a 'D' or 'I' by the prosecutor, the FSP should allow access. The FSP will use the copy MG6C or SDC supplied by the police as a checklist, and to identify material that does not require disclosure at that time.

Supervision of access to non-sensitive unused material by the FSP will be governed by way of local arrangements. Best practice suggests that the investigator or disclosure officer is present wherever possible when the defence examine any forensic material.

It should be noted that the defence may also be entitled to access to material in the possession of forensic science organisations through the operation of Part 19 of the CPR. This will relate to the records of any tests, calculations, documents, or objects upon which the forensic scientist bases his expert opinion and which forms part of the prosecution case.

Chapter 24

Security of Sensitive Material Schedules and Unused Material

This chapter is not available on the CPS website

Chapter 25

Disclosure of CHIS Material and the Involvement or Identity of a CHIS

This chapter is not available on the CPS website

Chapter 26

Dealing with Surveillance Authorisations

Surveillance is defined by section 48(2) of RIPA as including monitoring, observing or listening to persons, their movements, conversations or other activities and communications.

Surveillance is covert if, and only if, it is carried out in a manner calculated to ensure that any persons who are subject to the surveillance are unaware that it is or may be taking place (section 26(9)(a)).

The question of whether an investigative technique requires a Directed Surveillance Authority (DSA) will depend on the purpose of accessing the data and what is being sought. Whilst researching "open source" materials available without restriction to any member of the public is unlikely to require a DSA, the covert monitoring of online activity can amount to directed surveillance for which an authority under the RIPA should be sought. Prosecutors are referred to the Covert Law Enforcement Manual within the Legal Guidance.

Material subject to legal privilege

Covert surveillance likely or intended to result in the acquisition of knowledge of matters subject to legal privilege may take place in circumstances covered by Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010, in particular Article 3(2)(a) -(f) ('Extension of authorisation provisions: legal consultations').

Such surveillance requires prior approval of a Surveillance Commissioner and written notice of the Commissioner's decision to approve the authorisation to the authorising officer, unless urgent or granted by the Secretary of State (See Home Office Covert Surveillance and Property Interference Codes of Practice (COP) paragraph 4.16 & 4.19).

An authorisation shall only be granted or approved if the authorising officer, Secretary of State or approving Surveillance Commissioner is satisfied that there are exceptional and compelling circumstances that make the authorisation necessary and proportionate (Code of Practice paragraphs 4.12 and 4.13).

Directed surveillance authorisation in such circumstances can only be given by authorising officers entitled to grant authorisations in respect of confidential information (Code of Practice paragraph 4.13). Intrusive surveillance, including surveillance which is treated as intrusive by the 2010 Order (as to which see Article 3 (2) (a)) or property interference likely to result in the acquisition of material subject to legal privilege may only be granted by authorising officers entitled to grant intrusive surveillance or property interference authorisations (Code of Practice paragraph 4.14).

Authorisations will not take effect until the Surveillance Commissioner's approval has been given and written notice of the Commissioner's decision has been provided to the authorising officer (Code of Practice paragraph 4.21).

Investigatory Powers Tribunal

The IPT was established by section 65(4) RIPA as a complaints tribunal for a person aggrieved by any such conduct specified in Section 65(4) and provides remedies including the quashing or cancelling of any authorisation, destruction of any records, compensation and any other order it thinks fit.

Disclosure duties and obligations

The CPIA Code of Practice procedure covers surveillance operations. Material which may be relevant to an investigation, which has been retained in accordance with this Code, and which the Disclosure Officer believes will not form part of the prosecution case, must be listed on a schedule (paragraph 6.2). Authorisations and accompanying forms will usually be on the non-sensitive material schedule (please consult Chapter 8 of this manual and CPIA Code of Practice paragraphs 6.15 and 6.16). More often than not, in these circumstances, the fact that surveillance has been carried out will be sensitive and the material treated accordingly. This will include the authorities and any supporting documentation. Where any material obtained or generated in these circumstances is considered relevant to the case, it must be dealt with in accordance with the guidance provided in Chapter 8 of this manual.

The prosecutor's duties with regard to the disclosure of surveillance authorisation documentation surveillance have been clarified by the Court of Appeal in *R v GS and Others* [2005] EWCA Crim 887. This case makes clear that the validity or otherwise of surveillance authorisations goes to the lawfulness of the evidence obtained, and not its admissibility, as Surveillance Commissioners decisions by section 91(10) Police Act 1997, "shall not be subject to appeal or liable to be questioned in any court".

Whatever the type of surveillance relied upon, there is a duty on the prosecutor to review the authorisation and all supporting documentation. *R v GS* confirmed if the material does not weaken the prosecution case or strengthen the defence case, there is no requirement to disclose it. The usual principles and process apply.

For intrusive surveillance the prosecution should produce to the trial judge the Surveillance Commissioner's signed approval forms. It is good practice to tell the defence, in advance of the trial that the Surveillance Commissioner's approval has been obtained for the police activity that resulted in the evidence which is sought to be adduced, and that a copy of the approval will be provided to the trial judge. The alternative suggestion in *R v GS and Others* of a Chief Officer giving evidence is not recommended. Once it has been produced, defence counsel are not entitled to reopen the lawfulness of the authorisation as a means of, or as a route to, ventilating its admissibility (paragraph 35).

In relation to directed surveillance and human intelligence sources the prosecutor should only disclose to the defence a copy of the authorisation, redacted as necessary to remove any material to which PII applies, where it satisfies the disclosure test and/or the defence have indicated that the lawfulness of the authority or the conduct to which it relates is in issue. Such a challenge would be based on either served evidence or material disclosed by the prosecutor as potentially undermining or assisting, although *R v GS and Others* makes it clear that establishing that the surveillance was unlawfully conducted will rarely be sufficient to justify exclusion.

All such documentation must be dealt with in accordance with the guidance contained in Chapter 7, Chapter 8 and Chapter 9 of this manual.

Chapter 27

Dealing with Intercept Product

This chapter is to be updated when the Investigatory Powers Act 2016 is in force

The legislation regulating interception of communications is in part one, chapter one of the Regulation of Investigatory Powers Act 2000 (RIPA). Guidance on the application of the regime can be found in the Interception of Communications Code of Practice (ICC Code) (January 2016).

Certain provisions of RIPA are likely to be amended by the Investigatory Powers Act 2016 (IPA). At the time of writing, the relevant provisions of the IPA are yet to be commenced; this guidance should continue to be adhered to until such time as the IPA comes fully into force.

This chapter is concerned with lawfully obtained intercept under a warrant issued pursuant to section 5 of RIPA, which is to be reviewed for disclosure purposes by a crown prosecutor (generic term) in order to ensure a fair trial. (Note that interception may also be lawful under sections 3 and 4 of RIPA). Intercept material and its product does not constitute unused material for the purposes of the CPIA because it specifically excludes intercept product from its ambit (see, CPIA s3(7) and s 7A(9)). Intercept product should therefore be handled in accordance with part one, chapter one of RIPA and relevant guidance.

Communication includes telephonic (public and private), electronic and postal communication.

A person intercepts a communication in the course of its transmission by means of a telecommunications system if and only if, he modifies or interferes with the system, or its operation, monitors transmissions made by means of the system, or monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system so as to make some or all of the contents of the communications available, while being transmitted, to a person other than the sender or intended recipient of the communication.

An interception warrant can only be issued by the Secretary of State where it is necessary (a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; (c) for the purpose, in circumstances appearing to the Secretary of State to be relevant to the interests of national security, of safeguarding the economic well-being of the United Kingdom; or (d) for the purpose of any international mutual legal assistance agreement.

Prosecutors will usually encounter interception product where it has been obtained under grounds (a) or (b) above. The warrant may have been obtained by the National Crime Agency (NCA), HMRC or another agency. The raw product (post, voice or email data) may or may not any longer exist at the prosecution stage, as the intercepted material and any related communications data is required to be destroyed as soon as there are no longer any grounds for retaining it as necessary for any of the authorised purposes. The prosecutor should identify what material the

relevant agency holds; for example raw product, a copy of the product, monitors notes, notes created concerning the content, applications and authorisations etc. and examine it in accordance with this guidance.

Section 15 of RIPA and Part 6 of the ICC Code set out the obligations placed on the intercepting agencies in relation to the handling, destruction and copying of the product. Intercepted material should not be retained against a remote possibility that it might be relevant to future proceedings. The normal expectation is that the intercepted material will be destroyed in accordance with the safeguards in section 15. It is however important that material is retained if it has the capacity to undermine a potential future prosecution or assist the defence.

Each intercepting agency will interpret the obligations under section 15 in a different way, depending on their own statutory functions, and will have their own internal handling arrangements. Prosecutors should comply with the agreed handling arrangements of the relevant agency.

Prosecutors must keep secret matters related to warranted interception (s19 of RIPA). It is a criminal offence to make an unauthorised disclosure of material relating to warranted interception, as may failing to comply with the requirements of section 15, or the internal handling arrangements of interception agencies.

The ICC Code clearly envisages that much of the product will have been destroyed before revelation to the prosecutor becomes an issue. However, it is stressed that this will depend on the handling arrangements of the interception agency. Material, be it raw product, copies, etc will therefore only be available if a conscious decision has been made to retain it for an authorised purpose, i.e. the same purpose for which the warrant was issued (National security/ prevention or detection of crime) or retention was deemed necessary for prosecutorial review of all available material.

Material (product, copies, documents and/ information) resulting from an interception warrant which exists and which could affect the fairness of the trial will be brought to the attention of the prosecutor in accordance with internal referral criteria for the prosecution agency and/or Division. This process is known as a 'Preston briefing'.

The prosecutor should ascertain from the police (or other investigator and/or relevant third party, where applicable) whether 'Preston' material exists. This material should then be handled in accordance with guidance issued to areas in May 2016, and in the case of Central Casework Divisions any other guidance. This process is assisted by the relevant organisation and or listening personnel being provided with:

- a summary of how the prosecution puts its case;
- proposed charges, charges or an indictment; and where applicable
- a defence statement.

A note of all discussions should be kept, and should be retained in accordance with applicable guidance.

The prosecutor should make a note on the disclosure review sheet (DRS) that a conference has been held (describing the conference as one involving a sensitive

intelligence briefing), detailing who attended the conference and confirming that a note of the discussions is retained by the NCA (or other agency).

Where all material has been destroyed but an officer of the interception agency informs the prosecutor that he or she recalls that material existed which could have an impact on the fairness of the proceedings, the recollection should be treated as if it were a document, and if appropriate set out in a witness statement, and reviewed for the purposes of fairness.

Guidance has been issued by the Attorney General on the operation of sections 17 and 18 of RIPA.

Section 17 RIPA prohibits the use of intercept product as evidence. It is unlawful even to ask questions in court about the existence of intercept product. (Note exception in relation to intercept product initiated overseas and gathered overseas.) If asked whether interception has taken place a prosecutor should respond as follows:

> "*I am not in a position to answer that, but I am aware of the provisions of sections 17 and 18 of the Regulation of Investigatory Powers Act 2000 and the Attorney General's Guidelines on Disclosure of Information in Exceptional Circumstances under section 18*."

If, in the view of the prosecutor, to take no action in relation to interception product would render the proceedings unfair, for example that a jury could draw a wrong inference if not corrected, the prosecutor should take such steps as are available to him or her to secure the fairness of the proceedings, provided these steps do not contravene section 18(10). Such steps could include:

i. putting the prosecution case in such a way that the misleading inference is not drawn by the jury;
ii. not relying upon the evidence which makes the information relevant;
iii. discontinuing that part of the prosecution case in relation to which the protected information is relevant, by amending a charge or count on the indictment or offering no evidence on such a charge or count; or
iv. making an admission of fact as long as it would not contravene section 17 and reveal the existence of an interception warrant.

The fact of a warranted interception should not be revealed to the judge, unless the prosecutor has exhausted the options described above, in which case the prosecutor can invite the judge to direct disclosure to himself, but only '*where the exceptional circumstances of the case make the disclosure essential in the interests of justice'*.

Experience suggests that exceptional circumstances in the course of a trial justifying disclosure to the judge arise only where the judge's assistance is required to ensure the fairness of the trial, and where the judge requires knowledge of the protected material for some other purpose (see, paragraph 8 of the AG's Guidance).

Therefore, an admission can be made without the need to refer to the judge, where there are no exceptional circumstances, in order to ensure the fairness of the

proceeding, provided it would not contravene section 17 RIPA. Liaison with the intercepting agency should take place throughout. The agency can also assist with the drafting of any admission so as to ensure it does not offend against section 17.

