# JOINT OPERATIONAL INSTRUCTIONS FOR

# THE DISCLOSURE OF UNUSED MATERIAL

# FOREWORD

*'Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed under Article 6 of the European Convention on Human Rights. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial.'*

**The Attorney General's Guidelines on the Disclosure of Information in Criminal Proceedings 2000**

The scheme set out in the Criminal Procedure and Investigations Act 1996 (the Act) and the Code of Practice issued under it (the Code) is designed to ensure that there is a fair system for the disclosure of unused material, which assists the defence in the timely preparation and presentation of its case and enables the court to focus on all the relevant issues in the trial.

These revised Joint Operational Instructions contribute to those objectives by assisting CPS and police practitioners to perform their disclosure duties consistently and effectively. They are designed to provide a practical guide to disclosure principles and procedures, building on the framework of the Act, the Code and the Attorney General's Guidelines.

# JOINT OPERATIONAL INSTRUCTIONS FOR THE DISCLOSURE OF UNUSED MATERIAL

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# SECTION ONE: GENERAL

## Introduction

1.1 These instructions explain how the Police Service and the CPS have agreed to fulfil their duties to disclose unused material to the defence. It is important that the Police Service and the CPS adopt consistent practices across England and Wales. The instructions also contain advice on efficient file management.

- Section One provides an overview of the procedures introduced by the **Criminal Procedure and Investigations Act 1996** and the **Code of Practice** issued under it.

- Section Two contains more detailed guidance on how police officers should meet the requirements of the Act and the Code.

- Section Three contains guidance on how the CPS should fulfil its statutory duties.

1.2 These instructions take into account provisions in the Manual of Guidance for the Preparation, Processing and Submission of Files and other agreements on operational issues reached between the Association of Chief Police Officers (ACPO) and the CPS. This means that on occasions these instructions require certain actions to be taken in addition to those required by the Act and the Code. This is designed to ensure that the statutory duties are carried out promptly, efficiently and effectively.

1.3 For the purpose of these instructions, references to unused material are to material which may be relevant to the investigation that has been retained but does not form part of the case for the prosecution against the accused. Disclosure refers to the act of allowing the defence copies of, or access to, any material which in the prosecutor's opinion might undermine the prosecution case, or which might be reasonably expected to assist any defence revealed in the defence statement, and which has not previously been disclosed to the accused.

1.4 In this document, revelation refers to the act of the police in alerting the prosecutor to the existence of material that has been retained in the investigation. **Revelation to the prosecutor does not mean automatic disclosure to the defence**. Where the police have a concern that certain material should not be disclosed to the defence there will be an opportunity for consultation with the prosecutor. The prosecutor will always have regard to the need to protect certain material.

1.5 The law is set down in:

- the Criminal Procedure and Investigations Act 1996 **(the Act)**

- the Code of Practice, issued under Section 23 of the Act **(the Code)**

- the Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997, the Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Confidentiality) Rules 1997, the Crown Court (Criminal

Procedure and Investigations Act 1996) (Disclosure) Rules 1997 and the Crown Court (Criminal Procedure and Investigations Act 1996) (Confidentiality) Rules 1997, issued under Section 19 of the Act **(the Rules)**

- the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 issued under Section 12 of the Act **(the Regulations)**.

1.6 In addition to these, in November 2000 the Attorney General issued Guidelines on the Disclosure of Information in Criminal Proceedings, which build on the existing law.

1.7 A disclosure wall chart has been prepared for all police forces and CPS Areas. It has been devised to progress sequentially through the various stages of the disclosure process to provide ready access to summarised guidance and examples of completed schedules.

**Retention and recording**

1.8 The Code requires the police to **retain and record** 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 or retained in the form of a copy rather than the original, if the original is perishable or was supplied to the investigator rather than generated by him and is returned to its owner

- 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

- the Code creates the role of **disclosure officer** with specific responsibilities for examining material, revealing it to the prosecutor, disclosing it to the accused, and certifying to the prosecutor that action has been taken in accordance with the Code

- the disclosure officer is required to create schedules of unused material retained during an investigation and submit them to the prosecutor together with certain categories of material

- non-sensitive and sensitive material should be listed on separate MG6C and MG6D schedules.

**Primary disclosure**

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

- a plea of not guilty in the magistrates' court

- committal or transfer of a case for trial at the Crown court

- the preferment of a voluntary bill of indictment

- the service of the prosecution case following the sending of an accused to the Crown court under s51(1) Crime and Disorder Act 1998.

When this occurs the CPS must provide the accused with **primary disclosure.** This obligation exists irrespective of any action by the defence.

1.10 Primary disclosure means providing the defence with any prosecution material which has not previously been disclosed to the accused, and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. If there is no such material the prosecutor must inform the defence in writing. Disclosure to the defence **must** take place **as soon as reasonably practicable** after the duty arises.

1.11 The police will need to provide the CPS with details of all unused material **promptly** so as to enable the duty to make primary disclosure to be carried out. The disclosure officer has a key role in supplying the prosecutor with accurate and comprehensive schedules, and in helping the prosecutor identify what should be disclosed to the defence.

1.12 If the prosecutor decides that certain material might undermine the case for the prosecution, but that it is not in the public interest that the information be disclosed, the prosecutor can apply to the court for an order that the material should not be disclosed. It is for the court to decide whether the overall public interest in a fair trial requires disclosure. But the prosecutor may also have to consider whether it is appropriate to continue with the case, or whether to make voluntary disclosure of the material after full consultation with the police and other interested parties.

1.13 There are **common law** duties to disclose material which exist in addition to those arising under the Act. These require the prosecution to disclose, in the interests of justice, material that may assist the defence, but which ordinarily would not be required to be disclosed under the Act because of the stage of the proceedings. See paragraphs 2.105 - 6 and 3.129 - 130 below.

**Defence disclosure**

1.14 When the prosecutor has complied with the duties of primary disclosure the accused must serve a **defence statement** on the prosecutor and the court in proceedings before the Crown court.

1.15 In the magistrates' court the accused is not obliged to serve a defence statement but may choose to do so.

1.16 In the defence statement the accused should:

- set out in general terms the nature of the accused's defence

- indicate the matters on which he takes issue with the prosecution

- set out why issue is taken on those matters.

1.17 If the defence statement discloses an alibi the accused must give particulars of the alibi in the statement. The defence statement should be served within the time limit specified by the Regulations (see paragraph 1.5 above).

1.18 Defence disclosure has two purposes. It assists in the management of the trial by helping to identify the issues in dispute. It also provides information that the prosecutor needs to identify any remaining material that falls to be disclosed at the secondary stage (see below).

**Secondary disclosure**

1.19 Secondary disclosure of unused material is made after the accused has provided the prosecutor with a defence statement. Secondary disclosure means that the prosecutor must disclose material that has not previously been disclosed to the defence and which might reasonably be expected to assist the accused's defence as set out in the defence statement. If no such material exists the prosecutor should confirm this in writing.

1.20 Secondary disclosure **must** take place **as soon as reasonably practicable** after the defence statement has been provided.

1.21 If no defence statement has been provided there is no duty to make secondary disclosure. If the accused decides not to serve a defence statement in the magistrates' court secondary disclosure will not have to be made.

1.22 When deciding what should be disclosed at this stage, the prosecutor will consider the defence statement to see if there is any material not yet disclosed which might be reasonably expected to assist the accused's defence as disclosed by the defence statement. The disclosure officer will need to help the prosecutor identify material which may have to be disclosed to the accused, and provide the prosecutor with copies of the material where necessary.

1.23 As at the earlier stage, if the prosecutor decides that certain material would fall to be disclosed under secondary disclosure but that it is not in the public interest for this to be disclosed to the accused, the prosecutor may apply to the court for an order permitting non-disclosure. Again, the prosecutor will need to consider all the circumstances when deciding whether to make the application to the court (see paragraphs 3.111 to 3.125 below).

**The continuing duty to review disclosure**

1.24 The duty to disclose exists throughout any summary trial or proceedings in the Crown court. The prosecutor must keep under review, throughout the prosecution and trial, the question of whether there is prosecution material which might undermine the case for the prosecution or which might assist the accused's defence as revealed by the defence statement. If there is any such material at any time until the trial has been concluded, the prosecutor must disclose it to the accused as soon as reasonably practicable.

**Dispute resolution**

1.25 After secondary disclosure, if the accused considers that there is additional prosecution material that has not already been disclosed which might reasonably be expected to assist the defence disclosed by the accused in a defence statement, the accused may apply to the court for an order requiring it to be disclosed. Neither the court nor the accused have the right under the Act to challenge the exercise of the prosecutor's discretion on primary disclosure.

**Failure to comply with the disclosure requirements**

1.26 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 Act or the Code 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 (where the prosecutor fails to comply with the duties of primary 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 Act or Code, 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 Act or Code
- disciplinary proceedings may be instituted against the prosecutor or a police officer.

1.27 It is therefore important to ensure that the duties imposed by the Act and the Code 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, he or she must not continue with the case.

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

- loss of entitlement to secondary disclosure (for example, if the accused fails to provide a defence statement)
- the court, or with the leave of the court, any other party can make appropriate comments on any faults in disclosure by the accused

- the court or jury can draw inferences from any failure in deciding whether the accused is guilty of an offence.

**File management**

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

This documentation should include:

- all unused material, unless marked **Confidential** or above (see 1.32 below) of which copies have been provided to the CPS (where volume allows)

- all disclosure schedules unless marked **Confidential** or above

- any defence statement(s) and

- the disclosure record sheet (see paragraph 1.30 below, and specimen at Annex C).

1.30 The disclosure record sheet should be completed to record all actions taken in discharging disclosure responsibilities. As such, it should be securely fixed in a readily accessible position within the unused material folder, because it will require periodic endorsement throughout the life of the case.

1.31 In those cases where the large volume of unused material copied to the CPS does not allow for its storage in the unused material folder, a note of its location should be made on the disclosure record sheet.

1.32 Proper handling of sensitive material is of utmost concern to the police and CPS. Protective markings will be applied by police to sensitive material that is revealed to the prosecutor. The relevant category of marking will be **Restricted**, **Confidential**, **Secret** or **Top Secret**. Once the prosecutor has considered and agreed the marking category appropriate to the level of sensitivity of the document's contents (whether it be the schedule or copy material), the material will be handled according to that classification. (See further guidance at Annex K). CPS Areas should ensure that procedures are put in place for the resolution of any dispute between the prosecutor and the disclosure officer over the appropriate protective marking of material.

1.33 Sensitive material that is **Restricted** may remain on the file. It will be kept with the schedule and any copy material in the disclosure folder or a sealed envelope within it. Material that is **Confidential**, **Secret** or **Top Secret**, and all related documentation, must be kept off-file in secure storage. Notes of any discussions about sensitive material, with a police officer or the prosecution advocate for instance, should be stored according to the sensitivity of their content.

**Sensitive material**

1.34 Material must not be disclosed at either primary or secondary stage if a court, on application by the prosecutor, concludes that it is not in the public interest to disclose it and orders accordingly. This is usually referred to as sensitive material. The Code at paragraph 6.12 gives some examples of the types of material which may be regarded as sensitive. The list in the Code is not exhaustive, and there may be other types of material that can properly be regarded as sensitive.

1.35 The police will have the opportunity to draw to the prosecutor's attention material which they believe is not in the public interest to disclose. The prosecutor will always have regard to representations made by the police (or other parties with a legitimate interest in the material) as to whether material should be the subject of an application to withhold it from the accused.

1.36 If the prosecutor decides that sensitive material requires disclosure to the accused, because it might undermine the prosecution case or might assist the defence, the prosecutor must assess whether the prosecution can fairly continue without disclosure. Often, the material will be put before the court for a ruling, but this may not always be appropriate. If the prosecution cannot fairly continue against the accused, the material must either be disclosed or the case abandoned. The police and any other body with a legitimate interest in the material will always be consulted before such decisions are taken (see sensitive material paragraphs at 3.86 - 95, 3.99 - 105 and 3.111 - 125).

1.37 Where an application to withhold sensitive material is made, the ultimate decision on whether such material should be disclosed is that of the court.

1.38 The procedures for obtaining a ruling from the court, which were previously established in the case of *R v Davis, Johnson and Rowe* [1993] 1 WLR 613, have been codified and replaced by rules of court (see paragraph 1.5 above).

**Third parties**

1.39 Duties of disclosure under the Act 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 prosecuting or investigating team. Third parties frequently encountered will include:

- owners of CCTV material
- social services departments
- forensic experts
- police surgeons.