Chapter 28

Operational Reviews

In major investigations, regular reviews are conducted which might identify flaws in the investigation to date. Operational reviews may take place following the arrest phase of an operation and/or at the conclusion of court proceedings. The purpose of review at the investigative stage is to identify ways in which the investigation can be progressed. The purpose of ex post facto reviews is to identify lessons that can be learnt to the benefit of future operations. Whenever a review is conducted, a discussion of the operational tactics deployed might reveal shortcomings in an investigation.

It is important that those participating in an operational review should feel able to express their views frankly. They may feel inhibited if their views or comments are to be subject to disclosure. Views/comments made by individual officers at an operational review would not ordinarily be disclosable, although facts that informed those views/comments might be if they satisfy the disclosure test (subject to PII).

It is difficult to provide prescriptive guidance on how disclosure issues should be addressed, however, the following general principles should be applied:

- a record made at an operational review in a case where a prosecution has resulted will almost invariably satisfy the CPIA Code of Practice's 'relevance' test and so fall to be considered for disclosure (even though it will rarely satisfy the disclosure test);
- where shortcomings in an investigation have been identified in an operational review, this would not be disclosable per se unless the identified shortcomings had the capability to undermine the prosecution case or assist the defence case;
- any such shortcomings will usually have generated some product which would satisfy the disclosure test. Disclosure of the product will ordinarily fulfil the prosecutor's disclosure obligations without recourse to disclosing the record of the operational review;
- where this is not the case, it may be possible to reveal investigative shortcomings by way of formal admission e.g. by conceding that a particular line of investigation which might have produced material of assistance to the defence was not followed; and
- where an operational review takes place after conviction and generates material that would satisfy the disclosure test (for instance, because it reveals reasonable lines of enquiry that were not pursued) this should be brought to the attention of the unit head or CCD specialist prosecutor.

Chapter 29

Large Scale Case Administration

Introduction

Large-scale cases create difficulties for the prosecutor in terms of the volume of both the evidence and unused material. Factors that contribute to difficulties may include the length of the investigation, the number of defendants, the number of witnesses, applying differential disclosure, dealing with material from joint or linked investigations, historical material and accessing or obtaining third party material, particularly from foreign jurisdictions.

Under the CPS regime for handling disclosure in serious and complex cases (which has been in place since 1 March 2013) a Prosecution Strategy Document and risk register are mandatory in all serious and complex cases. Prosecutors should refer to local guidelines when determining whether other mandatory documents should also be used. In Complex Casework Units and the Central Casework Divisions, responsibility for ensuring that the mandatory documentation is used where required lies with the Unit Head. Templates for the documents referred to in this section can be found on the disclosure pages of the CPS Casework Hub

Large-scale cases require project management techniques. Effective large-scale case management will demand discipline from investigator and prosecutor alike to ensure that plans, timescales, milestones and risk assessments are identified, adopted, and monitored. It is essential that effective quality assurance be conducted in large cases.

In applying the guidance in this chapter, investigators and prosecutors should be aware of the terms of the Lord Chief Justice's Protocol (the Protocol) on the handling of heavy fraud and other complex criminal cases and the Better Case Management flowchart for serious cases.

Early issues

Early contact between the reviewing prosecutor and the investigator and the early appointment of the prosecution advocate is vital in large-scale cases. Potential disclosure issues should be aired and actioned early and not left until all evidence is collected.

Where there is more than one investigating agency, multi-agency agreements (some local templates are available) can be used to record the strategy for the identification, retention, recording and revelation of material relevant to the investigation. The identification, role parameters and reporting channels of the lead disclosure officer and any deputy disclosure officer must be clearly established.

Investigators and prosecutors should consider whether all reasonable lines of enquiry have been pursued. Likely sources of evidence and unused material should be explored and decisions made as to how this material should be obtained. Where material is in possession of third parties, decisions will need to be made as to how to

access this material. Where the material is outside of the jurisdiction, a letter of request may be needed (see further guidance in Chapter 35). In large complex cases there needs to be early engagement between investigators, disclosure officers and prosecutors to set the strategy from the outset. Prosecutors and investigators should agree a disclosure strategy either within the PSD or as a standalone document.

In particular, the extent, disclosability and impact of sensitive material should be addressed from the very outset of a case. Where a third party has, or is believed to have, relevant sensitive material, contact should be made to ascertain the third party's stance on how the material may be inspected and handled.

The prosecutor, with the Unit Head, should consider whether his or her unit will require extra resources to adequately handle the case, and if so, seek senior management approval for additional assistance to be made available.

Better case management principles and the court in *R v R and Others* [2015] EWCA 1941 refer to the obligation on the prosecution to encourage dialogue and prompt engagement with the defence.

Systems and administration

The prosecutor must ensure that there is a comprehensive record of disclosure decisions recorded accurately, clearly and concisely on the Disclosure Record Sheet, along with a list of what has been disclosed to the defence, and when. An appropriately edited (for sensitive material) Disclosure Record Sheet might form the basis of a disclosure index to be served on the court and defence when proceedings reach trial if there are issues over what was served, and when.

It is particularly important in large-scale cases that systems are in place to:

- record the receipt of papers (and other material) and service of them on the court and defence;
- to record and action court orders or other deadlines and monitor compliance; and
- to deal with correspondence and to carry forward actions where a response cannot be made immediately.

It is essential that the file record shows what was sent, when, and to whom in respect of all evidence and unused material disclosed. In large-scale cases, it is particularly important that all successive schedule submissions follow on from the last in terms of consecutive numbering of individual items. Where this does not occur, the prosecutor should raise the matter at an early stage and ensure that the lead disclosure officer puts this system in place.

Where confiscation proceedings are in progress or envisaged, the lead disclosure officer must ensure that material gathered in the course of those investigations be incorporated into the appropriate schedule. Where it is apparent this has not occurred, the prosecutor should raise this with the disclosure officer and insist on

amended schedules. The prosecutor should ensure that copies of non-sensitive material are clearly and accurately indexed to the schedules.

Large-scale cases will often necessitate service of successive tranches of disclosure upon the defence, both when the disclosure duty is triggered under the CPIA and as part of the duty of continuing review. The use and disclosure of the disclosure management document will assist the defence and the court to understand the rationale for such an approach and reduce the risk of challenge.

The prosecutor should ensure that notes of conferences and actions arising therefrom are kept, action-dated and monitored to completion. A clear note should be made of all court orders and any other actions required. These should be action-dated and brought to the attention of all relevant parties promptly after each hearing.

The prosecutor must be alert to the risks of unused material being provided and not recorded at court, either by the prosecution advocate or by disclosure counsel. It is recognised that as issues arise in a trial, disclosure of unused material may have to be made but prosecution advocates should ensure that it is done methodically, and properly recorded on the schedules and record sheet. Instructions to the prosecution advocate and/or disclosure counsel should clearly set out what is expected in respect of the service of unused material and how this will be achieved. Where material is served at court, a record must be made on the Disclosure Record Sheet.

Court liaison

A clear disclosure strategy should assist the prosecution to secure and maintain the confidence of the court as to the proper discharge of its disclosure obligations for non-sensitive material. The prosecution should, at the point of primary disclosure, provide to the defence and court a summary of the disclosure processes adopted, including a clear description of, and rationale for, the parameters employed in the identification of undermining or assisting material. It is essential that the content of this Disclosure Management Document properly reflects the needs of each individual case.

At the outset the judge will set a timetable for dealing with disclosure issues, including a date by which all defence applications for specific disclosure must be made. The defence should provide a specific, manageable and realistic list of the documents they are interested in and from what source. The prosecution should only disclose those documents meeting the disclosure test.

If the bona fides of the investigation are called into question, consideration should be given to calling the officer in charge of the case to the early case management hearing to give evidence on oath covering the contents of the disclosure schedules.

Thorough, well prepared case management hearings will save court time and costs overall and a trial date should be sought at that stage.

Handover procedures

During the life of a case there may be successive investigators, disclosure officers, prosecutors and advocates. Incoming personnel should have the opportunity to acquaint themselves with the papers prior to any discussion and handover, in order that they can make sensible decisions regarding disclosure with a firm grasp of the essence of the case. A full record of the details of all handovers must be kept with the case papers or recorded on the file.

Disclosure Counsel

General guidance

Best practice dictates that generally it should be the lawyer in a case who examines and makes decisions on unused material. However, in large cases it may be appropriate to instruct counsel to carry out this task (or a proportion of it) either alone or in conjunction with the lawyer in the case. Counsel is instructed to advise the prosecutor and may be instructed to endorse the schedules as to his assessment of disclosure decisions.

Such a decision will usually be taken where the volume or complexity of the material is such that it is inappropriate or impractical for the prosecutor to carry out the task or where time constraints render it so. In addition, such a course may be considered where counsel has a particular degree of expertise, for example because of the specialised nature of the material or because of knowledge of a linked case.

In appropriate cases, a decision to appoint disclosure counsel may be made at the outset of a case with a view not only to assessing unused material but also deciding which items should constitute the evidence relied upon. Counsel instructed may be the junior for the whole case or may be instructed solely to deal with the question of disclosure. Irrespective of this, in complex cases, they should be instructed for the duration of the case. Exceptionally large cases may require a team of disclosure counsel.

Case management

Whatever role or responsibility is given to disclosure counsel, the ultimate responsibility for all aspects of the case remains with the reviewing prosecutor. It is essential to set out clearly in instructions:

- the parameters of disclosure counsel's role;
- the tasks;
- the level of autonomy;
- the type of decisions that counsel can take;
- the type of decisions that have to be referred to the reviewing prosecutor; and
- the role of disclosure counsel in any subsequent trial.

The rationale for the appointment, the extent of the appointment and the scope of counsel's duties should be recorded in counsel's brief and agreed with trial counsel.

Standard instructions on disclosure can be found on the CPS Casework Hub. A copy of the disclosure management document should also accompany the brief.

Selection of Counsel

Only suitably experienced, competent and capable counsel should be appointed who are familiar with the CPIA, its Code of Practice, the AG's Guidelines, and this manual.

Counsel should be instructed in writing, although in many cases it would be beneficial to reinforce those instructions in a conference. CPS guidance on very high cost cases provides assistance on the instruction of counsel.

A conference will be a good opportunity to introduce counsel to the SIO and disclosure officer, with whom counsel will have to liaise. Instructions should refer counsel specifically to the CPIA, Code of Practice, the Guidelines and this manual.

Written advice on disclosure will be required (if necessary adopting and incorporating the endorsed schedules) and arrangements should be made for interim progress reports from counsel, orally or in writing, and at such intervals as the reviewing prosecutor considers appropriate.

Counsel should be instructed to maintain a full, written audit trail of the work he or she has carried out. Instructions should also make clear the responsibility of trial or disclosure counsel to keep the Disclosure Record Sheet updated during the trial.

It should be made clear in the instructions that counsel will be expected to be disclosure counsel in any forthcoming trial. In the normal course it would be very exceptional reasons that would prevent counsel's attendance at the trial, and accordingly counsel should make the necessary arrangements to make himself or herself available as early as possible.

Chapter 30

Digital Material

Guidance

The guidance in this chapter is intended to supplement the principles established within the 'Attorney General's Guidance on Disclosure: Supplementary Guidelines on Digitally Stored Material', which appears as an annex to the Attorney General's Guidelines on Disclosure 2013. It is essential that prosecutors understand and adhere to these guidelines, as well as the Code of Practice to the CPIA and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, December 2013 ('the Protocol').

Search and seizure of digital items

It is important for the prosecutor to have early discussions with investigators about the digital strategy to be adopted. This should, where possible, include a discussion as to which digital devices should be seized during the course of an investigation. It is essential for the prosecutor to ascertain which, if any, devices have been seized, where from, to whom they are attributed and an indication of the amount of data held. This basic information is required in order to develop the strategy of how devices are to be analysed for disclosure.

Investigators should be expected to have considered disclosure from the earliest opportunity. Digital disclosure is a time consuming and complex exercise, and unless completed at an early stage, it may not be possible for a prosecutor to be satisfied that the disclosure exercise can be completed properly and thoroughly in advance of trial. Unless the digital disclosure process is at a well advanced stage prior to a charging decision, there may be insufficient time between charge and trial for the exercise to be properly completed. This should be possible unless the prosecution is as a result of a reactive investigation.

The complexity of digital disclosure is such that it may be necessary for additional resources to be applied by investigators. Specialist software may need to be sourced and additionally resourced to assist in the disclosure exercise. Any concerns over the amount of resources being applied to resourcing disclosure by investigators should be escalated.

The Police and Criminal Evidence Act 1984 (PACE) provides powers to seize and retain anything for which the search has been authorised, other than items attracting legal professional privilege. In addition, there is a general power to seize anything which is on the premises if there are reasonable grounds to believe that it has been obtained in the commission of an offence, or that it is evidence which must be seized to prevent it being concealed, lost, altered or destroyed. There is another related power to require information which is stored in any electronic form accessible from the premises to be produced in a form in which it can be taken away, and in which it is visible and legible or from which it can readily be produced in a visible and legible form.

An image (a forensically sound copy) of the digital material may be taken at the location of the search. The seizure of computers may have a detrimental effect on the ability of a business to operate, and great care must be exercised. Where the investigator makes an image of the digital material at the location, the original need not be seized. Alternatively, when originals are taken, investigators must be prepared to copy or image the material for the owners when reasonably practicable in accordance with PACE 1984 Code B 7.17.

Where it is not possible, or reasonably practicable, to image the computer or hard drive, it will need to be removed from the location or premises for examination elsewhere. This allows the investigator to seize and sift material for the purpose of identifying that which meets the tests for retention in accordance with PACE.

Reasonable lines of enquiry

What amounts to a reasonable line of enquiry will depend on the circumstances of each case. A thinking approach is crucial; consideration must be given to what is reasonable and proportionate in every case. This will often include the obtaining and analysis of communication evidence, whether it originates from devices or social media accounts belonging to the complainant or the suspect or, in some cases, to third parties. Prosecutors should be alert to the often critical importance of such evidence and, where such reasonable lines of inquiry have not been undertaken, should provide appropriate advice to the police to pursue them.

Prosecutors should refer to the Disclosure - Guidelines on Communication Evidence.

Prosecutors should work closely with investigators, disclosure officers and computer forensic experts to ensure all reasonable lines of enquiry are followed and that digital material is properly assessed for relevance, revelation and disclosure.

Transparency of the approach that has been taken in every case is of paramount importance. The prosecution should encourage early dialogue with the defence as to what has been considered reasonable in the particular circumstances of each case.

Identifying relevant material

Digital material is likely to be extensive. There will be a considerable amount of data held on a digital device which may not be 'relevant'. The disclosure officer/investigator may search by key words, sample or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers. The purpose of applying such techniques is in order to identify the relevant material on each device. Where key word searches are applied, these should be agreed with the investigator/disclosure officer and be designed to capture not only evidential material but also material likely to pass the test for relevance. Too general search terms or too many search terms may generate a large number of hits, containing much material which may not be relevant and which may complicate the disclosure exercise. It is essential that search terms are selected with care, are not too generic and are targeted.

It is never appropriate to adopt an approach which simply supplies images of digital devices to the defence for the defence to conduct their own disclosure exercise even if on occasion a copy of the device needs to be supplied. Consideration should always be given to file structure and metadata of documents, as well as specific content.

Where a large number of hits have been generated, it will be necessary for the disclosure officer to consider these and decide whether or not the material is relevant material. A scoping assessment may be conducted to establish whether the search terms or other techniques have indeed been successful in capturing the relevant material. This could lead to the application of additional search terms or other techniques to strip out material which is not relevant and identify further material which is relevant.

Generally, once the material deemed to be relevant has been identified, all such material will be scheduled. There may however be exceptional situations where the amount of relevant material identified remains vast, so it may be necessary to apply additional techniques such as dip sampling. The court requires a carefully considered and intelligent approach to be adopted. Where dip sampling is used, it may yield more accurate results if concentrated over particular time periods or types of hit. Dip sampling, if used, must be conducted in a manner which is statistically robust and capable of repetition.

Documentation

The disclosure officer should keep a record or log of all digital material seized or imaged and subsequently retained as relevant to the investigation. Such a log should be shared with the prosecutor to ensure they are aware of the nature and extent of digital material in the case, from where it was seized, and what has been done with it.

In cases involving very large quantities of data, where the person in charge of the investigation has developed a strategy setting out how the material should be analysed or searched to identify categories of data, a record should be made of the strategy and the analytical techniques used to search the data. The record should include details of the person who has carried out the process, and the date and time it was carried out. In such cases, the strategy should record the reasons why certain categories have been searched for (such as names, companies, dates etc).

In every case, it is important that any searching or analytical processing of digital material, as well as the data identified by that process, is properly recorded. So far as practicable, what is required is a record of the terms of the searches or processing that has been carried out. This means that in principle the following details may be recorded:

- a record of all searches carried out, including the date of each search and the person(s) who conducted it;
- a record of all search words or terms used on each search. Where it is impracticable to record each word or terms (such as where Boolean searches

or search strings or conceptual searches are used) it will usually be sufficient to record each broad category of search;
- a log of the key judgements made while refining the search strategy in the light of what is found, or deciding not to carry out further searches; and,
- where material relating to a 'hit' is not examined, the decision not to examine should be explained in the record of examination or in a statement.

Scheduling

The disclosure officer should ensure that scheduling of relevant material is carried out in accordance with the principles outlined in this manual. In some enquiries, it may not be practicable to list each item of material separately. If so, these may be listed in a block and described by quantity and generic title. Block listing needs to be applied sensibly and with logic to the type of material concerned. Even if the material is listed in a block, the search terms used and any items of material which might satisfy the disclosure test are required to be listed and described separately. In practical terms this will mean, where appropriate, cross referencing the schedules to the Disclosure Management Document.

Defence engagement

It is essential that efforts are made to engage with the defence with regards to digital disclosure in order to seek their views on the approach adopted, the search terms to be applied and to suggest additional search terms or other techniques to be used to identify material which could fall to be disclosed. If practicable, the defence can be approached for suggested search terms at a very early stage pre-charge. The prosecution must be transparent with the defence and the courts about how the prosecution has approached complying with its disclosure obligations in the context of the individual case. A Disclosure Management Document should be provided as part of initial disclosure, setting out what the prosecution has done in relation to digital disclosure and anything on-going.

The Attorney General's Guidelines, the Judicial Protocol on unused material and the ruling of the Court of Appeal in the case of *R v R and Others* [2015] EWCA Crim 1941clearly envisage that the defence should provide early and meaningful engagement. The defence is expected to play their part in defining the real issues in the case and this should be addressed in the DMD. The defence should be invited to supply a list of its own search terms which the disclosure officer may then consider applying. Discussion with the defence should be held to ensure these are clear and realistic. Assistance can be sought from the court to assist in the management of the issue. The final decision as to which search terms to apply rests with the disclosure officer.

A defence statement is an essential tool in case managing issues of digital disclosure. The defence should be reminded of their obligations to supply one, setting out in detail the nature of the defence, what the issues in the case are and why the defence challenge these issues. A defence statement which fails to identify the issues should be rejected and a further defence statement should be sought. Failures of the defence to comply must be reported to the court.

It may be necessary to apply search terms and conduct analysis of digital items on more than one occasion.

Legal professional privilege

The prosecutor should be aware that digital material may include material which is subject to legal professional privilege (LPP). If such material is seized, the investigator must arrange for it to be isolated from other seized material and any other investigation material in the possession of the investigating authority. Consideration should be given to having independent counsel present during a search.

Where material potentially subject to LPP is thought to be on a device, analysis of file structures and search terms can be applied to identify the material likely to be LPP. The defence should be invited to engage to assist in the process. Material which responds to the search terms or other techniques and which may be subject to LPP can then be referred to independent counsel.

Retention of seized material

Where material is seized under the powers conferred by PACE, the duty to retain it under the CPIA Code of Practice is subject to the provisions on retention under PACE s22. Material seized under sections 50 and 51 of the Criminal Justice and Police Act 2001 may be retained or returned in accordance with sections 53-58 of that Act. Under section 22 of PACE, an image of the digital device can be made and the device itself returned. However, care needs to be taken to ensure the device is returned to its correct owner and that doing so would not enable further offences to be committed.

Considerable caution needs to be exercised before digital devices which have not been imaged are returned. Prosecutors should liaise with investigators before the return of any such item to ensure a proper assessment of the relevance of the content of any such device has been conducted prior to its return. This may not be possible in many cases without an image having been taken and a proper digital analysis being conducted. Material which has been deemed not relevant may become relevant at a later date. Problems may occur where the data held on the returned device has changed.

Engagement with the court

The Disclosure Management Document should be shared with the defence and the court at the earliest opportunity and the judge should be asked to approve the approach. Any issues should be raised with the court at an early stage, and if necessary the judge should be invited to make further orders to ensure the efficient management of the digital disclosure exercise.

The duty of the court to actively manage the case is established by rule 3.2 of the Criminal Procedure Rules. See also paragraphs 39 and 56 of the Judicial Protocol.

Copying disclosable material

When dealing with large quantities of digital product satisfying the disclosure test, care must be taken not to inadvertently disclose confidential or sensitive material to the defence.

Where the disclosure officer or investigator have concerns about differential disclosure of confidential information between co-accused, they should bring these concerns to the attention of the prosecutor. The prosecutor should seek agreement with the defence, and where appropriate the court, as to how disclosure may be made.

It may be appropriate to ask owners of data if any breach of confidentiality will occur should the data be disclosed to any accused.

Chapter 31

Cases Using Holmes2

Introduction

The Home Office Large Major Enquiry System (Holmes2) is a computer database that has been designed to aid the investigation into large-scale enquiries. It can be used by the police to collate and subsequently cross reference all information gathered in a major investigation.

The system is based on a server and allows a number of users to input, update and access information at the same time. All police forces in the United Kingdom have their own Holmes2 server and they have the ability to link incidents to share information or conduct a joint investigation, although not all forces use it for all major crime.

Holmes2 has been created so that it can cater for investigations of varying size and complexity. The roles performed by staff will therefore vary, and on smaller investigations people may undertake more than one role (whereas on a very large enquiry, a team of people may be needed for the same function).

All information will be recorded and entered into the incident room as source documentation. Staff will assess this information and decide on what action should be taken in line with the officer in charge of investigation's policy. Staff will also assess what information should be cross-referenced and indexed so that it can be easily researched and retrieved.

Holmes2 has a number of indices, management tools, document storage, search tools and a customised disclosure facility. The same principles apply to disclosure as in any other case. Once the disclosure officer has made an assessment of sensitive and non-sensitive items and whether they meet the disclosure test, Holmes2 can automatically list and generate the items onto the relevant schedules.

It is inappropriate to allow the defence direct access to Holmes2 because of its ability to cross-reference sensitive and non-sensitive material.

Disclosure officers

The disclosure officer will be an integral part of the Major Incident Team and the individual appointed must have completed training in disclosure and the specific Holmes2 disclosure facility. The officer in charge of investigation must provide support and supervision and ensure that the disclosure officer has sufficient skills and authority commensurate with the complexity of the investigation to discharge their functions effectively, using Holmes2.

By their nature, Holmes2 enquiries are likely to generate a vast amount of documentation. A disclosure officer should be appointed at the beginning of the enquiry so that they are aware of all aspects of the case and can start to assess the material.

The disclosure officer and Holmes2 documents

The Holmes2 disclosure facility has been designed so that the disclosure officer will have to consider all source material for disclosure purposes. The source material is registered with a unique identifier that shows the document type and each item will have a number that is unique to that material type. For example actions will be numbered A1, A2, whereas interview records will be recorded as Y1, Y2 etc. The unique letter used for each document type is shown in brackets:

- Actions (A)
- Electronic Transmissions (T)
- Exhibits (X)
- House to house (H)
- Interviews (Y)
- Messages (M)
- Other Documents (D)
- Officers' Reports (R)
- Personal Descriptive Forms (P)
- Questionnaires (Q)
- Statements (S)
- Intelligence Reports (Z).

The printed schedules produced from the system will show each item with its unique reference number. The computer cannot number items consecutively. The pages will be numbered consecutively and the schedule will be date and time stamped.

The indices are a working tool of the investigation and contain information drawn from the source documentation. Indices do not have to be considered for disclosure because they have no independent significance or bearing on the case. All information entered onto an index must, therefore be sourced to a document. The indices are: categories; location; nominal; sequence of events; telephone, and vehicle. The index records will contain cross-references from a mixture of non-sensitive and sensitive records and there is no facility to edit the index records on screen.

Submission

The disclosure officer should aim to submit the schedules with the file, but in a major enquiry this may not be possible due to the volume of unused material. The arrest and post charge stage of the investigation may raise new lines of enquiry as a result of the interviews, forensic possibilities, telephone examinations, etc.