1.40 Where police and another investigating agency (such as the Immigration Service, or a foreign police force) 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 these instructions. The investigators from those other agencies have a duty to pursue reasonable lines of enquiry within their organisation.

1.41 The police must make reasonable enquiries of third parties although speculative enquiries are not required. Any material coming into the hands of the police from a third party will be material obtained in the course of an investigation. If it is relevant it must be recorded and dealt with just like any other material.

1.42 If a third party has information which may be relevant to a criminal investigation, the third party is under no duty under the Act to retain such material and reveal it to the investigator or prosecutor. In cases of difficulty it may be necessary to resort to the witness summons procedure to obtain access to the material. However, public authorities ought to recognise an obligation to respond to a request for information for the purposes of a criminal investigation or prosecution, and Government departments will always do so.

1.43 If the police believe that another investigating agency (such as HM Customs and Excise) holds material that may be relevant to the investigation they should tell the other agency of the investigation and inform the prosecutor as soon as possible.

1.44 Any reports prepared by the third party at the request of the police, and actually obtained by the police, are subject to the requirements of the Act relating to disclosure.

**Use of the material by the accused**

1.45 The accused is prohibited from using disclosed material for any purpose other than the criminal proceedings concerned. The only exceptions to this rule are where the permission of the court is obtained, or where the material has been displayed or communicated to the public in open court.

1.46 The accused will be guilty of a contempt of court if this prohibition on the use of unused material is breached. For these purposes, disclosure to the accused includes disclosure to his legal representative, and either may be in breach of the confidentiality provisions of the Act.

**Application of the Act and Code to non-police investigators**

1.47 Any person other than a police officer who is charged with the duty of conducting a criminal investigation shall have regard to the Code as if the investigation was being conducted by police officers. In the event of non-compliance by the non-police investigator the same consequences will follow.

**Pre-CPIA investigations**

1.48 The Act came into force on 1 April 1997. It has been agreed between ACPO and the CPS that the police should assume that their duties to record and retain material are

governed by these joint operational instructions, notwithstanding that the investigation may have begun before 1 April 1997.

1.49 For the prosecutor, the duties of disclosure will differ depending on when the investigation began. Where prosecutions follow on from investigations commenced before 1 April 1997, the common law disclosure principles laid down in *R v Keane* will be applicable.

## SECTION TWO: POLICE ACTIONS

### Introduction

2.1 This section contains instructions and guidance explaining how police officers should meet the requirements of the Act and the Code. The Code provides the framework for the roles of police officers in the disclosure process, and it forms the basis of this guidance. These instructions should also be read in conjunction with the Manual of Guidance for the Preparation, Processing and Submission of Files and other agreements on operational issues reached between ACPO and the CPS.

### Roles and responsibilities

2.2 The **chief officer of police** for 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 that of the disclosure officer is recorded.

2.3 An investigator, a disclosure officer, and an officer in charge of an investigation perform different functions. The three roles may be performed by different people or by one person. The person who is performing the role of disclosure officer and officer in charge of the investigation must be identifiable.

2.4 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 Act and the Code.

2.5 The **officer in charge of the investigation** is responsible for directing an investigation. This officer's responsibilities under the Act and the Code 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 enquiries 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 tasks delegated to civilians employed by the police force have been carried out in accordance with the requirements of the Code
- ensure that material which is 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

- 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.

2.6 An **investigator** is any police officer or civilian employee involved in a criminal investigation. All officers, including those who may not view themselves as investigators, have a responsibility for carrying out the duties imposed under the Code. All officers, in particular must retain material obtained in a criminal investigation which is either created or discovered during the investigation, and which may be relevant to the investigation.

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

2.8 The **disclosure officer** (or **officers**, see paragraphs 2.164 – 66 below) has a statutory duty to discharge disclosure responsibilities throughout a criminal investigation. The officer(s) must:

- examine, inspect, view or listen to all material that has been retained by the investigator and that does not form part of the prosecution case unless the material comes within paragraph 9 of the Attorney General's Guidelines 2000 (see paragraph 2.145 below)

- create schedules that fully describe the material

- identify to the prosecutor all material which might undermine the prosecution case

- pass the schedules 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 and copies of the documents described in 2.120 below, if the prosecutor does not have them already

- consult with and allow the prosecutor to inspect the retained material

- review the schedules and the retained material after the defence statement has been received, identify to the prosecutor material that might reasonably be expected to assist the accused's defence, and supply a copy of any such material not already provided

- certify that all retained material has been revealed to the prosecutor in accordance with the Code at both the primary and secondary stages of prosecution disclosure

- schedule and reveal to the prosecutor any relevant additional unused material pursuant to the continuing duty of disclosure

- where the prosecutor requests disclosure of any material to the accused, give the accused a copy of the material or allow the accused to inspect it.

2.9 The disclosure officer may be a police officer or a civilian. In order to perform the duties under the Code properly, the disclosure officer will need to become fully familiar with the facts and background to the case. The investigator(s) and the officer in charge of the investigation (where these roles are performed by a different individual to the disclosure officer) must provide assistance to the disclosure officer in performing this function.

2.10 In some cases it will be desirable to appoint a disclosure officer at the outset of the investigation. In making this decision, the officer in charge of the investigation should have regard to the nature and seriousness of the case, the volume of material which may be obtained or created, and the likelihood of a committal or a not guilty 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 submitted to CPS.

2.11 An individual must not be appointed as disclosure officer, or 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 criminal proceedings. 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 the disclosure officer. If thereafter the doubt remains, the advice of the prosecutor should be sought.

2.12 The officer in charge of an investigation may delegate certain tasks to civilians employed by the police such as SOCO and fingerprint officers. The officer in charge of an investigation must ensure that those tasks have been carried out in accordance with the Code.

**Retention**

2.13 The Code requires that material of any kind, including information and objects, which is **obtained in the course of a criminal investigation and which may be relevant to the investigation** must be retained.

2.14 If material with an evidential value has been destroyed, there is a danger that a court may stop the prosecution for abuse of process. Thus while it is not necessary to retain every item obtained or generated during the course of an investigation, any doubt should be resolved in favour of retention.

2.15 Material includes information given orally. Where relevant material is not recorded in any way, it will need to be reduced into a suitable form (see paragraphs 2.28 onwards below).

2.16 Material which may be **relevant to the investigation** is defined in the Code as anything that:

> **has some bearing on any offence under investigation or any person being investigated, or to the surrounding circumstances of the case, unless it is incapable of having any impact on the case.**

2.17 Care is needed when exercising judgement and discretion to decide what should be retained. Material or information which may not appear to have any significance at the outset of an investigation may have a bearing at a later stage.

2.18 The issue of relevance is especially important where an investigator is considering whether to throw something away, or to return an item to the owner, or not to record information; or where not keeping material or recording information would result in the permanent loss or alteration of the material (as with control room tapes, shop videos etc).

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

2.20 Factors that may influence the decision to record information or retain material may be the size of the enquiry, the number of potential suspects, and the stage that the enquiry has reached. Early in an enquiry 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, 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
- what the potential consequences will be if the material is not preserved.

2.21 If there is any question whatsoever that the material or information might have an impact on the case, either now or at some time in the future, the investigator should exercise his judgement in favour of recording and retaining the material.

2.22 Negative results can sometimes be as significant to an investigation as positive ones. It is impossible to define precisely when a negative result may be significant, as every case is different. However it will include the result of any enquiry that differs from what might be expected, given the prevailing circumstances. An example is given in paragraph 4.3 of the Code. Not only must material or information which points towards a fact or an individual be retained, but also that which casts doubt on the suspect's guilt, or implicates another person. Examples of negative information include:

- a CCTV camera that did not function, had no videotape loaded or did not record the crime/location/suspect. This comprises three separate and distinct scenarios for potential negative information, but it is only the last of these that may usually be considered relevant
- 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, or is of insufficient value to determine identity

- any other failure to match a crime scene sample with one taken from a known suspect.

2.23 Material may come into an investigator's possession during an investigation, or be generated during the course of the investigation: for example an interview record. Whatever the source, if it is relevant, it must be retained. If it is not possible or practicable to retain an item, a copy or a photograph may be taken. In indictable cases, and those other cases where a not guilty plea is likely, investigators should seek the advice of the officer in charge of the investigation, and if necessary, the prosecutor, particularly when the investigator is minded to return any material to its owner or otherwise dispose of it.

2.24 A **criminal investigation** is defined in the Code as an investigation conducted by a police officer 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.

2.25 This includes investigations which are begun in the belief that a crime is about to be committed. For example, a surveillance operation is part of an investigation even if it is directed to a target without there being a specific offence in mind.

2.26 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 impacts 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.

2.27 Particular categories of material that **must** be retained are listed in paragraph 5.4 of the Code. The list is not exhaustive, and there may be other material which requires retaining because it may be relevant. Examples of specific items which fall into these categories are listed in Annex D and the disclosure wall chart.

**Recording of information**

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

2.29 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 audio tape, or computer disk.

2.30 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 more easily stored form before the tapes are destroyed.

2.31 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 pursuit. Investigators should also consider making a record of conversations with experts and other investigators, where the information discussed is likely to be relevant to the case.

2.32 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**

2.33 It is difficult to give clear-cut guidance on the approach to be adopted when dealing with information recorded on computer, owing to the wide range of investigative computer systems employed throughout the Police Service. But many computer systems (for example, HOLMES) generate material in the form of hard copy. This should be treated in the same way as relevant material from any other source.

2.34 The prosecutor will need to be informed of the use of such systems, and any hard copies produced listed on the schedules by the disclosure officer. Local arrangements may need to be agreed as to the means by which the prosecutor can inspect material held on computer systems. Where material is to be disclosed to the defence under the Act, 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.

2.35 Information contained in emails may amount to relevant unused material, particularly if the information is not recorded elsewhere. It should be recorded, retained and scheduled in the same way as other relevant material. (Where however, emails are intercepted under section 17 of the Regulation of Investigatory Powers Act 2000, disclosure is specifically prohibited).

2.36 On a major crime enquiry, investigators may find it helpful to identify potentially sensitive material at the input stage. The final decision as to sensitivity at this stage will be the responsibility of the officer in charge of the investigation.

**Recovering material not retained**

2.37 Material may be examined during the course of an investigation, but not retained because it does not appear to be relevant at that stage. This will include material that has been returned to its owner without a copy being taken.

2.38 If during the lifetime of a case, the officer in charge of an investigation becomes aware that such material may become relevant as a result of new developments, paragraph 5.3 of the Code will apply. That officer should take steps to recover the material wherever practicable, or ensure that it is preserved by the person in possession of it.

**Material in the possession of third parties**

2.39 The Act only imposes duties of disclosure upon the investigator and the prosecutor. The term `third party' applies to any person or agency who does not have a duty under the Act.

2.40 A third party has no obligation under the Act 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.

2.41 However, there is a duty under the Code 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 particular case, but it may include enquiries as to the existence of material relevant to the investigation 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. For example, where a child witness is in the care of the local authority, the social services may have relevant material relating to the allegation under investigation.

2.42 If the officer in charge of the investigation, the investigator or the disclosure officer suspects that a third party holds material that may be relevant to the investigation, that person or body should be told of the investigation. They should be alerted to the need to preserve relevant material. Consideration should be given as to whether it is appropriate to seek access to the material, and if so, steps should be taken to obtain such material. It will be important to do so if the material or information is likely to undermine the prosecution case, or to assist a known defence. A letter should be sent to the third party together with the explanatory leaflet, specimens of which are at Annex J.

2.43 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. In some circumstances it may be appropriate for the disclosure officer and the investigator to consider with the prosecutor whether the third party should be approached and further material sought or inspected.

2.44 If material relevant to the investigation comes to the knowledge of the investigator or is inspected or obtained from a third party, it will become unused material or information within the terms of the Code. This applies particularly to relevant information conveyed verbally by the third party. This should be recorded in a durable or retrievable form (for example potentially relevant information revealed in discussions at a child protection conference attended by police officers)**.** It will have to be recorded on the appropriate schedule and revealed to the prosecutor in the usual way.

2.45 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 should consider making an application under Schedule 1 of the Police and Criminal Evidence Act (PACE) 1984, (Special Procedure Material). The investigator may seek advice of the prosecutor before such an application is made.

2.46 Where there are proceedings before a court and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the

Magistrates' Court Act 1980 as appropriate are satisfied, then the investigator or the prosecutor should apply for a witness summons causing a representative of the third party to produce the material to the court.

2.47 The statutory requirements in 2.46 above are more stringent than those for the primary and secondary disclosure tests. 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).

2.48 Any reports prepared by a third party at the request of the investigator and supplied to the investigator will also be subject to the requirements of the Act relating to disclosure.

2.49 Where material is obtained from third parties, the investigator should discuss with them whether any sensitivities attach 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 MG6.

2.50 Where material is held by a Government department or other Crown body that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material. Investigators and disclosure officers should refer to paragraph 3.145 below for the procedure to follow.

**Retention periods**

2.51 Paragraphs 5.6 to 5.10 of the Code provide for the period of retention. This is the minimum period of retention and individual force policy may provide for a longer period.

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

**Preparation of schedules**

2.53 The disclosure officer is responsible for preparing the schedules and submitting them to the prosecutor. The schedules, dated by the disclosure officer, should be submitted to the prosecutor with a full file.

2.54 It is not necessary to maintain schedule(s) of unused material from the start of all investigations. During the course of the investigation it may not be possible to decide whether particular material will eventually form part of the prosecution case, or will remain unused. In some cases there may be advantages in starting the schedule(s) at an early stage. 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.

2.55 Where working schedules or draft lists have been created as the enquiry progressed, the disclosure officer must check the contents and consolidate the items into two schedules for the prosecutor listing:

- any non-sensitive unused material (MG6C)
- any sensitive unused material (MG6D).

2.56 Draft schedules or lists used to prepare the final schedule need not be retained or listed on the MG6C.

2.57 Any comments, observations or explanations about the contents of the schedules should be made on the MG6, which should accompany the submission of the MG6C and MG6D. The disclosure officer must also indicate on the MG6E whether the investigation started before 1 April 1997. This will be of relevance to the prosecutor in deciding how to go about disclosing material to the accused, see **Pre-CPIA investigations** at paragraphs 1.48 - 49 above.

2.58 **All** items of material relevant to the investigation must be listed on one of the above schedules for the prosecutor, unless the material is so sensitive that it cannot even be listed on a schedule. This is dealt with at paragraph 2.86 below.

2.59 The table at Annex D provides some help as to whether the material should be listed as sensitive or otherwise. If in doubt, consult the prosecutor.

2.60 Correspondence or advice between the CPS and the police should not ordinarily be listed on either schedule, see paragraph 2.85 below.

2.61 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 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.

2.62 Where the disclosure officer is unsure whether an item is relevant to the investigation and thus requires listing on a schedule, the prosecutor should be consulted as soon as practicable.

**The non-sensitive material schedule**

2.63 Non-sensitive unused material should be listed on the MG6C. **This form will be disclosed to the defence.**

2.64 In the description column of every schedule, each item should be individually listed and consecutively numbered throughout all schedules. Thus, where continuation sheets are used or additional schedules sent in later submissions, item numbering must be consecutive to all items on earlier schedules.

2.65 The descriptions in non-sensitive schedules should be detailed, clear and accurate. **They should include a summary of the contents of the retained material to allow the**

**prosecutor to make an informed decision on disclosure**. The same applies to sensitive schedules to the extent possible without compromising the confidentiality of the information. It is not sufficient merely to refer to a document by way of a form number which may be meaningless outside the Police Service. Example schedules are given on the disclosure wall chart.

2.66 In cases where there are many items of a similar or repetitive nature (messages for example) it is permissible to describe them by quantity and generic title. However, inappropriate use of generic listing (such as 'correspondence 1.4.02 to 10.12.02') is likely to lead to requests from the prosecutor and the defence to see the items. This may result in wasted resources and unnecessary delay. The preparation of properly detailed schedules at this stage will save time and resources throughout the disclosure process, and will promote confidence in its integrity.

2.67 When items are described by generic titles or quantities, the disclosure officer must ensure that items which might meet the test for disclosure are listed individually.

2.68 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. A copy will also assist the disclosure officer to keep track of the items listed, should the schedules need to be updated.

**Phoenix input documents**

2.69 Frequently, Phoenix input documents and fingerprint forms contain information that replicates exactly that which appears in other documents which have been used as evidence or are unused material. Not all information recorded on Phoenix forms will be material relevant to the investigation within the meaning of the Code: for example, information recorded for intelligence purposes only.

2.70 However, there will be circumstances where relevant information on these documents does not appear elsewhere, or is inconsistent with other material. Where this occurs, the disclosure officer should seek advice from the prosecutor as to whether the material may be relevant before listing the item on a schedule. A copy of the document should be sent to the prosecutor. The disclosure officer should explain why the information is thought to be relevant in the particular case.

2.71 It will not normally be necessary to list these documents on a schedule unless the prosecutor considers that they may be relevant. The prosecutor will decide whether the material is relevant, and whether it requires disclosure to the accused under the Act. If the item is relevant, but does not require disclosure to the accused, the prosecutor will request that it be added to the appropriate schedule.

2.72 If the document contains relevant information that must be disclosed to the accused because it undermines the prosecution case, or assists the defence at secondary stage, the prosecutor and the disclosure officer may need to consider whether the document should be edited if it contains sensitive material.

**Offences taken into consideration (TICs)**

2.73 Offences not charged but prepared as matters to be taken into consideration by the court on sentence will be treated in accordance with the Manual of Guidance. Normally, material relating to TICs need not be scheduled as individual items. However, if the investigating officer or the disclosure officer forms the view that a confession is unreliable, and this undermines the prosecution case, the CPS must be informed using the MG6. In this event the material relating to proposed TICs should be listed in the same way as all other unused material.

**The sensitive material schedule**

2.74 This schedule should be used to reveal to the prosecutor the existence of unused material which the disclosure officer, after consulting with the officer in charge of the investigation, believes should be withheld from the defence because it is not in the public interest to disclose it. Such material must none the less be revealed to the prosecutor.

2.75 The disclosure officer must list such material on the MG6D, and indicate on the form why the item(s) should not be disclosed. **This form will not be disclosed to the defence.**

2.76 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 with the MG6C and MG6E.

2.77 It is not possible to provide an exhaustive list of items which may be withheld. The proper test to apply is whether disclosure of the item would cause **real harm to the public interest**. Some examples are given at paragraph 6.12 of the Code.

2.78 Some items by their very nature will reveal why disclosure should be withheld, for example, information concerning intelligence sources. Others require more explanation. Careful attention to this element of the schedule will avoid further enquiries and consequent delay. Both the 'Description of item' and the 'Reasons for sensitivity' sections must 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.

2.79 The police and CPS will 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.

2.80 When the schedule and any material is 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 had to the police policy guidance issued in October 2001 as to the detailed categorisation of different types of sensitive material as **Restricted, Confidential**, **Secret** or **Top Secret.** Guidance is given in Annex K below.

2.81 In deciding sensitivity it is important to bear in mind that the sensitivity of the schedule and the sensitivity of the information may differ. It may be possible to describe a highly sensitive piece of material adequately on the schedule without disclosing the information (for example, a name), which makes the material sensitive. The security marking will depend on what is being submitted to the prosecutor; if the material itself is to accompany the schedule the material will determine the marking. If the schedule alone is submitted the content of the schedule will determine its security marking.

2.82 Sensitive unused material and schedules relating to informants, observation posts or undercover operations will normally be treated as **Confidential.** They should be sent to the prosecutor in a sealed envelope marked 'Sensitive unused material – **Confidential'** and bearing the name and URN of the defendant(s). Any other material which the police consider to meet the requirements of a **Confidential** marking should be submitted in the same way.

2.83 If a third party gives material to investigators, or allows material to be inspected, but indicates that material is sensitive in any way, the material must be listed on the MG6D. The third party's view must be passed on to the prosecutor via the MG6.

2.84 In order to make a proper assessment of the material which is said to be sensitive, the prosecutor will need either to see the material or part of it, or to be fully informed of its contents. In many cases it will be possible to attach a copy of the material (or part of it) to the schedule. But there will be occasions when this will not be feasible, either because the bulk of the material makes it impractical, or because the material is too sensitive to be copied and transmitted. In this event it will be for the disclosure officer to make arrangements with the prosecutor to view the material with an appropriate level of physical and personal security.

2.85 There is no need to list reports, advice or other communications between the CPS and police. Most in themselves will have no bearing on the case and thus will not be relevant. Those that are relevant will usually be protected by PII. When in doubt, guidance should be sought from the prosecutor.

**Handling highly sensitive material**

2.86 **All** relevant sensitive unused material should be included on the MG6D unless the exceptional circumstances identified in paragraph 6.13 of the Code exist. Paragraph 6.13 recognises that there may be material of such sensitivity that it would be inappropriate even to list it on the MG6D. Examples of such highly sensitive material would include information that, should it be compromised, would:

- lead directly to the loss of life
- 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 in the **Secret** or **Top Secret** categories.

2.87 Where there is unused material that is so sensitive that it cannot be itemised on the MG6D but the disclosure officer is aware of it, the disclosure officer should refer to the existence of such material on the MG6D without identifying it. The disclosure officer should notify the prosecutor of the existence of such material as soon as possible after a full file has been submitted to the prosecutor and should identify the person holding the material to enable the prosecutor to contact that person to discuss the nature of the material and to arrange to inspect it. Inspection should be at an appropriate location having regard to the sensitivity of the material.

2.88 Where the material in question is considered by police to be too sensitive even for a reference to its existence to be included on the MG6D, or it is considered too sensitive to reveal to the disclosure officer, the person holding the material should make contact with the prosecutor to discuss the material which **must** be viewed by the prosecutor.

2.89 It is likely that there will need to be an early consultation to discuss whether sensitive material may require disclosure and to decide whether the direction of the court should be sought. Where the police contend that material comes within paragraph. 2.86 above, initial contact with the CPS to discuss the material should be with the appropriate Unit Head or Special Casework Lawyer.

**Applications to the court: sensitive material**

2.90 The prosecutor has a duty under the Act to consider whether sensitive material might undermine the prosecution case or assist the defence. Where the prosecutor decides that the sensitive material requires disclosure to the accused because it falls within the tests set out in the Act, and the prosecutor in consultation with the police considers that disclosure should be withheld on public interest grounds, the direction of the court must be sought.

2.91 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 (see paragraphs 3.120 and 3.123 for levels of authority). Others may also be consulted, including the officer in charge of the investigation, and in Crown court cases, the prosecution advocate.

2.92 Consultation will include a careful examination of the circumstances of the case and the nature of the sensitive material. In particular, the prosecutor will require 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 real harm would be caused to the public interest by disclosure
- the consequences of revealing to the defence

    (i) the material itself

    (ii) the category of the material

(iii) the fact that an application is being made

- the 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.

2.93 For consultation to be effective, the officer in charge of the investigation should ensure that the prosecutor is provided with the information necessary to make a proper decision on how the application is to be made. This should be in documentary form, unless the information is so sensitive that it would be inappropriate to put it into writing.

2.94 On the basis of the information provided at the consultation, the prosecutor will decide whether an application should be made, and the form of application required. The editing of a document, or other methods of disclosing the relevant information without compromising the sensitive material may be considered appropriate.

2.95 Following consultation, the prosecutor will set out in writing the submission to be made to the court (see paragraph 3.124 below). The submission will be signed by the prosecutor (at Unit Head or Special Casework Lawyer level), and by a Detective Chief Inspector, unless a Detective Inspector has specific delegated authority to do so. The officer will 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.

**Editing**

2.96 Some documents may contain a mixture of sensitive and non-sensitive material. For example, a witness address or personal telephone number may appear on a document that otherwise is entirely non-sensitive.

2.97 In these cases there may be no objection to the sensitive part being blocked out, using a dark marker pen (not correcting fluid), on the copy document which is to be sent to the prosecutor. The original should not be marked in any way. A description of the document should be listed on the MG6C. (The unedited version should **not** be listed 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.

2.98 Decisions about editing documents should only be made after consultation between the disclosure officer and the prosecutor, other than for the simple deletion of the personal addresses or telephone numbers of witnesses.

**Amending the schedules**

2.99 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 directly to the defence without waiting for the disclosure officer to amend the schedule, but should advise the officer accordingly. Police officers should ensure that obviously non-evidential material is not included in the evidence bundle.

2.100 The prosecutor is required to advise the disclosure officer of: items listed on the MG6C that should properly be on the MG6D; any apparent omissions or amendments required; where there are insufficient or unclear descriptions; or where there has been a failure to provide schedules at all. The disclosure officer must then 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.