The prosecutor should be informed of the volume of unused material and this should be revealed in phases within agreed time scales. It is important to enter a dialogue with the prosecutor and explain the nature and extent of any problem as it arises, to reach an agreement, and keep each other fully informed.

Holmes2 facilitates the phased approach and will record all actions raised, together with how they were completed. Unused material that is ready at the approach of the initial disclosure time limit will be served as phase one. The disclosure officer should

update the 'phase' field to ensure that any additional material will automatically be served to the prosecutor in the next phase. The prosecutor will receive the schedules of unused material as well as the total number of records and how many can be supplied by the first time limit. Thereafter, a time-scale for the delivery of phase two and three should be agreed.

Disclosure officers should use the 'search and count' facility to inform the prosecutor of the total number of records that are being dealt with, how many have already been assessed in phase one, and how many are still outstanding. They should emphasise that the arrest of the suspect has in itself generated new actions and other material that has not yet been completed.

Assessing the material

The disclosure officer should refer to the earlier chapters of this manual for detailed guidance on how to schedule items of material. Holmes2 requires the user to select from the following options:

- Non-sensitive
- Sensitive can be edited
- Sensitive
- Highly sensitive.

This material is recorded automatically onto the relevant MG6C or D.

Much routine material has small parts that are sensitive. Routine editing of personal details should be carried out in the normal way. Where any editing is not routine, decisions about editing documents should only be made after consultation between the disclosure officer and the prosecutor. The disclosure officer should consider using the note facility for this purpose. Where the intention is to edit paragraphs or passages containing sensitive material other than personal details from a report etc, the disclosure officer should consider placing this material on both schedules.

When instructed to do so, Holmes2 removes highly sensitive material from all schedules. A separate highly sensitive schedule will need to be created (following Chapter 9) by the disclosure officer. Holmes2 has the functionality to allow for the creation of a highly sensitive schedule, which remains under the control of the disclosure officer (or deputy).

Selecting any of the above sensitive options on the window invokes one or more of the PII examples in paragraph 6.12 of the CPIA Code of Practice.

The MG6E

Holmes2 is automated so that if the disclosure officer selects any of the options in 7.3 of the Code of Practice, a field will appear to be completed to explain why this material meets the disclosure test and needs to be brought to the attention of the prosecutor.

Record of first description – this no longer needs to be routinely revealed to the prosecutor on the MG6E because numerous descriptions are entirely consistent with later ones and therefore do not satisfy the disclosure test. However, these will usually form part of the prosecution case if admissible e.g. as a previous consistent statement by the identifying witness. Where not consistent, records of first description will satisfy the disclosure test and should be revealed to the prosecutor. Unless the disclosure officer is sure that it is not the first record, he or she should treat all descriptions as if they are. Descriptions of suspects are likely to be recorded on:

- rough paper at the scene;
- pocketbooks;
- crime reports;
- MIR messages;
- statements;
- command and control incidents.

The description itself could be scheduled as non-sensitive, part sensitive, sensitive or highly sensitive.

Information provided by the accused – In the majority of cases, the information provided by the accused will be evidence, as it will normally consist of the accused's interview records, or conversations made on arrest, or in transit. There may be numerous relevant interviews that do not form part of the evidence but if relevant unused material they will be scheduled and handled in the usual way.

Material casting doubt on the reliability of a confession - This category covers any material that tends to show that the confession may be unreliable. Examples may include psychiatric reports, forensic or pathology that is inconsistent with the confession and material suggesting there have been breaches of PACE.

Material casting doubt on the credibility and reliability of a witness - This category covers any material that is detrimental to the witness, such as witnesses' previous convictions or rewards. If a witness has received or sought a reward, either directly or indirectly, this might satisfy the disclosure test and should be brought to the attention of the prosecutor via the MG6E.

The disclosure officer should be objective and fair and think from the defence point of view. It does not have to be a case breaking point: the defence may want to put small pieces of evidence together that might place doubt in the jury's mind.

It is advisable to start the scheduling process as soon as the enquiry commences, to cope with the large volume of material generated.

Holmes2 is used in many enquiries where the identity of the offender is not known. It may be impossible to make a definite decision as to whether some material may satisfy the disclosure test or not in the early stages. In particular, information reports naming the person responsible may or may not be accurate. It is not uncommon to have a number of information reports each naming different suspects for the same offence. In this situation, the disclosure officer should describe the material, show its

location and sensitivity, and apply any notes, before selecting the 'requires re-assessment' option. This will record the initial assessment but it will not move the record through to the next queue state, instead it will remain as 'ready for assessment'. Once the identity of the offender is known, the disclosure officer should be in a position to re-assess this material by conducting a search to retrieve all material dealt with in this way.

Block entries

In some enquiries, it may not be practicable to list each item of material separately as there may be many items of a similar or repetitive nature. These may be listed in block and described by quantity and generic title. The disclosure officer should be aware of block entries from the beginning so that material can be added to a block until they are ready to be printed. These copy documents can be grouped together as they will be scheduled as exhibits in their own right. Clearly the facility can be used to group actions, documents together etc. but the system cannot create a group of mixed documents, e.g. actions *and* documents.

It is important to remember that nothing should be added to a block entry once it has been submitted on a schedule. If additional material comes to notice, the disclosure officer should start a new block entry and submit this via another phase. Disclosure officers need to ensure that they use this facility properly and only group together material that would have no added value if scheduled individually. Material that satisfies the disclosure test should be scheduled individually.

Block entries should be used for all material types. If the disclosure officer is not sure whether it would be appropriate to create a particular block for a case they should speak to the prosecutor and explain how they propose to describe certain material.

There are many examples of block entries, such as:

- 2487 actions raised to obtain DNA swabs from individuals where in each case the swabs were taken and submitted to the FSS for analysis;
- 267 actions raised to obtain statements from people seen on Operation X. In each case the action result is recorded as statement and Personal Descriptive Form taken. No other information given. Each of the documents taken have been considered for disclosure and listed on the appropriate schedules;
- Examples might include, where a car is seen near to the murder scene and a partial registration number is taken, a VODS check may generate 400 actions. These actions may eventually be written off if the user of the vehicle is traced and eliminated or in a hi-jacking case where boarding cards have been created as other document or PNC print outs of vehicles parked in vicinity of scene. Print outs obtained and submitted into incident room as OD's Exhibits are listed and scheduled in their own right. There is no need to list copy exhibits that have been created as other documents on the schedule as well. Eventually, blocks may be assessed as not relevant, removing it from the schedule and leaving just that which is relevant.

The disclosure officer should consider liaising with the prosecutor who should advise whether they would prefer each action raised to obtain itemised billings listed individually or created as a block.

House-to-house material

House-to-house material is the only document type where the unique reference number is not generated by the system. The officer in charge of investigation for each incident has to decide whether the house-to-house material will be registered onto the Holmes2 system. Either the disclosure officer or a deputy should examine each item of material and any that satisfy the disclosure test should be scheduled individually. The remaining material can normally be submitted as a block entry and should be described so that it is clear where the house to house has taken place.

Correspondence with the CPS

Correspondence or advice between the CPS and the police should not ordinarily be listed on either schedule.

Linked incidents

There may be a number of forces involved, and it is recommended that each lead investigator sign a disclosure agreement between investigators to establish the lead investigator and disclosure roles. Where local templates are available, they should be used.

Consideration of the defence statement and continuing review

By their nature, many Holmes2 investigations will cover a vast amount of material and therefore the initial schedules are likely to be large, and may run into a number of volumes. In view of this, once a defence statement is served, Holmes2 will generate a new MG6C and MG6D of only the material that has been identified by the disclosure officer as satisfying the test for disclosure (once the disclosure officer has assessed the unused material again). The MG6E in response to the defence statement will refer to these mini-schedules.

Chapter 32

Co-ordination of Disclosure Issues involving Multiple Police Force and Multiple Agency Investigations Within the UK

Introduction

Where enquiries reveal the existence of a separate but linked investigation(s) conducted by another force or agency, a formal agreement between the forces/agencies concerned should set out their respective roles and responsibilities.

Investigations may be linked by, for example:

- the suspect(s) being the same;
- surveillance by different agencies uncovering related suspects;
- suspects becoming related after the commencement of an investigation by virtue of being accessories or accomplices; or
- where one investigating agency supplies assistance or information to another investigating agency.

This guidance provides for two types of agreement:

- an NCA operational memorandum of understanding (OMOU) where investigators wish to establish a long term case relationship; and
- a disclosure agreement document (the 'disclosure agreement') for cases involving other investigators and where more limited assistance is provided in an NCA case.

The operational memorandum of understanding (OMOU)

The purpose of such an agreement is to agree the strategic and tactical objectives of the operation, and the roles and responsibilities of the parties, including those relating to disclosure so that each party is aware of its specific responsibilities.

In an NCA operation, the prosecutor should be notified and a copy provided at the earliest opportunity. The prosecuting agency should be made aware of any changes to the document as they are made.

Prosecutors

The prosecutor should be fully engaged in the disclosure process from an early stage. Where relevant, respective agencies' prosecutors should have regard to the Prosecutors' Convention in order to coordinate revelation and disclosure, and consider inter alia how to co-ordinate related prosecutions, lead prosecution responsibility, timing of proceedings, mechanisms for sharing information and other disclosure issues.

Linked investigations

When a link between different investigations is discovered, the respective officers in charge of the investigation should discuss the nature and extent of the link to assess whether the used and unused evidence of one investigation might impact directly upon or be relevant to the other investigation.

Coordination of disclosure issues should be evidenced within the disclosure agreement, together with the nature and extent of any future relationship. The extent of the link and the subsequent relationship desired will vary.

Police investigations can cross force boundaries, or a National Crime Agency enquiry may lead to the adoption of a local force's investigation. Where the NCA is involved, an OMOU should be agreed.

Each force is bound by the CPIA Code of Practice and the AG Guidelines and has duties to record and retain relevant information and material and reveal relevant material to the prosecutor. The officer in charge of the investigation in each agency should appoint the disclosure officer and decide the number and location of deputy disclosure officers, bearing in mind the volume and the geographical location of the material. This should be recorded and the agreement should be kept updated by the respective officers in charge.

The lead disclosure officer is responsible for:

- overall disclosure strategy (and should involve the prosecutor at the earliest possible opportunity) and being the central point of contact;
- assessing the disclosure implications of any other linked investigations, and;
- facilitating the free flow of information between investigators, paying particular attention to areas, which may satisfy the disclosure test. To assist this process, a disclosure conference with all the deputy disclosure officers is recommended. This should be followed by regular briefings.

Investigators should prepare a summary of the main points for each offence to assist the disclosure officers. Regular meetings of the disclosure officers on each enquiry should support this process and they should attend the joint briefings and all conferences, as necessary, to keep fully abreast of developments. Disclosure officers have a continuing duty to assess material generated by the investigation and during the course of the trial.

In particularly sensitive enquiries, it may be necessary to appoint deputy disclosure officers for different topics, for example, one disclosure officer for the main investigation and another for the highly sensitive material. These officers must work closely together and be aware of all aspects of the case.

Obtaining material from government departments

The Guidelines make it clear that where it appears to an investigator that another government department or agency may have relevant material, they must take reasonable steps to identify and consider it.

Under the Act and the Guidelines, government agencies, departments or Crown Servants are normally considered third parties in relation to an investigation carried out by a different investigative agency. One government agency cannot be deemed to be in constructive possession of material held by another government agency (see Guideline 48). However, unlike other third parties, such agencies or departments have a public law duty to cooperate with a criminal investigation. Moreover the Human Rights Act 1998 makes it unlawful for public authorities to act in a way that is incompatible with a convention right, which includes the right to a fair trial guaranteed by Article 6.

In some circumstances, there may be a statutory prohibition in relation to disclosure of information to those outside the department and it will be necessary to gain access through that department or agency's statutory gateway to allow the disclosure of information.

Where there are parallel or linked investigations between agencies, both agencies may be investigators under the CPIA with the resulting duties to record and retain. However, the fact that one agency may have simply been tasked to assist another investigating agency may not of itself be enough to make it an 'investigator', with the related duties to record and retain. Whilst it will always be a matter of fact and degree, the status of any tasked agency should be agreed at the earliest possible opportunity and recorded in the OMOU or disclosure agreement as appropriate to avoid potential confusion and uncertainty.

For the procedure for obtaining highly sensitive material gathered and/or generated by the security and intelligence agencies, see the relevant restricted chapters.

Security

Any issues in relation to the handling of sensitive material and/or its security should be set out within the OMOU or formal agreement, as information will not be shared unless the appropriate level of individual clearance is observed and secure storage is available. In relation to the security of the material itself, each department or agency will have security advisors. Material should always be dealt with according to its security classification.