2.101 The Code places the responsibility for creating the schedules and keeping them accurate and up to date on the disclosure officer. Consequently, the prosecutor will not amend them. In these circumstances the prosecutor will inform the disclosure officer of the changes required, and will return the schedules for amendment where appropriate.

2.102 The disclosure officer should effect the amendments promptly and return the amended or fresh schedules to the prosecutor as soon as possible with an MG6E as appropriate.

**Continuing duties**

2.103 The duties of revelation to the prosecutor and disclosure to the accused are continuing obligations. Any new material coming to light after primary or secondary disclosure has been completed should be treated in the same way as earlier material. The new material should be listed 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.

2.104 A further MG6E should also be submitted irrespective of whether or not any of the new material is considered by the disclosure officer to come within the appropriate primary or secondary disclosure test.

**Revelation of the material to the prosecutor: common law**

2.105 Investigators and disclosure officers must be mindful of the prosecutor's duty, in the interests of justice and fairness in the particular circumstances of any case, to make disclosure of material after the commencement of proceedings but **before** the duty arises under the Act. For instance, the investigator or disclosure officer must inform the prosecutor of significant information, such as a victim's previous convictions, that might affect a bail decision or that might enable the defence to contest committal proceedings.

2.106 Similarly, 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 defendant in laying blame in whole or in part upon a co-defendant or another).

**Revelation of the material to the prosecutor: primary stage**

2.107 Revealing material to the prosecutor does not mean automatic disclosure to the defence. The prosecutor will only disclose material to the defence if it falls within the tests for disclosure set out in the Act. If the material is sensitive, and must otherwise be disclosed under the Act, the prosecutor will either apply to the court for a ruling as to whether the public interest requires disclosure or disclose the material after consultation with police or withdraw the prosecution.

2.108 The MG6C will be disclosed to the defence at primary stage.

2.109 Revelation to the prosecutor involves:

- promptly sending the completed schedules
- pointing out any material which might undermine the prosecution case and therefore fall within the test for primary disclosure
- copying certain material to the prosecutor (see paragraphs 2.119 - 2.125 below)
- allowing the prosecutor to inspect material.

2.110 Disclosure at the primary stage requires the disclosure of material which **in the prosecutor's opinion might undermine the case for the prosecution**. The disclosure officer will need to carefully check the material listed on **both** schedules and assist the prosecutor to identify anything which **potentially** might need disclosing to the defence. The case against each accused must be considered separately.

2.111 In large or complicated cases or in any case where particular difficulties are anticipated, an early discussion between the disclosure officer or the officer in charge of the investigation, the prosecutor and prosecution advocate, if instructed, may be extremely beneficial. For example, they may agree to look at the material together before the schedules are prepared. In such circumstance, the disclosure officer or the officer in charge of the investigation, should not hesitate to contact the prosecutor for advice.

2.112 The disclosure officer should bring to the prosecutor's attention any material which might have the potential to undermine the prosecution case. Examples will include:

- records of previous convictions and cautions for prosecution witnesses (see Annex A and Annex B)
- any other information which casts doubt on the reliability of a witness or on the accuracy of any prosecution evidence
- any motives for the making false of 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 defendant's mental or physical health, his intellectual capacity, or to any ill-treatment which the defendant may have suffered when in the investigators custody is likely to have the potential for casting doubt on the reliability of a purported confession

- information that a person other than the defendant was or might have been responsible or which points to another person whether charged or not (including a co-defendant) having involvement in the commission of the offence.

2.113 Any material that has an adverse effect on the strength of the prosecution case should be pointed out by the disclosure officer. This will include anything that may weaken an essential part of the prosecution case. 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 provided to the prosecutor at this stage. It also includes anything that points away from the defendant, such as information about a possible alibi. If the material might undermine the prosecution case it should be brought to the prosecutor's attention at this stage even though it suggests a defence inconsistent with or alternative to the one already advanced by the defendant or solicitor. Items of material viewed in isolation may not be considered to have potential to undermine the prosecution case, however several items together can have that effect.

2.114 Such material must 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 an opinion on what weight should be given to it.

2.115 A wide interpretation should be given when identifying material that might fall within the test. A thorough and careful check at primary stage may save time later on. The disclosure officer should consult with the prosecutor where necessary to help identify material that may require disclosure at this stage, and must specifically draw material to the attention of the prosecutor where the disclosure officer has any doubt as to whether it might have potential to undermine the prosecution case.

2.116 Disclosure officers must deal expeditiously with requests by the prosecutor for further information on material which may lead to disclosure.

2.117 The MG6E should be used to draw the attention of the prosecutor to material that might undermine the prosecution case. 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 itself should not be marked or highlighted in any way, as it will be provided to the defence.

2.118 Where it is the case that the disclosure officer believes there is no material that might have the potential to undermine the prosecution case, the officer should endorse the MG6E in the following terms: **'I have reviewed all the material which has been retained and made available to me and there is nothing to the best of my knowledge and belief that might undermine the prosecution case.'**

2.119 As well as describing the material on the schedule(s), there is a duty to copy certain material to the prosecutor. The types of material that should **always** be sent are described in paragraph 7.3 of the Code.

2.120 In addition to this, and as an aid to prosecutors in their case review function, copies of the crime report and the log of messages should also 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 OIS or CAD for the log of messages).

2.121 The documents should be fully described in accordance with 2.65 above to enable a properly informed decision by the prosecutor as to disclosure.

2.122 If the disclosure officer believes that these documents might have the potential to undermine the prosecution case, they should be listed on the MG6E in the usual way. However, copies should be provided to the prosecutor irrespective of whether they are considered to be potentially disclosable to the defence.

2.123 The copy of the crime report and log of messages should be edited by the police in accordance with paragraphs 2.96 and 2.97 above, before they are sent to the prosecutor. If it is impossible to edit any sensitive parts of the material, then it should be listed on the MG6D and be sent to the prosecutor with that schedule.

2.124 **Revealing this material to the prosecutor does not mean it will be automatically disclosed to the defence.** The prosecutor will only disclose unused material if it falls within the test for disclosure set out in the Act, and will advise the police of any such decision by endorsing the MG6C with reasons as to why the material meets the disclosure test.

2.125 This requirement to routinely reveal the crime report and the log of messages does not prejudice any other locally agreed arrangements between the police and the CPS that allow for the similar treatment of other additional categories or types of document.

2.126 The task of indicating material that might undermine the prosecution case, and the submission of copies of that material, involves a proper consideration of all the retained material. That obligation cannot be discharged by simply sending to the prosecutor material which has not been so considered.

2.127 Considering the unused material against the primary disclosure test does not mean that material not thought to be capable of undermining the prosecution case can be omitted from the schedule(s). **All retained unused material or information must be scheduled,** save in those rare cases where paragraphs 2.86 - 2.89 apply.

2.128 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 both stages of disclosure.

2.129 After the prosecutor has considered each schedule, it will be endorsed with the decisions as to whether each listed item will be disclosed to the defence. A copy of the endorsed schedule will be sent to the disclosure officer.

**Revelation of material to the prosecutor: secondary stage**

2.130 The prosecutor will give the disclosure officer a copy of any defence statement received as soon as possible following its receipt.

2.131 The defence statement should set out the nature of the defence in general terms, indicate the matters on which the defendant takes issue with the prosecution and the reasons why he takes issue. There may be a note from the prosecutor, providing guidance on what material might have to be disclosed at the secondary stage, advice on whether any further lines of enquiry need to be followed (for example, where an alibi has been given) or suggestions for when the officer reconsiders the unused material. These may arise where the prosecutor (unlike the disclosure officer) is aware of issues raised by the defence during the progress of the case, for example at bail hearings or during committal proceedings.

2.132 At the secondary stage, the prosecutor must serve upon the defence material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement. This must be done as soon as reasonably practicable after receipt of the defence statement.

2.133 The disclosure officer should promptly look again at the retained material and must draw the attention of the prosecutor to any material which **might reasonably be expected to assist the accused's defence as disclosed by the defence statement**. Both sensitive and non-sensitive material must be considered.

2.134 Material that might assist the defence may already have been identified at primary stage. It will include anything that might help the defence in preparing or presenting their case, as outlined in the defence statement. The disclosure officer should consult with the prosecutor where necessary to help identify any material which may require disclosure at this stage, as for primary disclosure.

2.135 The disclosure officer's observations should be submitted to the prosecutor on a fresh MG6E. If there is no material that the disclosure officer believes will assist the defence, the disclosure officer should endorse the second MG6E in the following terms: '**I have reviewed all the retained material made available to me and there is nothing to the best of my knowledge and belief to assist the defence in the light of the defence statement.'**

2.136 Any items that might assist should be referred to by quoting the item number from the schedule(s). If material identified has not previously been supplied to the prosecutor, a copy should be forwarded by the disclosure officer, 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.

2.137 The disclosure officer should ensure that it is clear that the MG6E has been completed in response to a defence statement (secondary disclosure.) The disclosure officer should

explain why the material might reasonably be expected to assist the defence. The disclosure officer must sign and date the MG6E to comply with paragraph 9.1 of the Code.

2.138 The defence statement may on occasion point the prosecution to other lines of inquiry, for example, the investigation of an alibi, or where forensic expert evidence is involved. The disclosure officer should inform the officer in charge of the investigation and copy the defence statement to him or her, together with any advice provided by the prosecutor, if appropriate. Further investigation in these circumstances is possible and evidence obtained as a result of inquiring into a defence statement may be used as part of the prosecution case or to rebut the defence. However, an investigator should not show a defence statement to a witness. The extent to which the detail of a defence case statement is made known to a witness will depend upon the extent to which it is necessary to clarify the issues disputed by the defence, assist the prosecutor to identify any further disclosable material and/or to identify any further reasonable lines of inquiry. The officer should seek guidance from the prosecutor if there is any doubt as to permissible usage of the defence statement in conducting further inquiries.

2.139 If enquiries are carried out in response to the defence statement, the disclosure officer in consultation with the officer in charge of the investigation should notify the prosecutor of the results of those enquiries. This should be done on an MG20, and given to the prosecutor together with any additional schedules and a further MG6E as appropriate. If no enquiries were made, particularly when the defence statement has given details of an alibi, the disclosure officer should explain why.

2.140 Once the prosecutor has decided whether there is material that should be disclosed at secondary stage, a letter will be sent to the defence. The disclosure officer will be sent a copy of the letter, which will contain details of any items that require disclosure.

**Large or complex cases**

2.141 Some investigations may involve a large quantity of material, both used and unused. Examples of cases where this may occur include the following:

- substantial frauds
- large scale conspiracies
- drug related offences involving manufacture, importation or supply
- homicide or other major enquiries.

2.142 Such cases will inevitably need close and early liaison between the disclosure officer and the prosecutor. Where appropriate, they may agree to look at the material together before the schedules are prepared. Alternatively, they may need to work closely to identify material listed on the schedules that may require disclosure under the Act, and to agree arrangements for its disclosure to the accused. Such early discussion between the Police and the prosecutor may be extremely beneficial to effective case preparation.

2.143 In any cases where there is a large amount of unused material, it may not be possible or desirable to copy all necessary material to the prosecutor. The disclosure officer should inform the prosecutor that a large quantity of material exists, and should make any necessary arrangements to facilitate inspection of the items by the prosecutor.

2.144 The disclosure officer and the prosecutor must consider the unused material, and decide what items require disclosure to the accused. Once a decision has been reached on what should be disclosed, the disclosure officer and the prosecutor may agree that it would be more practicable to allow the defence to inspect all or part of the material that should be disclosed. This is more likely to occur at secondary stage in cases where there is potentially a lot of material that may assist the defence put forward, but it may occur at primary stage.

2.145 In some cases, investigators may seize large volumes of material that may not, for whatever reason, seem likely ever to be relevant. In such circumstances, the investigator may consider that it is not an appropriate use of resources to examine such large volumes of material seized on a precautionary basis. If such material is not examined by the investigator or disclosure officer, and it is not intended to examine it, but the material is nevertheless retained, its existence should be made known to the accused in general terms at the primary stage and permission granted for its inspection by him or his legal advisers. A section 9 statement will be completed by the investigator or the disclosure officer describing the material by general category and justifying it not having been examined. This statement will itself be listed as unused material and automatically disclosed to the defence.

2.146 The prosecutor should be informed of any arrangements made with the defence and should also be informed of defence requests for copies of items. The disclosure officer must comply with defence requests for copies unless it is neither practicable nor desirable. Examples of such circumstances are given in paragraph 10.3 of the Code.