Sensitive material and PII hearings

Material may be considered sensitive or highly sensitive by one agency but that view may not be shared by another agency. It is important that there is clear communication about such matters and if necessary, areas of dispute are escalated as appropriate.

The prosecutor should consider the possible need for a PII application at the earliest stage and record their views in line with Chapter 13 of this manual. The views of the owner of the material, if they are a separate agency, should also be sought and the owner should be given the opportunity to make representations to the prosecutor prior to the hearing and be separately represented at, and/or attend the hearing.

Where another agency or department wishes to have its own representation at court, the prosecution advocate should assist where possible by setting out the agency's interest in the case to the judge.

All investigators and prosecutors should refer to guidance on PII applications, scheduling and CHIS issues in this manual.

Flagging

A number of law enforcement agencies adhere to a system of flagging for subjects under investigation and provide checks against their data on behalf of other law enforcement agencies. The principle of flagging is that if an investigator has an interest in an individual, through investigating an offence or commencing an investigation or proactive operation, they will register that interest by a documentary application. A flagging request document is used to register an individual, address or other unique searchable data, and the flag refers to the ability of the database to identify checks subsequently conducted on the subject.

The investigator with a flagged registered investigation is responsible for handling all the disclosure issues connected with the flagging application document and for the supporting intelligence used to justify and support registration, both initially and when the flag falls for renewal (every three months). All disclosure issues flowing from the use of a flag must be handled in accordance with the instructions in this manual.

When a check is done, therefore, it may reveal the interest of another agency. If a check is conducted against a flagged individual in any agency, that agency will inform the flag holder that another agency has an interest. (The flag holding agency does not, under normal circumstances, notify the 'enquirer' of the other organisation's interest. However, they may arbitrate or facilitate cross flow of information.)

A number of law enforcement agencies protect the dissemination of the material with a disclosure caveat. This requires that the flag holding agency be informed of any subsequent prosecution after which they will then be responsible for handling any disclosure issues relating to the disseminated material.

Whilst use of the flagging system is encouraged, it is not mandatory. For various reasons, a check cannot provide a conclusive record of subjects under investigation. A negative check against a flagged individual should not therefore preclude other reasonable lines of enquiry.

Disclosure in Missing trader/carousel fraud cases

For guidance on disclosure in Missing Trader Intra Community (MTIC) cases, prosecutors should refer to guidance issued in 2012, which replaced all previous guidance. It can be accessed on from the 'Disclosure' pages of the CPS Casework Hub.

There is also a typology on MTIC cases produced by CPS Specialist Fraud Division, which contains further general guidance, which can be accessed from the same location.

Chapter 33

Access to and Handling Highly Sensitive Third Party Material

Introduction

This chapter provides guidance to investigators and prosecutors who have to deal with sensitive material generated by, or in possession of, the security and intelligence agencies (the agencies). The agencies are third parties under the CPIA. They are not deemed to be 'investigators'.

Local arrangements are in place for counter terrorism cases.

Initial contact with the agencies

Where the officer in charge of the investigation has reason to believe that an Agency has material that is potentially relevant to an investigation, he or she should ask the disclosure officer to make contact with the Agency concerned, asking them to retain the material. The disclosure officer should then contact the prosecutor to inform him or her that the Agency may have material in its possession that may need to be inspected. The prosecutor should make contact with the agency using the contact point to arrange to inspect the material.

Where the agencies believe that they have information (including documents), which may be relevant to the investigation or prosecution of a criminal offence, or to the defence, they have a general professional duty to draw this fact to the attention of the investigator or prosecutor. Furthermore, the agencies have a duty to support the administration of justice by ensuring that investigators and prosecutors are given full and proper assistance in their search for relevant material.

The agencies have enquiry points who will ensure requests for information are processed. Even where an individual within the agency has contacted the investigator or prosecutor directly, a request for information to the enquiry point should be made. If it is not clear which agency or department is responsible for the information, full details of the request should be addressed to the enquiry point of the Government Legal Department.

Requests for information should be as precisely drawn as possible, particularly where specific documents or facts are being sought. Where available and applicable, requests for information should include:

- the reasons for believing that the agency or department has documents or other information relevant to the investigation, prosecution or the defence;
- the broad subject matter of the request;
- the particular matters or issues relevant to the request;
- the time period covered by the request;
- the names, aliases nationalities and dates of birth of all persons;
- the name of any companies, organisations or any part of same;

- details of any geographical information or limitations of the request (many departments have different sections to deal with different geographical regions);
- the issue the information being sought is intended to test and the likely lines of defence on the issue; and
- time-limits for responding to the request.

In all cases, requests should provide as much information as is practicable. If there is information that may be relevant, or would help focus the searches to be carried out, that information should be provided. If the request contains sensitive information, the nature and degree of sensitivity should be stated to enable appropriate security measures to be taken.

Even where all the details described above are supplied, difficulties may still arise in identifying the information required. This may happen, for example, where responsibility for the information covered by the request is spread between several different departments. In these circumstances, the person responsible for dealing with the disclosure issue within the department may seek further details or suggest a meeting. It may be necessary for a more limited search for information to be carried out than that required by the terms of the request. In this case, the parameters of the search, and the reasons why a fuller search is not practicable, should be explained in writing to the person requesting the information.

There may be circumstances where it will not be appropriate to reveal to the officer in charge of the case the nature of the material the prosecution has been told about. However, the best practice is that the officer in charge of the investigation should be fully informed wherever possible. The officer in charge of the investigation has a right to be present (or represented) during any consultation on evidential matters between the prosecutor and the third party. Where the sensitivity of material leads to a request for the OIC to be excluded, the presence of another appropriately security cleared senior officer should be considered.

Initial CPS actions

Where a prosecutor has reason to believe that an agency may possess relevant material, that lawyer should discuss the issue with a prosecutor at level E or above. The senior prosecutor should provide guidance for how and when the prosecutor should contact the agency. How this is done will depend on the individual security clearance of the lawyers concerned. The agency's contact details will be retained by the level E prosecutor.

The prosecutor should consider the need for security clearance before being able to access and review material held by such agencies. Such procedure should be discussed with the point of contact at the initial stages and an appropriate period of time to allow this to take place must be built into the timetable for case preparation.

If there is insufficient time to obtain the necessary security clearance, an application for more time may be appropriate, or a lawyer with necessary security clearance may be needed to complete the assessment of the material. Details of personnel

with the appropriate clearance can usually be obtained from the Departmental Security Officer at CPS HQ.

Guidance for visiting security and intelligence agency premises

If investigators, prosecutors or advocates have to inspect documents in the possession of the agencies, such inspection will take place at their premises.

Before the first visit, the investigator, prosecutor or advocate should:

- ensure that the agency has been supplied in advance with such relevant prosecution papers (such as the case summary) to enable it to retrieve the relevant material;
- ensure they have the correct level of security clearance, which can take several weeks to arrange; and
- obtain a contact telephone number so that they can be reached while in meetings, as mobile phones are not permitted on agency premises.

Investigators, prosecutors or advocates visiting agency premises should:

- give at least twenty-four hours' notice of an intended visit;
- expect, on first visit, to be briefed on the applicable security arrangements and may be asked to sign the Official Secrets Act;
- remember that any written notes will not be permitted to be taken off agency premises, as the notes themselves may be classified; and
- give advance notice if they want to make an electronic record, as a secure laptop will be required.

Should the investigator, prosecutor or advocate be required to provide written advice, this might be classified. Arrangements will need to be made for such advice to be produced securely. It is not permitted for such advice to be produced or stored on personal or chambers' computer systems. If any classified documents are required to be produced for court hearings, the agency will make arrangements for their transport, delivery and storage.

Guidance on access to foreign intelligence agencies

There may be occasions where there are reasonable grounds to believe that material in the possession of an intelligence agency of another country is potentially of significant relevance to a prosecution. In the first instance all queries should be directed to the relevant Head of CCD.

In any subsequent contact, it is important that the purpose of such enquiries is made clear to the agency concerned in order to avoid disputes at a later date.

Chapter 34

Handling National Security Related Claims for Public Interest Immunity

Introduction

This guidance is intended to assist in the handling of PII applications in cases that involve sensitive material held by one of the intelligence and security agencies (the Security Service, the Secret Intelligence Service and GCHQ). It supplements the guidance agreed by the Agencies, the Attorney General's Office (AGO), the SFO, the CPS, HM Customs and Excise (now HM Revenue and Customs), the Foreign and Commonwealth Office, the Home Office and Treasury Solicitors in July 1997. This guidance reproduces the terms of the 1997 guidance for ease of reference.

Prosecutors will be familiar with Part 1 of the Regulation of Investigatory Powers Act 2000 (RIPA), section 17 of which provides an exception to the disclosure regime under the common law and the CPIA. In dealing with this material, prosecutors should refer to their own internal guidance, as well as the Attorney General's Section 18 RIPA Guidelines.

In cases that involve agency material, the prosecutor with conduct of the case has the responsibility for instructing the prosecuting advocate. This guidance sets out agreed procedures for the revelation of agency material to the prosecutor, the procedure that the agency will adopt to obtain a ministerial certificate, and emphasises the importance of making early contact.

Ministerial certificates

A ministerial certificate is the preferred means by which the agencies seek to claim PII before a court where there is agency material which:

- is relevant to the case;
- satisfies the disclosure test;
- if disclosed, would cause a real risk of serious prejudice to an important public interest and;
- the relevant agency's minister believes properly ought to be withheld.

If the case proceeds, the prosecution advocate will put the certificate before the trial judge in the same way as other prosecution material which is disclosable, sensitive and in respect of which a PII application ought properly to be made (see Chapter 13). Thus where a PII claim may need to be made for agency material, the necessary preparatory work should, wherever possible, be carried out to an agreed timetable which accommodates the needs of the prosecutor, the agency and any interested departments.

Liaison with the agency legal adviser

As soon as it appears to the officer in charge of investigation or the prosecutor that agency material may need to be considered for disclosure in the proceedings,

arrangements for the viewing and handling should be done in accordance with Chapter 33.

If a PII claim may have to be made for agency material, the prosecutor should liaise with the agency legal adviser (and any other relevant department), to agree a timetable for the certificate process (with estimated/provisional timings) covering:

- the anticipated date of the PII hearing (if possible). It is desirable to fix a date sufficiently far in advance of the trial for there to be time for the prosecutor to liaise appropriately about the future conduct of the proceedings should the judge order disclosure of material for which a claim is made, or indeed, in case of any other unexpected developments;
- the latest date by which the signed PII Certificate should be obtained;
- working back from this, and on the basis of guidance provided by the agency legal adviser, the latest realistic date by which the certificate and accompanying material should be submitted to the minister for consideration and signature; and
- working back from this, and on the basis of any advice from the agency legal adviser, the latest realistic date by which the draft certificate and accompanying material should be submitted by the agency to the minster's department.

It is, of course, appreciated that time estimates are liable to change and that the timetable may have to be updated.

The agency legal advisor should also notify the Attorney General's Office (AGO) and the Government Legal Department's Litigation Division.

The prosecutor and the prosecution advocate, in liaison with the agency legal adviser, should ensure that all necessary information is provided in sufficient time to enable the agency to comply with its deadline for submitting the material and a draft certificate to the relevant minister's department. The prosecutor should ensure that the draft certificate sets out what material, in the opinion of the prosecutor, satisfies the disclosure test (and why), and whether, in the opinion of the agency, disclosure of the material would cause a real risk of serious prejudice to an important public interest.

Close liaison between the prosecutor and agency legal adviser is desirable to avoid delay. Generally, the prosecutor should supply the legal adviser with, as a minimum:

- a case summary, and any communications from the defence or a copy of the CPIA defence statement if it has been received; and
- advice from the prosecution advocate as to what agency material satisfies the disclosure test, thus identifying the material in relation to which PII needs to be considered.

The agency legal adviser will then take instructions from his or her respective agency as to whether disclosure of any of the identified material would cause a real risk of serious prejudice to an important public interest. The agencies will be anxious to avoid putting unnecessary claims before ministers or the courts.

If following this, if the agency considers that the identified material is both disclosable and sensitive, the legal adviser will liaise with the prosecutor and prosecution advocate to discuss whether the harm to the public interest in question can properly be avoided by the appropriate use of redactions, summaries or admissions. To assist this, the prosecutor should provide the legal adviser with an additional submission covering the information required by Chapter 13 of this manual. Where fairness can be maintained without damaging the public interest by providing a summary rather than the material in its entirety, the prosecutor should provide a suggested draft of that summary.

Where the agency wishes to redact certain passages, or withhold entire documents, because of their sensitivity, he or she will ask the prosecutor or prosecution advocate to advise on the impact of this on the fairness of the proceedings.

Special considerations apply to material obtained as a result of interception of communications pursuant to a warrant issued under Part 1 of RIPA. Section 17 of RIPA largely excludes material obtained in this way from being adduced in any legal proceedings and material covered by section 17 should not be included in a PII claim. The interaction between Part 1 RIPA and PII can, however, cause problems and this guidance should be read carefully with the Attorney General's Section 18 RIPA Guidelines.

Procedure for obtaining a ministerial certificate

If the agency legal adviser considers that a minister should be invited to sign a certificate in support of a claim for PII in proceedings before the court, he or she will submit the material, together with a draft certificate and the submissions or advice from the prosecutor and prosecution advocate, to the minister's departmental legal adviser. (He or she will also a copy to the AGO for information). When doing so, the agency legal adviser should ensure that the material is presented in a logical format, bearing in mind that the departmental legal adviser may not be familiar with either the background to the case or the techniques or other issues for which PII is being sought. For example, it may be helpful to group documents by individual topic rather than by date order. It is normally helpful if, whatever approach is used, this is reflected in a sensitive schedule accompanying the PII application, so that the legal adviser and subsequently the minister may use this as a framework for working through the papers.

Where there is a large amount of material and/or where it is unlikely that the minister can personally view all the material, the minister can properly be invited to consider a representative sample of the material with appropriate safeguards. Responsibility for making the selection rests with the department concerned, if necessary, in consultation with the agency legal adviser and possibly the prosecutor. A record of the material selected should be maintained.

The departmental legal adviser should advise the minister whether a PII claim for the material in question is justified, and therefore, must be satisfied that the certificate is cast in appropriate terms. To do this, the departmental legal adviser will generally

need to view all the PII material, as well as read the advice and any other material prepared by prosecutor or prosecution advocate.

Where there is a particularly large amount of material and a representative sample is prepared for the minister, it will still generally be appropriate for the department legal adviser, as well as the agency legal adviser, to view all the material. This would appear to be in line with the general expectations of ministers, although it is accepted that, in the final analysis, it is up to individual departments to decide whether to follow this practice or whether, in a particular case (and bearing in mind the desirability of avoiding unnecessary duplication), they would wish to depart from it.

After the certificate and accompanying advice to ministers on the PII claim are finalised, the departmental legal adviser should consult the AGO, so that the certificate and submissions can (where appropriate) be cleared with the Law Officers (copies of the sensitive material itself should not normally be provided). In cases of particular difficulty or sensitivity, or where a novel point arises, the departmental or agency legal adviser may decide to seek advice and guidance from the AGO (and GLD) at an earlier stage.

The PII application

The guidance below should only be referred to in conjunction with that set out at Chapter 13.

When a minister has signed a certificate, it is normally appropriate for the prosecution advocate to make the submissions at the PII application, because the issue is usually where the balance of the public interest lies, and the advocate is in the best position to assist. To do this, the advocate should be provided with a copy of the certificate, the accompanying sensitive schedule and the agency material concerned. These must be returned to the agency after the hearing.

On rare occasions, a real question of principle may be raised as to the basis on which a particular claim is made, and or whether PII arises at all. In such cases the agency may instruct a separate advocate. Close liaison between the prosecuting case lawyer and the agency should ensure that the agency is aware of developments and should be able to take any necessary action immediately.

Once it becomes clear that a PII application will be required, the prosecutor should write to the court asking for a hearing to be fixed. The letter should follow the requirements and guidance set out at Chapter 14.

There should be early and close communication between the prosecutor, the agency legal adviser and the court manager to ensure that satisfactory practical arrangements are in place for the hearing.

Chapter 35

International Disclosure Issues

International enquiries are a powerful and often crucial tool in the investigation and prosecution of offences. It is important to note that the approach to disclosure in the international context is consistent with the disclosure principles generally.

For guidance on the obligations on the prosecutor in respect of material held overseas, see paragraphs 59 – 64 of the Attorney General's 2013 Guidelines on Disclosure ("International Matters"), and paragraphs 51 – 53 of the Judicial Protocol on the Disclosure of Unused Material.

More detailed instruction for prosecutors on the obtaining of evidence from abroad for use in a UK prosecution, including on mutual legal assistance, can be found in the 'International' pages of the CPS Casework Hub.

It is anticipated that this chapter of the manual will be revisited following the coming into operation of the European Investigation Order.

Chapter 36

Expert Witnesses - Prosecution Disclosure Obligations

General

The test for disclosure of unused material is the same in relation to material generated by an expert as for all other types. If unused material relating to an expert witness is relevant, the police must reveal it to the prosecutor and, if the material meets the disclosure test, it must be disclosed to the defence, or a PII application made.

There is no definitive legal definition of an expert. It is a matter for the court to rule upon in each case. However, for the purposes of this guidance, an expert is defined as a person whose evidence is intended to be tendered before a court and who has relevant skill or knowledge achieved through research, experience or professional application within a specific field sufficient to entitle them to give evidence of their opinion and upon which the court may require independent, impartial assistance.

The difference between an expert and other witnesses is that experts are the only witnesses allowed to give opinion evidence. For that reason, an expert witness's competence in their field of expertise may be in issue, as well as their credibility. If an expert's credibility and/or competence is the subject of concern, that information should be considered for disclosure.

Guidance booklet for experts

The obligations which apply to an expert are to ensure that the prosecution team can comply fully with the requirements of disclosure. These obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which the expert may belong and can be summarised as the key actions of record, retain and reveal.

An expert not employed by the police is a third party, and is not bound by the obligations set out in the CPIA as amended. The CPS seeks to impose these obligations as part of the contractual relationship with the expert.

The obligations are set out in a booklet known as Disclosure: Experts' Evidence, Case Management and Unused Material May 2010 (the Guidance Booklet).

When an expert is instructed in an investigation, it must be ensured that the expert understands the obligations placed upon them by this status. The expert witness has an overriding duty to assist the court and, in this respect, the expert's duty is to the court, and not to the investigator or prosecutor. This will include obligations relating to disclosure. In addition to an explanation of the disclosure regime, the Guidance Booklet contains a flowchart which illustrates the process of revelation.

The Guidance Booklet also contains a sample of the index of unused material that an expert will be asked to complete, describing all the unused material in their possession. The expert will not be expected to distinguish between sensitive and

non-sensitive material. It is the responsibility of the disclosure officer, in conjunction with the expert, to identify any sensitive material.

The disclosure officer should include the index completed by the expert, on the MG6C/D schedule.

Competence and credibility

Investigators have a duty to pursue all reasonable lines of enquiry. This would include satisfying themselves that any witness to be called as an expert is both credible and competent. Where questions are raised as to the competence or credibility of an expert witness, members of the prosecution team should refer to Chapter 37 of this manual.

The expert's self-certificate

The expert instructed should submit to the investigating officer or disclosure officer, a completed self-certificate revealing whether or not there is information which may be capable of adversely affecting his or her competence and/or credibility as an expert. This should be submitted to the investigating or disclosure officer as soon as the expert is instructed.

Expert witnesses will be asked to complete a certificate on every occasion that the expert is asked to provide expert evidence in the form of a full statement or report. Failure by an expert to complete the certificate may cause the prosecutor either to seek an expert who will, or to continue with that expert and disclose the information to the defence, if it meets the disclosure test. Where an expert refuses to complete a certificate, consideration should be given by the prosecution team to the use of that expert in future cases.

The prosecutor should ensure that the details contained in the certificate are sufficient to enable the disclosure officer to make an informed decision about the relevance and disclosability of the information to the proceedings in question. If it is insufficient then the prosecutor should ask the disclosure officer to make further enquiries.

Where the expert has indicated that there is a positive answer to any of the questions on the certificate, the prosecutor is responsible for considering whether the information satisfies the disclosure test.

The certificate should be referred to on the MG6C and should not be sent to the defence. The certificate should be described on the MG6C as: "completed certificate by [name of expert]."

Any matters revealed on the certificate that fall to be disclosed should be disclosed using the pro forma letter.

Matters that relate to the credibility and/or competence of expert witnesses, if disclosable, may be deployable in court in order to discredit their evidence.

Prosecutors should in considering whether or not such material is deployable have regard to the authorities upon the proper extent of cross-examination, both as to an issue in the case and as to the witness's credibility, including, but not restricted to, the cases of *R v Edwards* (1991) 2 All ER 266; *R v Guney* (1998) 2 Cr App R 242 and *R v Brooks* [2002] EWCA Crim. 2107. A further example of the approach that ought to be taken to this issue is to be found in the case of *R v Zomparelli* CA 23 March 2000 (unreported).

Bad character

Prosecutors should have regard to the provisions in part 5 of the Criminal Justice Act 2003. Expert witnesses are open to questions about their bad character in the same way as any other witness. Prosecutors should refer to the CPS legal guidance on Bad Character Evidence for guidance on whether this material can be used in court.

Unresolved complaints and disciplinary proceedings

Complaints about expert witnesses, or disciplinary matters that are under investigation and have not yet been concluded, should be revealed by the disclosure officer to the prosecutor. The information that such unresolved allegations reveal may be relevant and the prosecutor should consider whether it satisfies the disclosure test.

Declaration

The expert must include in their statement a declaration that they have understood and complied with their disclosure obligations. It is suggested that this declaration should appear at the beginning of the expert's statement in the section before they cite their qualifications. The declaration can be found in the Guidance Booklet.

Failure by an expert to complete the declaration may cause the prosecutor to seek another expert.

PNC checks

A PNC check should be conducted in relation to every expert witness on whose evidence the prosecution relies. Previous convictions or cautions (save for minor road traffic offences) may fall to be disclosed as part of initial disclosure. Please refer to Chapter 12 of this manual for further guidance.

Adverse judicial findings

An adverse judicial finding is a finding by a civil or criminal court, expressly or by inevitable inference, that an expert witness has knowingly misled the court, whether on oath or otherwise. With regard to experts, this definition may be extended to include unintentional misleading of the court, i.e. incompetence.

It is the duty of any advocate representing the CPS to record an adverse judicial finding in full. A transcript should be requested wherever available. Any adverse

judicial finding against an expert witness should be reported by the advocate to the CPS.

There is no mechanism for the court to rescind an adverse judicial finding. However, if subsequent information comes to light that casts doubt on the finding, this should be reflected in the certificate and this will be a factor to be taken into account by the prosecutor when deciding whether, applying the disclosure test, to disclose the information.

When information is received that casts doubt over the reliability of an expert witness and/or the expert's technical area of expertise, consideration should be given to whether further disclosure is needed in current and past cases involving the expert. Prosecutors should refer to Chapter 37 of this manual for detailed guidance.

Disclosure

The prosecutor must first consider whether the information is relevant i.e. whether it has any bearing on the case. Only if the information is considered relevant will it need to be considered for disclosure to the defence.

If the prosecutor forms the view that the information would not satisfy the disclosure test, taking account of the nature of the expert's evidence and what is known of the defence or likely defence, details of the information submitted in the certificate should not be disclosed, but must be kept under review and reconsidered in the light of any defence statement. If a doubt remains about whether disclosure is required, the prosecutor should disclose. The decision to disclose or withhold information must be made or approved by a unit head or equivalent.

Prosecutors should cross refer to other relevant chapters in the Disclosure Manual when necessary. In particular, prosecutors should refer to Chapter 23.

Record of decision

The decision and details of any consultation between CPS prosecutors, the prosecution advocate and/or the police must be fully recorded on the Disclosure Record Sheet.

Notification of decision to the expert

On the date of trial, or earlier if possible, the prosecutor or caseworker in court will inform the expert whether the information has been disclosed or withheld.

Change of circumstances

It is essential that the prosecutor can, so far as possible, be confident that the information provided by the expert on the certificate is up to date. This is particularly the case where the hearing of a trial or appeal is imminent and some time has passed since the expert submitted the certificate.

Chapter 37

Guidance on Dealing with Current and Past Cases where the Competence and/or Credibility of an Expert is in Doubt

General

Information may be received that casts doubt on the competence and/or credibility of an expert witness. When this occurs, the disclosure implications need to be considered. Similarly, the methodology used by the expert may be discredited. Such information may render past convictions unsafe. In deciding whether action is needed in such cases, the overriding principle to be considered is public confidence in the integrity of the criminal justice system.