**Certification by disclosure officer**

2.147 The disclosure officer is required to certify to the prosecutor that: **To the best of my knowledge and belief, all material which has been retained and made available to me has been inspected, viewed or listened to (other than unexamined irrelevant material) and revealed to the prosecutor in accordance with the Criminal Procedure and Investigations Act 1996, Code of Practice and the Attorney General's Guidelines 2000.** The purpose of certification is to provide an assurance to the prosecutor on behalf of the police investigating team that all relevant material has been identified, considered and revealed to the prosecutor.

2.148 The officer in charge of the investigation must ensure that all relevant material that has been retained is either made available to the disclosure officer, or in exceptional circumstances revealed directly to the prosecutor. The disclosure officer must be able to perform the duties of scheduling the material and revealing it to the prosecutor accurately and efficiently.

2.149 The disclosure officer must make certification when the schedules are submitted at primary stage, and again at secondary stage when a defence statement has been supplied

and the retained material is reviewed again. The signed and dated MG6E should be used to provide certification to the prosecutor at both stages.

2.150 If the disclosure officer is uncertain as to whether all the retained material has been made available, enquiries should be made of the officer in charge of the investigation to resolve the matter.

**Disclosure to the accused**

2.151 Disclosure of material that falls within the tests for disclosure to the accused can be achieved either by copying the item, or by allowing the accused to inspect it. Where the item to be disclosed is a document, and has been copied to the CPS, the prosecutor will usually copy it to the defence.

2.152 There will be situations where this is not possible or appropriate, for example where the quality of the copy supplied is inadequate, or where the item is in a form requiring specialist copying equipment (such as audio or video tapes), or where the prosecutor considers that the material is not suitable for copying for other reasons (such as the sexual content). Sometimes it will not be possible to copy the item at all, for example where the item is a physical object.

2.153 In these circumstances the prosecutor may decide that the item should be inspected, or that the disclosure officer should arrange for a copy to be given to the defence. Where the item is a video or an audio tape, the police will be responsible for providing copies.

2.154 The prosecutor will indicate on the MG6C whether the item is to be disclosed by way of inspection, and should discuss with the disclosure officer the appropriate method of disclosure before that decision is taken. Where the prosecutor requests that the item to be disclosed should be made available for the accused (or his legal representative) to inspect, the disclosure officer is responsible for arranging this.

2.155 If the accused asks for a copy of any material which he has been allowed to inspect, the disclosure officer must give it to him, unless in the opinion of the disclosure officer it is either not practicable or desirable. Examples of these circumstances are given in paragraph 10.3 of the Code.

2.156 Where a copy of any disclosable item is given to the accused, the disclosure officer should inform the prosecutor, and supply a copy to the prosecutor, if one has not already been provided. It is important that a careful record is kept by the disclosure officer of what items are inspected by or copied to the accused or his legal representatives.

2.157 For information that is not recorded in writing, the disclosure officer may decide in what form the material should be disclosed. If a transcript is provided, the disclosure officer must ensure that the transcript is certified as a true record, for example by way of a short statement by the transcriber. It is not necessary for the disclosure officer to personally certify the accuracy of the transcript.

**Summary trials**

2.158 In summary trials, the time available for the investigator and the prosecutor to carry out their respective functions under the Act will be limited, particularly where the accused is in custody.

2.159 To make best use of available time, it is therefore essential that:

- potential not guilty pleas are identified so that the preparation of full files can start as soon as possible
- file upgrades are commenced as soon as possible
- full files should be submitted on time, complete with the schedules and copies of any items that must be supplied to the prosecutor.

2.160 In summary trials, the defence need not provide a defence statement. This means that there may not be a secondary stage to prosecution disclosure, and no opportunity to provide assisting material. In the interests of justice, the identification of material which might undermine the prosecution case should be interpreted as widely as possible.

2.161 In summary only matters, there is no requirement to provide schedules unless and until a formal not guilty plea is entered by the accused. However, as soon as the police receive notification of a not guilty plea in such cases, all appropriate disclosure schedules should be prepared and submitted to the prosecutor. This also applies to minor traffic offences.

**Special problems with disclosure**

2.162 There are a number of difficult areas that require specific and detailed guidance in relation to the handling of material for disclosure purposes. These are dealt with in the following annexes:

- previous convictions and disciplinary findings against police officers: Annex A
- previous convictions and cautions against other prosecution witnesses: Annex B
- debriefing sessions: Annex E
- pre-trial meetings with witnesses: Annex F
- financial investigation material: Annex G
- scientific support disclosure: Annexes H and I
- third party material procedures: Annex J
- the security of sensitive material schedules and unused material: Annex K (**Restricted**)

2.163 Investigators and disclosure officers should refer to the appropriate annex when dealing with these issues.

2.164 There will occasionally be cases where the unused material is revealed to the prosecutor by someone other than the disclosure officer. In some cases, for example, where the police investigation has been intelligence led, there may be an additional disclosure officer appointed just to deal with intelligence material which, by its very nature, is likely to be sensitive.

2.165 Where more than one disclosure officer has been appointed to deal with different aspects of the case, a **principal disclosure officer** should be identified as the single point of contact for the prosecutor. Where an officer other than the principal disclosure officer submits a disclosure schedule to the prosecutor, that officer should inform the principal disclosure officer.

2.166 Where the prosecutor consults with the principal disclosure officer, for example, when he provides a copy of the defence statement, the principal disclosure officer should inform any other officer who has provided unused material schedules to the prosecutor.

# SECTION THREE: CPS ACTIONS

## Introduction

3.1 This section contains guidance on how the CPS should go about fulfilling its statutory duties. The Act imposes a duty upon the prosecutor to disclose unused prosecution material to the defence, provided that it meets the criteria set out at each stage. Defence disclosure is conditional upon primary prosecution disclosure being properly carried out. If the prosecutor fails to comply with the disclosure duties by the time of the trial, an abuse of process argument by the defence may be successful.

3.2 Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice. Prosecutors must also be alert to the need to provide advice to disclosure officers on disclosure issues and to advise on disclosure procedure generally.

3.3 In order to carry out the duties set out in the Act, the prosecutor will need to consider the schedules of unused material and copies of any items supplied by the police to see if the tests for disclosure are satisfied. There is no duty to inspect every item on the non – sensitive schedule provided the items have been adequately described, or in the limited circumstances where the material comes within paragraph 9 of the Attorney General's Guidelines (see paragraph 2.145 above).

3.4 The disclosure officer is the first point of contact for all enquiries regarding the contents of the schedules and access to the material which has not been copied. It is important to liaise closely with the disclosure officer, and to consult regularly during the disclosure process.

### Receipt and review

3.5 In accordance with their duties under the Code and following the instructions at Section Two above, when a full file is submitted the police will send to the CPS:

- an MG6
- a schedule of non-sensitive material (MG6C)
- a schedule of sensitive material (MG6D)
- copies of sensitive material, where appropriate
- edited copies of the crime report and log of messages (see paragraphs 2.120 - 2.125 above)
- copies of material in the categories specified by the Code paragraph 7.3

- any other material that the disclosure officer considers might undermine the case for the prosecution

- a brief explanation of the basis for the selection of material that is thought to undermine the prosecution case (on the MG6E)

- certification by the disclosure officer (on the MG6E).

The prosecutor should examine the schedules carefully to check for possible omissions from them. Where there are apparent omissions from the schedules, the prosecutor must seek further details from the disclosure officer, and return any incomplete schedules for further endorsement.

3.6 The date of receipt of the schedules and any accompanying material must be recorded on the disclosure record sheet (see paragraph 3.8 below).

3.7 The schedule and any accompanying material should be brought to the attention of the prosecutor as soon as possible. The prosecutor should carry out a review of the schedules and the material received in accordance with the procedures set out below.

3.8 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 disclosure record sheet (a specimen is at Annex C). In addition, the disclosure record sheet should be used to record all actions and events that occur in the discharge of prosecution disclosure responsibilities.

A single disclosure record sheet should be completed in respect of all unused material, both sensitive and non-sensitive.

3.9 The review and preparation of unused material for disclosure to the defence should start as soon as possible after it becomes apparent that disclosure will be required. For most Crown court cases this means the review of unused material should take place at the same time as the preparation of committal papers, or preparation of the prosecution case following the sending of an accused to Crown court, so that primary disclosure can take place immediately after those proceedings. Following a not guilty plea in the magistrates' court, disclosure should take place as soon as possible after a full file has been received. If the file received from the police does not contain all unused material schedules, these should be requested immediately in all cases.

**Primary disclosure**

3.10 The prosecutor must thoroughly review the schedules, and any material supplied by the police, and decide whether there is:

**any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused**: section 3(1)(a) of the Act.

3.11 In deciding what material might undermine the prosecution case the prosecutor must pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. Material can be considered to have such potential if it has an adverse effect on the strength of the prosecution case.

Material can have such an adverse effect:

- by the use made of it in cross examination, and

- by its capacity to suggest any potential 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 defendant's rights under the Human Rights Act 1998.

Any material that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution will have potential to undermine the prosecution case.

3.12 This test should be applied to all prosecution material, both sensitive and non-sensitive. Prosecution material is defined in the Act in section 3(2) and is material which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or which the prosecutor has inspected under the provisions of the Code in connection with the case against the accused.

3.13 In cases where the description on the schedule is not sufficient, is unclear or where there are apparent omissions and the prosecutor cannot therefore make a decision on disclosability, the prosecutor must ask the disclosure officer to take all necessary action to provide properly completed schedules. If, following this, the prosecutor remains dissatisfied with the quality or content of the schedules, the matter must be raised with a senior officer and persisted with if necessary.

3.14 Consequently, it may be necessary to ask for a copy of an item not already supplied, or to arrange to inspect the material. Where there is a question about the nature and impact of a particular item upon the prosecution case, it will be appropriate to consult with the disclosure officer. The disclosure officer may seek advice regarding whether material is relevant to the investigation and requires listing on a schedule.

3.15 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 either of the threshold tests for disclosure.

Special considerations will apply to the handling of highly sensitive material, and these are described at paragraphs 3.103 - 3.108 below.

3.16 The test to be applied at the first stage is a subjective one: whether an individual prosecutor considers that the material might undermine the prosecution case, based on the knowledge of the entirety of the case as it stands when the test is applied. In carrying out the test the prosecutor must be proactive in scrutinising the disclosure schedules and identifying any material that might undermine the prosecution case.

3.17 Where the prosecutor has reason to believe that the disclosure officer has not inspected, viewed or listened to material (in accordance with paragraph 2.8 above), a request that this be done should be made. If the prosecutor considers that further material may exist which should be recorded on the MG6E, he or she should raise the issue with the disclosure officer immediately.

3.18 The prosecutor must always inspect, view or listen to material which it is believed might undermine the prosecution case.

3.19 Additionally, where the prosecutor believes there are further reasonable and relevant lines of inquiry to pursue, the investigator should be told as soon as possible.

3.20 What amounts to material which might undermine the prosecution case will be different in each case, but will always involve firstly considering:

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

3.21 The case against each defendant must be considered separately.

3.22 Normally, material disclosable to one defendant is disclosable to all co-defendants in the same proceedings. However, where the particular circumstances might dictate, differential disclosure is permissible and prosecutors should proceed in accordance with the principles laid down in *R v Peter Adams* (1997) Crim LR 292 and *Lawtel*.

3.23 The test applies to all unused prosecution material. If material substantially undermines the prosecution case or raises a fundamental question about the prosecution, the prosecutor will need to assess the case in accordance with the Code for Crown Prosecutors, and decide after consulting with the police whether the case should continue.

3.24 Generally, any material that can be considered to have an adverse effect on the strength of the prosecution case must be disclosed at primary stage (subject to Public Interest Immunity (PII)). This will include anything that goes toward an essential element of the

offence charged and that points away from the defendant having committed the offence with the requisite intent.

3.25 Examples of the kinds of material which might undermine the prosecution case are included in paragraph 7.3 of the Code. The list is not exhaustive, and anything that is inconsistent with an essential part of the prosecution case or which has the potential to weaken it will amount to undermining material requiring disclosure to the defence. The Attorney General's Guidelines 2000 give further examples of material having the potential to weaken the prosecution case or to be inconsistent with it, namely:

- 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 might undermine the prosecution case it should be disclosed at this stage even though it suggests a defence inconsistent with or alternative to one already advanced by the accused or his solicitor
- any material which may have a bearing on the admissibility of any prosecution evidence.

3.26 Additionally, if material of the description set out below might undermine the prosecution case, and does not justify an application to the court to withhold disclosure, prosecutors must disclose it at the primary stage. The material is:

- those recorded scientific or scenes of crime findings retained by the investigator which relate to the defendant, and are linked to the point at issue, and have not previously been disclosed
- where identification is or may be in issue, all previous 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
- 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

- 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).

Disclosure of video recordings or scientific findings by means of supplying copies may well involve delay or otherwise not be practicable or desirable, in which case the investigator should make reasonable arrangements for the video recordings or scientific findings to be viewed by the defence.

3.27 It should also be borne in mind that while items of material viewed in isolation may not be considered to potentially undermine the prosecution case, several items together can have that effect.

3.28 Experience suggests that any item which relates to the defendant's mental or physical health, his intellectual capacity, or to any ill treatment which the defendant 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 item in the possession of the prosecution.

3.29 It is not necessary to speculate about possible defences which may be raised. But where a distinct explanation has been put forward by the accused, or is apparent from the circumstances of the case, it must be considered in the context of assessing whether there is any material requiring disclosure at the first stage.

3.30 Where there is any doubt as to whether material should be disclosed at primary stage, this should be resolved in favour of disclosure. This is particularly important in summary trials, where a defence statement is not compulsory (see paragraph 3.74 below).

3.31 If the material that falls to be disclosed is sensitive, and the prosecutor considers that an application to withhold the material should be made, the application to the court should not delay disclosing non-sensitive material.

**Procedure: primary disclosure**

3.32 When considering primary disclosure the prosecutor should record his or her decisions on form MG6C, giving brief reasons for the decisions in the comment column where:

- the disclosability or otherwise of the material may not be apparent from the description, or

- material has been disclosed pursuant to paragraph 2.124 (material routinely revealed)

- reasons might otherwise be helpful.

The MG6C should be signed and dated by the prosecutor upon completion and the disclosure record sheet noted accordingly.

3.33 Where an item is to be disclosed, the prosecutor should enter a *'D'* in the appropriate column of the MG6C, and indicate in the comment section whether a copy is attached. If the item is to be disclosed and the prosecutor considers that inspection is more appropriate, an *'I'* should be entered in the appropriate column. If necessary, this should be clarified in the comment section. Items that are clearly not disclosable at this stage should be marked *'CND'*. In large cases with substantial amounts of unused material, items may be block marked where appropriate.

3.34 The MG6D should be used at both stages of disclosure. The prosecutor should record the decision and any observations relating to the material. In particular the prosecutor's endorsement should contain the following:

- whether the scheduled item has been viewed
- whether the item satisfies either of the tests for disclosure (with reasons)
- whether PII attaches to the scheduled item (with reasons)
- 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.

3.35 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.

3.36 Details of any unused material created by extracting statements or documents from the committal bundle or by not using material which has been supplied by the police as part of the prosecution case should be notified to the disclosure officer. The disclosure officer is responsible for maintaining the accuracy of the schedules, and will supply an amended schedule listing the additional material as soon as reasonably practicable (see police actions at paragraph 2.99 - 2.102).

3.37 Where additional unused material created by the prosecutor requires disclosure because it might undermine the case, or in any other circumstances where the prosecutor has unused material that is disclosable but the schedule requires amendment, the prosecutor should disclose this material without waiting for the schedule to be amended. The disclosure officer must be informed in writing of this decision.

3.38 In addition, the prosecutor is required to advise the disclosure officer of: items listed on the MG6C that should properly be on the MG6D; any apparent omissions or amendments required; where there are insufficient or unclear descriptions; or where there has been a failure to provide schedules at all. Where the prosecutor considers that the schedules require amendment for any reason, the disclosure officer should be consulted. The schedules should be returned to the disclosure officer with a note explaining why the amendments are necessary, and a fresh or amended schedule requested even when disclosure to the defence has already taken place. Failure to do so should result in the matter being raised with a senior officer.

3.39 Copies of the following documents should be prepared after review for primary disclosure:

- the endorsed MG6C
- copies of any documents which might undermine the prosecution case.

3.40 These should be sent to the defence with the letter at Annex C1 or C2, as appropriate, signed by the prosecutor, **as soon as possible after a not guilty plea** in the magistrates' court or **immediately after** committal/transfer or service of the prosecution case in cases sent to the Crown court for trial.

3.41 **Under no circumstances should the MG6D, MG6E or the disclosure record sheet be copied to the defence.**

3.42 At the same time, a second copy of the endorsed MG6C should be sent to the disclosure officer with the memo at Annex C6, together with a copy of the letter sent to the defence.

**Secondary disclosure**

3.43 The date of receipt of anything which purports to be a defence statement provided under either section 5 or section 6 of the Act shall be recorded on the disclosure record sheet. It should be acknowledged in writing to the defence and brought to the attention of the prosecutor as soon as possible.

3.44 A copy of the defence statement should be sent immediately to the disclosure officer using the memo at Annex C3. The disclosure record sheet should be completed to show the date of dispatch. The prosecutor should draw the attention of the disclosure officer to any key issues raised by the defence statement. Where appropriate, the prosecutor should give advice to the disclosure officer in writing 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. Such information should be communicated in the memo at Annex C3 or separately.

3.45 Advice to the disclosure officer may include:

- guidance on what material might have to be disclosed at the secondary stage
- advice on whether any further lines of enquiry need to be followed (for example, where an alibi has been given) or
- suggestions for when the disclosure officer reviews the unused material
- the appropriate use of a defence statement in conducting further enquiries, particularly when this necessitates additional enquiries of prosecution witnesses. An investigator should be advised not to show a defence statement to a witness.

However, the extent to which the details in a defence case statement can be made known to a witness will depend upon the extent to which it is necessary to clarify the issues disputed by the defence, assist the prosecutor to identify any further disclosable material and to identify any further reasonable lines of inquiry.

3.46 Again, it may be necessary to ask for copies of items listed on the schedule(s) or to inspect material. This should be done in consultation with the disclosure officer, who may be able to help identify material which should be disclosed. The disclosure officer should in any event supply a further certified MG6E identifying material which he or she believes might assist the defence as set out in the defence statement. In some cases it may be helpful to meet with the disclosure officer to discuss the implications of the defence statement, and jointly assess the material.

3.47 The prosecutor must consider afresh the MG6C and MG6D schedules and further MG6E, together with any material supplied by the police to see if there is:

**any prosecution material which has not previously been disclosed, and which might reasonably be expected to assist the accused's defence as disclosed by the defence statement**: section 7(2) of the Act.

The test applies to both sensitive and non-sensitive material, and is an objective one.

3.48 Material which may assist the defence will be different in each case, and different for each defendant. It extends only to material which has a bearing on the defence disclosed in the defence statement.

3.49 Examples of material which may reasonably be expected to assist the defence will include anything of relevance to the case which might:

- assist the defence to cross-examine prosecution witnesses, as to credit and/or to substance
- enable the defence to call evidence or advance a line of enquiry or argument
- explain or mitigate the defendant's actions.

3.50 The purpose of the second stage is to disclose anything which might possibly help the accused, within the terms of the defence that is raised. This should be generously interpreted, so as to avoid potential injustice or unnecessary applications under section 8. In considering afresh the disclosure schedules at this stage, the prosecutor must be proactive in identifying material, which in light of the defence statement, might reasonably be expected to assist the defence. The prosecutor should also consider whether material that has not been included on the MG6E ought nevertheless to be disclosed.

3.51 The prosecutor should inspect, view or listen to any material that he, or the disclosure officer, believes might reasonably be expected to assist the defence. Where the prosecutor believes there may be material that is not recorded on the MG6E, but which ought to be disclosed, he or she should raise the matter with the police immediately.

3.52 The defence statement of one defendant may be disclosable to co-defendants in the same prosecution (*R v Cairns*, [2002] All ER 344). The provisions of section 7(2) of the Act apply and a defence statement must be supplied to co-defendants if it might reasonably be expected to assist their defence. If a defence statement satisfies, or possibly satisfies, the disclosure test but contains sensitive material, the guidance given in paragraphs 3.111 onwards below will apply. It is important to keep in mind the continuing duty of disclosure imposed by section 9 of the Act. A defence statement which may not at first sight help a co-defendant may meet the disclosure test once the co-defendant's defence statement is received. A duty to disclose may also arise when the defendants give evidence, for example where there is a cut-throat defence and a defendant departs from his defence statement.

3.53 Prosecutors should be open, alert and responsive to requests for disclosure of material supported by a comprehensive defence statement. They should also be proactive in identifying inadequate defence statements. The minimum requirements of a defence statement are:

- to set out in general terms the nature of the defence case
- to indicate the matters on which the defendant takes issue with the prosecution and
- to set out, in the case of each such matter, the reason why he takes issue with the prosecution.

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 or consent. Where the defence differs from the facts on which the prosecution is based, those differences and the reasons for them, should be included in the defence statement to ensure that the prosecution has a proper opportunity of investigating the facts giving rise to those differences.

3.54 On receipt of a defence statement with a request that specifically links material sought with the defence being put forward, the material listed in paragraph 3.26 above should be disclosed unless there is good reason not to do so.

3.55 Where there is no defence statement or it is considered inadequate, the prosecutor should write to the defence indicating that secondary disclosure will not take place or will be limited (as appropriate) and inviting them to specify or clarify the defence case using specimen letter C4a at Annex C. Where the defence fails to respond or refuses to clarify the defence case, the prosecutor should consider raising the issue at a court hearing to enable the court to give directions. However, this does not mean that the defence is required to set out their defence in full, or should strengthen the prosecution case by providing evidence to fill any gaps. 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 should be considered in appropriate cases.

3.56 A failure to comply with the minimum requirements of a defence statement may attract an adverse inference under section 11 of the Act at trial. To assist the court in deciding whether to allow comment to be made or whether the jury should be allowed to draw

any inferences, the prosecutor should put the contents of the defence statement to the accused in cross-examination to elicit the differences between it and the actual defence relied upon and any justification for those differences. Leave of the court is not required for the prosecutor to do this, see *R v Tibbs* (2000) 2 Cr App R 309.

3.57 The requirements of a voluntary defence statement in the magistrates' court are the same as those for a compulsory defence statement in the Crown court. Prosecutors should treat both similarly.

**Procedure: secondary disclosure**

3.58 When considering secondary disclosure, the prosecutor should endorse any new disclosure decisions and reasons on the MG6C, making it clear that they have been made at the secondary stage. The MG6C should be signed and dated by the prosecutor upon completion and the disclosure record sheet noted accordingly. The letter C4 or C5 at Annex C should be prepared. Where there is material to be disclosed letter C4 should be used. Items to be disclosed should be referred to by their number on the original schedule, and marked as either copy attached or for inspection as appropriate. Letter C5 should be used where there is no further material to be disclosed.

3.59 The letter should be signed by the prosecutor and sent to the defendant **as soon as reasonably practicable,** and in any event before the commencement of the trial. A copy should be sent to the disclosure officer. The date of dispatch should be recorded on the disclosure record sheet.

**Method of disclosure: copying or inspection**

3.60 The prosecutor is responsible for ensuring that effective disclosure of material falling within the tests in the Act is made to the accused. 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 the item.

3.61 Where the item to be disclosed is a document 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, or
- it is in a form which requires specialist copying equipment (for example, audio or video tapes, computer disks), or
- the prosecutor considers that the material is not suitable for copying for other reasons (for example, sexual content).

3.62 In these circumstances, the prosecutor should discuss with the disclosure officer how disclosure to the defence can best be achieved. This may be by arranging for the disclosure officer to copy the original item and send it to the defence direct, or by arranging for the defence to inspect the original item. The decision should be endorsed

by the prosecutor on the MG6C as described in paragraph 3.33, and on the disclosure record sheet.

3.63 Where the item to be disclosed has not been copied and sent to the CPS, the usual method of disclosure will be by allowing the defence to inspect it. The disclosure officer will make the arrangements for the defence inspection of the item, and should notify the prosecutor whether and when the inspection takes place. If the disclosure officer makes a copy of the item for the accused, he should also send a copy to the prosecutor.

**Continuing duty to disclose**

3.64 Section 9 of the Act imposes a continuing duty upon the prosecutor to keep under review the question of whether there is any unused material which may undermine the prosecution case or assist the defence.

3.65 The prosecutor should be alert to the possibility that further unused material may come to light or be generated after the point at which primary or secondary disclosure has been made, for instance upon further investigation as a result of the prosecution advocate's advice, or material such as negative fingerprint and forensic results not previously available.