Information on the credibility and/or competence of an expert witness can come in various forms and from a number of sources, including:

- revelation by the police of convictions, cautions or penalty notices;
- complaints and disciplinary proceedings against the expert;
- adverse judicial findings;
- the expert's self-certificate;
- the Court of Appeal; where a conviction founded on the basis of expert evidence has been overturned; and
- any other source including other prosecuting authorities and the media.

There are two issues for consideration when the competence and credibility of an expert witness is called into question and that expert has given evidence in previous cases, resulting in a conviction:

1. whether a disclosure package should be sent to the defence in all current and past cases involving the expert;
2. whether there is a need to conduct a full and formal review of current and past cases involving the expert.

Full review of all the cases an expert has been involved in is an extreme measure to take. However, such a review may be unavoidable in order to fully address an issue that has arisen and restore public confidence. Guidance on a full and formal review is set out later in this chapter.

Guidance on further disclosure

Where an expert has given evidence in cases that resulted in a conviction, and the credibility and/or competence of the expert or the methodology used by the expert in those cases is called into question, then consideration should be given to whether further disclosure should be made.

Where appropriate in past cases, the prosecutor should put together a disclosure package and send it to the defence. The defence can then assess whether the further disclosure would have had any impact on an issue in the case. The defence may then be able to consider an appeal on the basis that had they known the issue

about the expert's competence and/or credibility at the time of the trial that they would have been able to cross examine the expert appropriately or objected to the expert's evidence being called.

Further disclosure to the defence would enable the defence to consider the impact and if necessary consider:

- an appeal;
- an appeal out of time; or
- an application to the Criminal Cases Review Commission (CCRC).

Guidance on how to deal with cases by way of a disclosure package

In past cases, the test to be applied is whether the information received might affect the safety of the conviction.

Prosecutors should consider upon discussion with the police whether the expert concerned works solely within a particular CPS area, or in a number of areas. If it is possible that the expert has worked in other areas, then CPS HQ Policy should be alerted.

Consideration should also be given to whether the expert has worked for other prosecuting authorities, and if so, those authorities should also be informed.

The decision whether to deal with the matter within the CPS area should be taken by the Chief Crown Prosecutor (CCP) or Deputy Chief Crown Prosecutor (DCCP). The CCP or DCCP should also consider whether further resources will be needed to manage the task.

The CCP may decide to refer the matter to CPS HQ Policy. In reaching that decision consideration should be given to the following:

- whether there is a large number of cases involving the expert;
- the nature, seriousness and complexity of the cases or the issues raised; and
- whether it is in the public interest to do so.

The role of HQ Policy will be to guide on any policy issues arising and to pass on relevant information to CPS areas.

The impact that the information may have on the safety of a conviction will depend upon the facts revealed. There is no hard and fast rule when deciding this.

Prosecutors should decide a point in time from which cases will need to be identified for disclosure purposes. This will be more difficult the longer an expert has given evidence. In some situations, this may mean all cases in which that expert has given evidence.

Prosecutors should take a fair and realistic approach when deciding how far back to go depending on the nature of the information and its relevance to the case.

Prosecutors should prioritise those cases in which disclosure packages are sent out. When deciding on the order of priority, consideration should be given to the priority matrix that can be found at the end of this chapter.

A disclosure package is likely to contain some or all of the following:

- memorandum of conviction;
- summary of complaint;
- transcript of an adverse judicial finding;
- transcripts of court proceedings;
- letters from regulatory bodies detailing the offence against the member and the outcome of any disciplinary proceedings; and
- the expert's self-certificate.

(This list is neither exclusive nor exhaustive and other information may fall to be considered for inclusion in the package.)

Disclosure packages will not usually need to contain matters that are already in the public domain through the media.

Consideration should be given as to whether the expert should be used in any future case. That decision will be made by HQ Policy in conjunction with the CCP and will be conveyed to all CPS areas.

Guidance on a full and formal review

There may be occasions when the information is of such significance that there will be a need to conduct a full and formal review of past cases involving that expert. These situations should be considered exceptional.

When the prosecutor considers that the information received could trigger a need for a full and formal review of past cases involving that expert then the prosecutor should bring this to the attention of the unit head as a priority. The matter should then be referred to the CCP (or DCCP) for consideration.

The CCP, in conjunction with the Director of Legal Services and the Director of Public Prosecutions, will decide whether a full and formal review of past cases is necessary.

A framework of issues to be addressed when considering a review of past cases is held for information and assistance by CPS HQ Policy and with CCPs. It is based on the experience gained from large scale reviews of past cases.

Guide priority matrix

Stage 1

- Defendant serving term of imprisonment
- Evidence of Expert Witness was contested

Stage 2

- Defendant serving term of imprisonment
- Evidence of Expert Witness was not contested

Stage 3

- Defendant not serving term of imprisonment
- Evidence of Expert Witness was contested

Stage 4

- Defendant not serving term of imprisonment
- Evidence of Expert Witness was not contested

Chapter 38

Guidance on Dealing with Disclosure involving Protected Person Material

The protection of witnesses and other persons is placed on a statutory footing under Chapter 4 of the Serious Organised Crime and Police Act (SOCPA) 2005. Prosecutors, police and other law enforcement agents should be aware of, and familiarise themselves with, the offences of disclosing information contained in Chapter 4 of SOCPA.

There may be other individuals who do not come under the scope of SOCPA, but who are included in a Protected Persons programme.

A person may be given 'Protected Person' status and offered support in the following scenarios:

- a witness unacquainted with the criminal courts, who has been placed at risk because of the nature of the offence or offender in respect of which (or whom) he is to give evidence
- the so-called 'protected witness', or 'protected assisting offender', who himself has committed offences of serious criminality and is now giving evidence against others involved in a similarly grave level of offending.

In either example, the framework of protection and support given will seek to meet the risk to (and needs of) the witness, whilst at the same time minimise any subsequent suggestion of inducement or lack of credibility as a result of the protection or support received.

A Protected Persons Unit (PPU) appointee will take responsibility for Protected Persons material as a 'Deputy Disclosure Officer'. It is the responsibility of that individual to notify the prosecutor of the status of a protected witness.

Guidance on disclosure in this sensitive area can be obtained from the Disclosure Protocol for Protected Persons Material. A copy can be obtained from the PPU appointee, as and when appropriate.

Annex A

Examples of unused material that may be created or used during an investigation

Crime reporting and suspect identification		
MG6C 999 voice tape Exhibits not referred to in statements Post arrest photographs Details of other suspects arrested interviewed or questioned but not charged Audio/video tapes of interviews of witnesses Potential witnesses' details where no MG11 given CCTV or other videos Media releases by police Fingerprint forms Witness album documentation ID procedure forms (except participant lists) Crime reports Incident log of messages Pocket books Custody records Letter of complaint of crime First description of all suspects however and wherever recorded Material in police possession from third party Plans or video of crime scene Details of whether any witness has sought or received a reward +	**MG6D/SDC** CHIS report Offender profiles Port warnings Wanted/missing circulations Crimestoppers Force intelligence bureau material Sensitive material in police possession from Social Services or Local Authority	**MG6B** Police misconduct material (disciplinary findings/ convictions etc) **MG6C** Road traffic crash reports Vulnerable victim or witness profile Message Switching System messages + Record of property recovered from crime scenes Record of searches Custody record Post charge photograph Lay visitors report Holmes actions, messages and docs + Family liaison logs + Property recovered from crime scenes forms

Investigation	Forensic and medical records	Third party
MG6C Scientific or SOCO findings not used as evidence Draft statements or preparatory notes DNA or other forensic material not used as evidence MG11s from unwilling or unhelpful witnesses Prompt notes for interviews Medical Examiner reports for suspect or witnesses Records of information provided e.g. in conversation House to house enquiries + Audiotape or written note of interview with witnesses notified by the accused **MG6D** Operational briefing/debriefing sheets Policy files Information in support of search or arrest warrants RIPA authorities/documentation Observations/surveillance logs	**MG6C** SOCO/IDO work sheets File records Pathologists' records Dental records Forensic scientist's records lab forms Hospital records relating to the condition which is the subject of the offence charged +	**MG6** Note existence of: Medical and dental records Media material Special procedure applications Records held by other agencies Records/material held by Social Services or local authority

+ Enter on MG6C unless doing so would reveal sensitive material, in which case list on MG6D, or consider editing.
Edit sensitive entries from copies to be disclosed to defence, e.g. address, telephone numbers.

Annex B

An Explanatory Note On The Principles And Procedures Relating To Third Parties Under The Criminal Procedure And Investigations Act 1996 And The Disclosure Of Material In Their Possession

Introduction

This note explains the procedures to be followed by the prosecution in seeking to obtain relevant material held by individuals and organisations that are regarded as third parties in criminal proceedings.

The law governing material held by third parties is contained in the Criminal Procedure and Investigations Act 1996, as amended (the CPIA 1996) and the Attorney General's Guidelines.

Who are third parties?

In the course of an investigation to determine whether an offence has been committed, the police may become aware of relevant material in the possession of persons or organisations which may have a bearing on the investigation. It is only the investigator and the prosecutor who have statutory duties of revelation and disclosure under the CPIA. All other categories of persons are third parties so far as the conduct of the case is concerned.

The legal requirements of the prosecution

Every accused person has a right to a fair trial, a right enshrined in our law and guaranteed under the European Convention on Human Rights. This right to a fair trial is fundamental and the accused's right to fair disclosure is an inseparable part of it.

The scheme set out in the CPIA is designed to ensure that there is fair disclosure of material to the accused which may be relevant to an investigation and which does not form part of the prosecution case. This is known as 'unused material'. Fairness does, however, recognise that there are other interests that need to be protected, including those of the victims and witnesses who might otherwise be exposed to harm. The CPIA protects those interests.

Investigators are under a duty to pursue all reasonable lines of enquiry, whether these point towards or away from the accused. What is reasonable in each case will depend on the particular circumstances. Investigators and prosecutors must do all they can to facilitate proper disclosure, as part of their general and professional responsibility to act fairly and impartially, in the interests of justice.

Where you possess material, which has not been obtained by the police, they are under a duty to inform you of the existence of the investigation and to invite you to retain the material in case they receive a request for its disclosure. Where the police inspect material with your agreement and do not retain it, they are under a duty to record details of that material and to reveal it to the prosecutor.

Where you do not allow the prosecution access to the material, the prosecution or defence may apply to the court for a witness summons, which if granted would require you to attend court to produce the material to the court. Application for a witness summons will only be made where the prosecution or defence considers that the material sought is likely to be material evidence in the proceedings. You do have the right to make representations to the court against the issue of a witness summons.

Where the relevant material held by you or owned by you but in the possession of the prosecution is sensitive, in that it is not in the public interest to disclose, then the prosecution will treat that material in confidence. Where that material satisfies the disclosure test a Public Interest Immunity application must be considered to prevent disclosure to the defence. Where you have an interest in that material and an application is considered appropriate, the prosecution is under a duty to notify you in writing of the time and place of any Public Interest Immunity application. You have a right to make representations to the court.

If a court, on hearing an application for Public Interest Immunity determines that the material in question should be disclosed to the defence, the interests of justice require, in appropriate cases the prosecution to terminate the proceedings rather than make such disclosure.

Annex C

Sensitive Material - Additional Guidance

This additional guidance should be read in conjunction with Chapter 13 of this manual, 'Making a PII application'.

Arranging the Application

Once it becomes clear that a PII application will be required, the prosecutor should make a written application to the court in accordance with CPR 15.3. The application should include the following information:

- the case name;
- the indictment number(s);
- the trial date where known;
- the allocated trial judge where known (if no trial judge has been allocated, the court should be invited to allocate one urgently to avoid delays at the commencement of the trial);
- the type of application to be made (see below), and;
- the estimated length of hearing of the application.

The application must also satisfy the requirements of paragraph 36 of *R v H and C* [2004] UKHL 3, in relation to each item of material to be placed before the court for a ruling.

The Criminal Procedure Rules (part 15.3) distinguish between three types of application:

- Type One: the prosecutor must give to the defence notice of application and indicate at least the category of the material held. The defence must have the opportunity to make representations and there is an inter partes hearing conducted in open court.
- Type Two: the prosecutor must give to the defence notice of application but the nature of material is not revealed because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed. The defence have the opportunity to address the court on the procedure to be adopted but the application is made to the court in the absence of the defendant or representative.
- Type Three: the prosecutor makes an application to the court without notice to the defence because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed – a "highly exceptional" class.