3.66 If any new material comes to light after the schedules have been submitted by the police, the disclosure officer should submit a fresh schedule or a continuation sheet along with an additional MG6E. If new material is not properly listed in accordance with paragraph 2.103 above, the prosecutor must request, and insist upon receiving, the correctly completed schedules. The prosecutor should consider this new material and apply the tests for disclosure in exactly the same way as for material submitted earlier.

3.67 The disclosure record sheet should be updated with any actions taken relevant to disclosure. The new schedule, or continuation sheet, should be endorsed with the disclosure decision, and provided to the defence with a covering letter.

3.68 Where new material is received that changes the nature or strength of the prosecution case, the prosecutor should re-assess the schedules and the material considered at an earlier stage. If that re-assessment results in a decision to disclose further material that was listed on an earlier schedule, the schedule and disclosure record sheet should be endorsed with the updated decision. That updated decision should be communicated to the defence, along with the material itself.

3.69 It will also be necessary to be alert to the possibility that 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 begins at paragraph 3.133 below and can be found in Annex J.

**Large or complex cases**

3.70 In large or complex cases involving a large quantity of material, it may not be possible or desirable for the police to copy all necessary material to the CPS, particularly at secondary stage. This is likely to occur in major enquiries of all kinds.

3.71 The prosecutor will need to consider with the disclosure officer at an early stage whether it will be more practicable to permit the defence access to all or part of the unused material that has been identified as undermining the prosecution case (at primary stage) or that might assist the defence (at secondary stage). This does not absolve the prosecutor from reviewing the schedules and assessing the unused material with the police for anything which might undermine the prosecution case. This still must be carried out to comply with the statutory duty under the Act.

3.72 In some cases, the police may seize large volumes of material that may not, for whatever reason, seem likely ever to be relevant. If this material is not examined by the police, but is never the less retained, the prosecutor should be notified of this. The prosecutor should make efforts to ensure that the procedure set out in paragraph 2.145 above is complied with.

**Instructions to the prosecution advocate**

3.73 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 at the primary stage about the disclosure of material which might undermine the prosecution case, and enclose copies of any relevant material;
- any decision the prosecutor has made about sensitive material
- the prosecutor's comments on the defence statement
- any decision the prosecutor has made at the secondary stage about the disclosure of material which might reasonably assist the defence and
- that the prosecution advocate should consider the disclosure record sheet at all conferences and before all court hearings.

**Summary trials**

3.74 In a summary trial, the defendant is not obliged to make a defence statement. If no defence statement is given, there is no duty upon the prosecution to provide secondary disclosure. Providing secondary disclosure in summary trial cases where there has been no defence statement will discourage proper defence disclosure and defeat the purpose of the Act. In any event, an assessment of assisting material without a defence statement may be unreliable and speculative.

3.75 The defendant can be reminded in appropriate cases that further material exists, but that until a defence statement is served there can be no additional disclosure. The defendant

can then consider whether any of it might assist his preparation for trial, in the light of the items listed on the non-sensitive schedule which was sent at the primary stage.

3.76 If the defendant leaves it until the trial to state the defence, and substantial additional costs are incurred, for example where the trial has been delayed and witnesses inconvenienced, an application for wasted costs should be considered in appropriate cases.

3.77 In minor summary only road traffic offences, if a not guilty plea is entered formally by the accused, the prosecutor should seek an adjournment. This will allow the police an opportunity to provide schedules and certification as required under the Act. If for any reason, these are not provided automatically by the police, prosecutors should request all appropriate disclosure schedules before the trial date. This request should be noted on the disclosure record sheet.

**Applications by the defence**

3.78 Under section 8 of the Act the defence may make a formal application for access to items on the schedule at any time after they have made a defence statement. The Rules impose requirements for the notification and timing of applications under section 8.

3.79 However, there may be informal approaches by the defence at any stage for access to material which is claimed might undermine the prosecution case, or which may assist the defence. The prosecutor should consider each approach on its merits, and wherever possible these issues should be explored and resolved without the need for a court hearing.

3.80 Upon receipt of the notice of application, the prosecutor should consider afresh the items requested by the defence, in consultation with the disclosure officer. The test to be applied is the same as for secondary disclosure. If necessary, the prosecutor should ask for copies of the items or inspect the material, as appropriate.

3.81 If, after considering the requested material, the prosecutor concludes that all or part of it should be disclosed, the decision should be communicated without delay to the defence using letter C4 in Annex C. The court should be notified of the further disclosure, and a copy of letter C4 sent to the court and police.

3.82 Where the prosecutor considers that the material requested has no bearing on the case or on the defence raised, the application will have to be determined by the court. At the hearing, the court will need to be informed of the nature and substance of the requested material, and given the prosecutor's reasons for withholding it. If the prosecutor considers that the defence statement is inadequate to form a proper view as to what might assist, this should be brought to the attention of the court.

**Confidentiality of disclosed material**

3.83 All unused material that has been disclosed to the defence is subject to the provisions of section 17 of the Act. 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. The material may be used in connection with appeals or any further criminal

proceedings arising out of the original case, but anything else requires the approval of the court.

3.84 If the disclosed material is used outside these circumstances, an offence under section 18 of the Act may have been committed.

3.85 Rules of Court set out the procedure for the notification and determining of applications by the accused to use the material for other purposes.

**Sensitive material**

3.86 Material which the disclosure officer considers to be sensitive for any reason will be listed on the MG6D sensitive unused material schedule. **The MG6D must not be disclosed to the defence at any stage.**

3.87 The disclosure record sheet should be used to record the way in which sensitive unused material has been handled. Its purpose is to record events rather than reasons and entries therefore should not 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 disclosure record sheet.

3.88 The disclosure record sheet should be used to record all events and actions, which will include the following:

- receipt of the MG6D
- the fact of all disclosure reviews (the outcome of such reviews will be recorded on the schedule itself)
- the receipt and review of any addenda to the MG6D
- the date of any contact with the disclosure officer or investigating officer in relation to sensitive unused material
- receipt of defence statements and further reviews
- the date of any consultation with the prosecution advocate
- the date of 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
- the fact of any PII applications

3.89 Where the sensitive material has been given a protective marking of **Confidential, Secret** or **Top Secret**, the material should be kept securely off file. A note should be made on the disclosure record sheet identifying the existence and location of the material stored off file. It is suggested that where there is both **Restricted** and **Confidential** sensitive material, then all sensitive material should be kept together off file.

3.90 Highly sensitive material may be brought to the prosecutor's attention by individual investigators without the details being known to the disclosure officer, in accordance with paragraph 6.13 of the Code. This is the responsibility of the individual investigator, but prosecutors should be alert to the possible existence of such material in appropriate cases.

3.91 Examples of what may amount to sensitive material are contained in paragraph 6.12 of the Code. The list is not exhaustive, and the prosecutor will need to assess whether the item is correctly identified as material which it would not be in the public interest to disclose. Where the prosecutor considers that the item should more properly appear on the MG6C, the disclosure officer must be consulted.

3.92 If appropriate, items should be inspected or copies requested in accordance with the procedure set out in paragraphs 3.13-14 and 3.46 above.

3.93 Upon receipt of the MG6D, the prosecutor should consider the items listed together with any copies supplied. At the appropriate stage, the tests for primary and secondary disclosure under the Act should be applied in the same way as for non-sensitive material.

3.94 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.

3.95 Reports or other communications between the CPS and police will not normally require scheduling. Most in themselves will have no bearing on the case and thus will not be relevant. Those that are relevant will usually be protected by PII. Where disclosure **is** sought of police reports or other communications between CPS and police, the prosecutor must address and respond to the request specifically. The prosecutor must not assume that there is no basis for disclosure. Further instructions can be found in CPS *Legal Guidance*, chapter 20.

**Editing**

3.96 Sometimes documents that fall to be disclosed under the Act, because they contain material that might undermine the prosecution case or assist the defence, may contain a mixture of sensitive and non-sensitive material. For example, a prosecution witness's address or personal telephone number may appear on an item that is otherwise entirely non-sensitive.

3.97 Rather than applying to withhold the entire document, it may be possible to block out the sensitive part of the item on the copy document that is to be sent to the defence. The disclosure officer may have already identified this problem, and should be consulted

before any decision to edit documents is taken. Other methods of disclosing material without showing the whole document include:

- creating a fresh statement, omitting the sensitive parts
- formal admissions.

3.98 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 otherwise requires disclosure under the Act.

**Consultation**

3.99 Where the prosecutor considers that the sensitive material should be disclosed to the defence because it falls within the statutory tests, the police (or any person having an interest in the material) should be consulted before any final conclusions are reached. The procedures and levels of authority required are set out below at the relevant paragraph for each stage.

3.100 Where an application to the court becomes necessary, consultation with the police must take place to establish the proper basis for the application (see paragraph 3.119 onwards below).

3.101 If any third party, such as social services or the prison service, 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.

3.102 A note should be made on the disclosure record sheet of any consultation that takes place, and of the conclusions reached, taking care that this does not make the disclosure record sheet exceed the **Restricted** classification.

**Highly sensitive material**

3.103 Where there is unused material that is so sensitive that it cannot be itemised on the MG6D but the disclosure officer is aware of it, the disclosure officer will have referred to the existence of such material on the MG6D without actually identifying it. The disclosure officer will have also identified the person holding the material. The prosecutor should contact that person to discuss the nature of the material and to arrange to inspect it. Inspection should be at an appropriate location having regard to the sensitivity of the material.

3.104 Where material in question is considered by the police to be too sensitive even for a reference to its existence to be included on the MG6D, or it is considered too sensitive to reveal to the disclosure officer, the person holding the material will make contact with the prosecutor to discuss the material. The material itself **must be** viewed by a CPS lawyer of appropriate seniority (see paragraph 3.105 below).

3.105 Where there is material that falls within paragraphs 3.103 or 3.104 above, consultation between the police and the CPS should take place as soon as possible. Initial contact

with the CPS should be at Unit Head or Special Casework Lawyer level unless the responsibility has been specifically delegated to a Prosecution Team Leader. The consideration of highly sensitive material obtained from the intelligence or security services should not normally be delegated.

3.106 During consultation on sensitive material marked as **Confidential** or above, any copies of the items discussed or notes taken which could identify the material should be kept separate from the file and in secure conditions. Access to the material or notes should be restricted to those prosecuting the case or advising upon it. If the material is taken to court, it must not be left in an unattended court file. Where the advice of the prosecution advocate is sought, appropriate arrangements must be made to ensure the security of the material.

3.107 Care should be taken to ensure that file endorsements relating to the consultation do not inadvertently identify the nature of the material.

3.108 At the conclusion of a case, any items of extreme sensitivity retained by the CPS should be returned to the police. The police officer authorised to collect the items should be handed all copies of the material, together with any notes which may refer to the nature of the material. Before the file is sent to be archived, the Unit Head or Special Casework Lawyer, as appropriate, must be satisfied that it does not contain anything which may identify the nature of the material.

**Instructing the prosecution advocate**

3.109 Instructions to the prosecution advocate in cases where there is sensitive unused material must 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 prosecution advocate in relation to sensitive unused material
- specific instructions on the handling and security of sensitive material consistent with its protective marking
- a note that the prosecution advocate should always check the disclosure record sheet prior to any hearings and at any case conference, as the disclosure record sheet itself should not be copied to the prosecution advocate.

3.110 There should be consultation between the prosecutor and the prosecution advocate where there is any question of an application being made to the court to withhold unused

material. A record of that consultation should be made, and a note of its location cross-referenced on the disclosure record sheet.

**Withholding sensitive material**

3.111 Where, following a review of the sensitive unused material, the prosecutor considers that there is material which satisfies, or possibly satisfies, the appropriate disclosure test, a decision to place that material before the court for a ruling as to disclosure should be taken by the Unit Head or a Special Casework Lawyer, unless the responsibility has been specifically delegated to another lawyer by the CCP. (References to 'Unit Head or Special Casework Lawyer' in paragraphs 3.120 and 3.123 below may be taken to include a lawyer to whom the CCP has delegated specific authority).

3.112 Files containing sensitive material should normally be handled by CPS prosecutors in the magistrates' court, unless specific approval is given by the appropriate Unit Head for the case being handled by a particular agent.

3.113 Sensitive material which does not satisfy either of the disclosure tests does not have to be disclosed or placed before the court for a ruling. The material must, however, be kept under constant review to take account of changing circumstances (see paragraph 1.24 above).