The police and the CPS must be careful to maintain the confidence of the court by making the appropriate type of application. Applications where no part of the application is served on the defendant should be considered exceptional and should only be made where it is genuinely necessary to protect confidentiality. These applications require the express approval of the CCP (or DCCP), or Head of Central Casework Division. Where the CCP (or DCCP) of the relevant CPS Area is not available, the approval of another CCP (or DCCP) is required.

Responsibility for Preparing the Application

The written application should be made to the court, prepared either by the reviewing prosecutor or the prosecuting advocate (on the basis of clear written instructions from the reviewing prosecutor). In large cases where an additional counsel has been instructed to deal solely with disclosure issues, or where the prosecuting advocate has a junior dealing with disclosure issues, disclosure counsel or the prosecuting advocate's junior may prepare the submission. In all cases the written application should be signed by the unit head or equivalent, and countersigned by a police officer of at least substantive Detective Inspector (or equivalent) rank. The officer should state that to the best of his or her knowledge and belief the assertions of fact on which the submission is based are correct. The officer may be required to attend court to give evidence in support of the application.

Where the material which is to be the subject of an application emanates from MG6Ds from more than one agency or police unit, e.g. where a separate MG6D has been submitted for intelligence material, an officer not below the rank of Detective Inspector (or equivalent) for each of the agencies or units who have submitted material must endorse the written submissions.

Whatever part the prosecution advocate may have played in the drafting of the application, responsibility for their form and content rests with the prosecutor. Any notice should also contain a request to the defence to provide such further written particulars of the defence case as the prosecutor sees fit, to better inform the court's assessment of the competing public interests.

Contents of the written application

The written application should comply with CPR 15.3 as set out above and also satisfy the requirements of paragraph 36 of *R v H and C*, in relation to each item of material to be placed before the court for a ruling. It should contain:

- A summary of the facts of the case. Where a case summary or prosecution opening note has been served and this is believed still to be accurate and adequate, it should be annexed to the application
- a list of trial issues which the prosecutor has been able to identify
- a summary of the defence case which has been advanced in a defence statement, section 8 application or correspondence. A copy of the defence statement, relevant s8 application or correspondence should be annexed to the application
- the number of the item as it appeared on form MG6D. Where more than one MG6D has been submitted, e.g. where the case has generated 'highly sensitive' material and involves more than one disclosure officer, each MG6D should be given its own reference
- a detailed description of the material
- in the case of lengthy items, a summary of their content
- an assessment giving reasons why it is considered that each item over which PII is sought satisfies the disclosure test, or why the reviewing prosecutor is unable to determine whether or not the disclosure test is satisfied

- why it is considered that disclosure of each item over which PII is sought will cause a real risk of serious prejudice to an important public interest and the degree of sensitivity that attaches to the material
- why it would not be appropriate to provide to the accused a formal admission, summary, extract or edited version of the material
- why the prosecutor contends that the public interest in withholding the material outweighs the public interest in disclosing it and
- where the material is the subject of a Type Two application, why it is considered inappropriate to inform the defence of the category of material into which the material falls
- where, exceptionally, the material is the subject of a Type Three application, why it is considered inappropriate to inform the defence at all.

In cases involving a large quantity of material to be placed before the court for a ruling, the prosecutor may prefer to present the representations in tabular form.

Prosecutors should bear in mind that in particularly difficult cases, and as a last resort, the court may decide that it requires assistance from a special advocate. Prosecutors should therefore be prepared, when requested, to formulate submissions to assist with this aspect of the court's decision.

A bundle should be prepared for the trial judge comprising the written application and the annexed documents, together with any further particulars of the defence case provided in response to the notice of the hearing. The bundle should contain a front sheet listing the contents of the bundle. The front sheet to the bundle, or a covering letter, should emphasise the sensitivity of the attached documentation and request that it be stored in suitably secure conditions, especially when the material is not being worked on. This is particularly important where a Type Two or Three application is being made.

The PII hearing

When the judge's bundle has been provided to the court, the prosecutor should contact the court to ascertain whether the judge wishes to view the material giving rise to the application in advance of the hearing, or whether the court is content for the material to be brought to the hearing.

The prosecutor must make arrangements to facilitate inspection of all sensitive and highly sensitive material by the prosecution advocate well ahead of the hearing.

Where the judge requests sight of the material in advance of the hearing, the disclosure officer with responsibility for the material should make the necessary arrangements with the judge's clerk or court manager. There may need to be detailed discussions as to the handling and storage arrangements for the material when it is in the court's possession. In some circumstances, the police may wish to remain in the court building whilst the material is being considered so that they can recover it once the judge has viewed it. This will be a matter for local arrangements on a case-by-case basis.

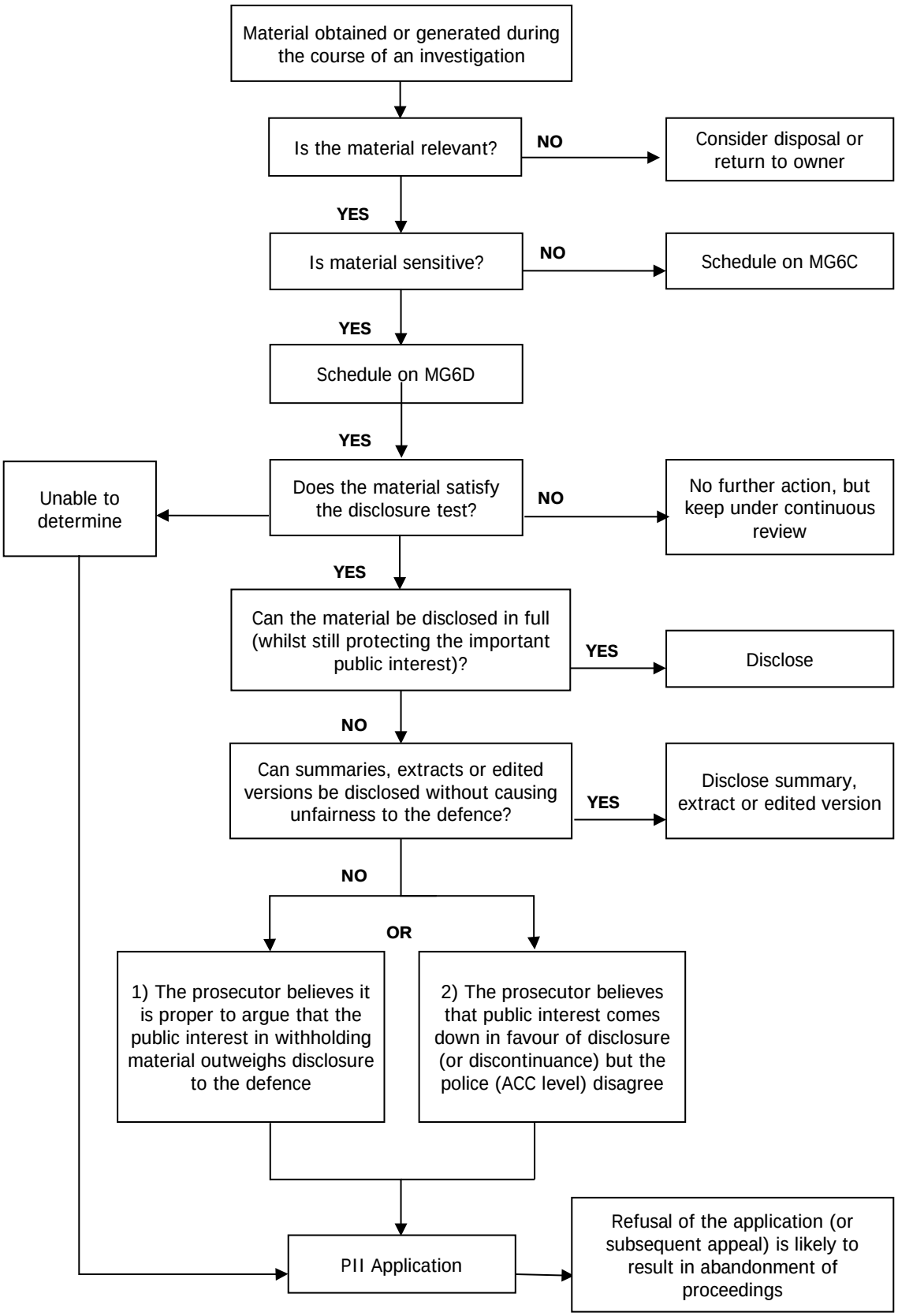
The oral representations in support of the written submissions may be made by the reviewing prosecutor, CPS higher court advocate, the prosecution advocate, his/her junior or disclosure counsel. A CPS or departmental representative should be present at the hearing. The hearing should also be attended by the officer in charge of the investigation and all disclosure officers who have provided schedules listing items that are subject of the application.

The manner in which the hearing should be conducted will be a matter for the judge to determine. At a hearing at which the defendant is present, the general rule is that the court must consider representations first by the prosecutor and any other person served with the application, and then by the defendant, in the presence of them all, and then further representations by the prosecutor and any such other person in the defendant's absence.

The court may direct other arrangements for the hearing.

Annex C1

Sensitive Material And PII Applications Flowchart



Annex D

The Use Of Keyword Searches And Digital Evidence Recovery Officers

The use of keyword searches and other appropriate search tools has been validated for use across the criminal justice system (see *R v R and Others* 2015 EWCA Crim 1941). A proper use of focused keywords and word searches at the initial stage should reduce the need to do further searches when considering the unused material 'hits', unless it is reasonable to further refine the search.

Some or all of the following (non-exhaustive list) are suggested as reasonable and proportionate actions for the disclosure officer to undertake to comply with the duties under the CPIA:

- inspecting the material retrieved in the keyword searches made by investigators
- reviewing the keyword dictionary and parameters used by investigators to see if these properly cover all reasonable lines of enquiry
- making additional keyword searches, using judgement and knowledge of the circumstances of the case to decide how much additional work is proportionate
- where appropriate, to review the same material that has been reviewed by the investigator in order to determine that all reasonable lines of enquiries have been followed. This may include folders, files, spreadsheets, images, and emails as an alternative or in addition to keyword searches
- inspecting the directory structure and reviewing the examination strategy used by the investigation officer to see if this properly covers all reasonable lines of enquiry
- carrying out additional direct examination of folders or classes of files if necessary, using judgement and knowledge of the circumstances of the case to decide whether all reasonable lines of enquiry have been followed
- identifying, as accurately and clearly as possible, any digital item containing stored data in the disclosure schedule, and for each item describing the various actions the disclosure officer has taken, describing the extent, manner and justification of the examination in the schedules:
  - a list of all the keywords used
  - a print out of the directory structure, or file listing where this is available
  - a forensic unit's documentation of any applications audit, where this is available
  - the search terms that were applied
  - the details of all the steps in this annex that have been carried out
  - why they were carried out

Digital evidence recovery officers

Digital evidence recovery officers (DEROs) may be commissioned to help extract evidence and to assist with unused material. They may be part of the police force, civilians attached to the computer crime unit or the National Hi Tech crime Unit. Sometimes specialist outside expertise may be required. Acting only upon instructions from the investigators and disclosure officers, their primary role is to

extract and preserve the evidence, although they may be involved in helping to collate and audit the unused material.

Investigators will need to work closely with the Forensic Computer Analyst (FCA) and the DERO, where available, in order to establish the appropriate methodology and terms of reference to employ in the examination. The completion of a Digital Evidence Recovery Form (DERF) together with the provision of the case summary will assist the DERO in identifying the parameters of the search and the selection of relevant keywords to employ in the examination.

Investigators should use the DERF to list focused keywords, in order to examine the data seized or obtained. The disclosure officer and the DERO may also use their own keywords, as may the prosecutor when they become involved. The DERF should be scheduled on the schedule of unused material.

Care must be taken to use focused keywords otherwise the purpose is defeated, by generating too many 'hits' to be useful. Each keyword search may produce relevant information that requires further searches. An example could be a keyword producing 10,000 hits. The DERO should usually produce the relevant hits onto a CD or DVD.

The investigator should then decide, after liaising with the DERO, which of the hits will be used as evidence. Any remainders are likely to become relevant unused material to be dealt with by the disclosure officer.

The DERO should produce a summary of his/her findings in a statement and/or report. Additionally, a log should be maintained as a diary of events and actions, setting out what examination methods were used. It should comment on items or 'hits' that become unused material. The log itself should be treated as unused material and if it contains sensitive material, its scheduling should follow the normal procedures.

The DERO should be supplied with a copy of any defence statement, and the prosecutor, investigating officer and disclosure officer should consider whether any further examination of the unused material needs to be carried out.