3.114 Where sensitive material is identified as meeting the appropriate disclosure test and the prosecutor is satisfied that **real harm** would be caused to the public interest by its disclosure, the material must be disclosed unless the court concludes that it would not be in the public interest to do so. An application to the court therefore will have to be made in respect of all sensitive material that the prosecutor considers might undermine the prosecution case, or which might reasonably be expected to assist the defence case as revealed in a defence statement, for the prosecution to withhold the material.

3.115 The common law rules relating to PII and withholding material were specifically preserved by the Act. However, a number of procedural changes were introduced by the Rules governing applications to withhold material. Prosecutors and caseworkers should be alert to formal obligations imposed by the Rules:

- third parties with an interest in material which the prosecutor wishes to be put before the court must be notified of PII applications
- 'interested third parties' have the right to make representations about the disclosure of their material at the PII hearing
- the defence may formally request the court to review a PII ruling, and interested third parties will have to be notified if appropriate.

3.116 The procedure for making an application to withhold material is governed by the Rules, but the following decisions will remain with the prosecution applying common law principles:

- whether an application should be made at all (in other words, to justify the making of a PII application to withhold material, the prosecutor must be satisfied that the public

interest in withholding the material **outweighs** the public interest in revealing material that might enable the defence to cast doubt upon the prosecution case)

- the type of application that is appropriate to the individual case
- the arguments to be put before the court in support of the application
- the form of the application.

3.117 The law requires disclosure to be made as soon as reasonably practicable after committal, transfer or service of the prosecution case (or not guilty plea in the magistrates' court) and as soon as reasonably practicable after defence disclosure. This means that arrangements for a PII application should be made as soon as it becomes clear that an application will be necessary.

3.118 Where the need to make a PII application has been identified and the CPS are in a position to make the application, the prosecutor should write to the court pointing out that an application is required but cannot be made until a trial judge has been allocated and that delay in allocating a trial judge may ultimately add significantly to the length of the trial.

3.119 There may be cases where the prosecutor identifies material which satisfies the relevant disclosure test and to which PII attaches (in other words, real harm would be caused to the public interest by its disclosure) but the continuation of the prosecution would demand disclosure having regard to the overriding duty to ensure fairness in the trial process. In such cases, the material should either be disclosed or the proceedings abandoned. Before such action is taken there must be consultation between the CPS and police (and when appropriate, the owners of sensitive third party material) at a senior level. This consultation should involve a Unit Head or Special Casework Lawyer from the CPS and a police officer of the rank of Assistant Chief Constable or above. Where agreement cannot be reached as to the appropriate way forward, the material should be placed before the court for ruling.

3.120 Even where the prosecutor considers that sensitive material which satisfies a disclosure test should be put before the court for a ruling as to where the overall balance of public interest lies, there may be consultation between the CPS and the police at a senior level. The appropriate Unit Head or Special Casework Lawyer (see 3.111 above) and a police officer of at least Detective Chief Inspector rank should be involved, unless a Detective Inspector has specific delegated authority. This does not preclude consultation with others, such as the officer in charge of the investigation, and the prosecution advocate in Crown court cases. 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 the application.

3.121 Where consultation is required, the parties should examine carefully the circumstances of the case and the nature of the sensitive material. It will be necessary to provide the court with information dealing with the following issues:

- the reasons why material is sensitive and why it would not be in the public interest to disclose it (in other words, the reasons why real harm would be caused to the public

interest by disclosing it)

- the degree of sensitivity attaching to the material
- the consequences of disclosing the material to the defence
- the relevance of the material to the issues in the case and its likely evidential weight
- whether any third parties have an interest in the material.

3.122 The type of the application to be made to the court should also be considered as part of the consultation process. The type of application to be made will determine whether the defence are to be notified of the fact of the application, or of the categories of the material. Where appropriate, editing or other means of disclosing relevant information, such as formal admissions, may be agreed.

3.123 Where an application to the court is to be made, written submissions should be prepared for the judge. Whether these are prepared by the prosecutor, or by the prosecution advocate (on the basis of clear written instructions from the prosecutor), they should be signed by the relevant Unit Head or a Special Casework Lawyer (see 3.111 above) and countersigned by a police officer of a least Detective Chief Inspector rank, unless a Detective Inspector has specific delegated authority. Whatever part prosecuting prosecution advocate may have played in the drafting of the submissions, responsibility for their form and content rests with the CPS.

3.124 Whatever form the written submissions take, they must as a minimum requirement contain the following:

- a clear description of each item to be placed before the court
- the reason(s) why it is considered that the item in question satisfies either (or both) of the tests for disclosure
- the reasons why it is considered that the item attracts public interest immunity from disclosure – in other words, the reason why the prosecution contend that the balancing exercise should be resolved in favour of withholding the material
- the type of application to be made in respect of each item.

3.125 The police and the CPS must be careful to maintain the confidence of the court by making the appropriate form of application. Type 2 (*ex parte* on notice) and, most especially, Type 3 (*ex parte* without notice) applications should be considered exceptional and should only be made where it is genuinely necessary to protect confidentiality. Type 3 applications require the express approval of the CCP (ACCP in London) or Head of Division. Where the CCP of the relevant CPS Area is not available, the approval of another CCP is required.

**Multiple disclosure officers**

3.126 There will be occasions when unused material is revealed to the prosecutor by someone other than the disclosure officer. For example, a number of police forces adopt the practice of appointing a separate disclosure officer to deal with intelligence material, which by its very nature is likely to be sensitive. Where more than one disclosure officer is appointed to deal with different aspects of the case, the officer in charge of the investigation will identify a principal disclosure officer who should be the single point of contact for the prosecutor.

3.127 Where the prosecutor wishes to consult with the disclosure officer(s) in relation to issues concerning the disclosure of sensitive unused material, it will be the responsibility of the principal disclosure officer to alert other disclosure officers to the need to consult with the prosecutor where the matters raised impact upon material not held by the principal disclosure officer.

**PII applications log**

3.128 A log should be kept within each Trial Unit and Criminal Justice Unit and within Casework Directorate of all PII applications. The log should record the name of the case, the nature, in general terms only, of the sensitive material, the date and type of application and the outcome. The log must be stored securely.

**Other disclosure**

3.129 Common law duties exist alongside those of the Act. Prosecutors must always be alive to the need, in the interests of justice and fairness in the particular circumstances of any case, to make disclosure of material after the commencement of proceedings but before the prosecutors' duty arises under the Act. For instance, disclosure ought to be made of significant information that might affect a bail decision or that might enable the defence to contest the committal proceedings, see *R v DPP ex parte Lee* [1999] 2 All ER 737.

3.130 The prosecutor must consider disclosing, in the interests of justice, any material that is relevant to sentence (for example, information which might mitigate the seriousness of the offence or assist the defendant in laying blame in whole or in part upon a co-defendant or another).

3.131 Where disclosure takes place in these circumstances, or takes place informally in correspondence or between advocates in court, prosecutors and caseworkers must ensure a clear record is made of all material that is actually disclosed at any stage of the proceedings.

3.132 Disclosure of any material that is made outside the ambit of Act will however attract similar confidentiality by virtue of *Taylor v SFO* [1998] 4 All ER 801 and *Lawtel.*

**Third parties**

3.133 Only the investigator and the prosecutor have statutory duties of revelation and disclosure under the Act. All other categories of persons are third parties so far as the

conduct of the case is concerned, and the common law concept of the `prosecution team' is presumed to be abolished by the statute.

**Non-police investigators**

3.134 Persons other than police officers who are charged with a duty to investigate criminal offences are directed to **'have regard to'** the provisions of the Code when conducting their investigative duties: section 26 of Act.

3.135 Examples of non-police investigators may include:

- HM Customs and Excise
- the Post Office
- the Health and Safety Executive.

3.136 If the police have been supplied with material from a non-police investigator, it will be treated in accordance with these Joint Operational Instructions. But there may be occasions when the non-police investigator does not provide material to the police, or supplies only some information or material considered necessary to prosecute the case.

3.137 Where the prosecutor becomes aware that an investigation has been conducted in whole or in part by a non-police investigator, it would be appropriate to approach the investigator and request revelation of unused material following the principles set out in the Code. It will be particularly important to do so where the prosecutor suspects that there is material which might undermine the prosecution case, or which might assist the defence following a defence statement.

**Other third parties**

3.138 Third parties who are not charged with a duty to investigate criminal offences do not have any statutory obligation to reveal material to the prosecutor. However, there may be cases where the prosecutor suspects that the third party has material or information which has a bearing on the case. The disclosure officer may alert the prosecutor to this possibility, or it may be deduced from the circumstances of the case.

3.139 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. It will be important to do so if the material is likely to potentially undermine the prosecution case, or might reasonably assist a known defence.

3.140 In advising the police on whether to approach a third party, the prosecutor should consult with the disclosure officer, the investigator and if necessary with the officer in charge of the investigation. (The principles and procedures relevant to dealing with third parties who may be in possession of unused material are summarised in the explanatory leaflet at Annex J).

3.141 If relevant material held by third parties is inspected by the police but not retained, it will become unused material or information within the terms of the Code, and will need to be

recorded on the appropriate schedule. An example might be where an investigator examines relevant material held by a third party, but decides not to obtain it. The record of information obtained in this way should then be assessed for disclosure to the defence as for all other unused material.

3.142 Where the third party refuses to co-operate, the prosecutor should consider whether to make an application for a witness summons. Where the prosecutor believes that there is material that might have the potential to undermine the prosecution case, or that might reasonably assist the defence case, he or she should nevertheless 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 (see also 2.46 above).

3.143 Before applying for the witness summons it may be appropriate to make a formal request directly to the third party. The request should explain:

- what material or information it is thought that the third party holds
- the reasons why access to the material is sought
- the known or suspected issues in the case
- what will happen to the material if it is released
- that views are invited from the third party on whether the material is considered sensitive
- what will happen if the material is not released.

A suitable time should be given for a response before making the application for the witness summons.

3.144 Applications for a witness summons in the Crown court must be in accordance with the Crown Court Rules 1982.

3.145 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 its case and of the relevant issues in the case in respect of which the department or body might possess material, and ask whether it has such material. Departments in England and Wales have established Enquiry Points to deal with issues concerning the disclosure of information in criminal proceedings. Further guidance for prosecutors and investigators seeking information (including documents) from Government departments or other Crown bodies may be found in the pamphlet 'Giving Evidence or Information about suspected crimes: Guidance for Departments and Investigators' (March 1997, Cabinet Office).

**ANNEX A**

**REVELATION AND DISCLOSURE OF POLICE MISCONDUCT**

*Annex A is unavailable as some aspects of the guidance it contains are subject to finalisation. It will be published as soon as practicable once complete.*

**ANNEX B**

**DISCLOSURE OF PREVIOUS CONVICTIONS AND CAUTIONS OF PROSECUTION WITNESSES**

*Annex B is under subject to consideration and will be issued as soon as it is finalised. In the interim, prosecutors are referred to chapter 20 of* Legal Guidance

**ANNEX C**

**LETTERS AND FORMS**

| | |
|---|---|
| DRS | Disclosure Record Sheet |
| C1 | Letter to defence at primary stage where there is material to be disclosed |
| C2 | Letter to defence at primary stage where there is no material to be disclosed |
| C3 | Memorandum to disclosure officer enclosing defence statement |
| C4 | Letter to defence disclosing material at secondary stage |
| C4a | Letter to defence where there is an inadequate defence statement |
| C5 | Letter to defence where there is no material to be disclosed |
| C6 | Memorandum to police enclosing MG6C |

## NOT TO BE DISCLOSED **Annex C DRS**

**CROWN PROSECUTION SERVICE**
**DISCLOSURE RECORD SHEET** **Page____of____**

| | |
|---|---|
| **DEFENDANT:** | **LAWYER:** |
| **CPS REF:** | **CASEWORKER:** |
| **URN:** | **COURT:** |

| DATE | EVENTS AND ACTIONS | INITIALS |
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- The purpose of this disclosure record sheet (DRS) is to provide a written record of all events and actions that occur in the discharge of prosecution disclosure responsibilities. **It should not be sent to the defence.**
- The DRS should provide a clear record of what happens and when. It will record for example, the receipt of schedules from the police, the consideration by the prosecutor of the numbered items listed by the disclosure officer and all disclosure of material. It will show the date of receipt of any defence statement and the resulting actions taken by the prosecutor and support staff.
- A single DRS should be completed in respect of sensitive and non-sensitive unused material**.**
- The DRS should be readily accessible in a separate folder in the prosecution file.
- **The DRS should not be sent to the prosecution advocate, but should be made available for reference at all court hearings or conferences.**

**Specimen letter C1**

**LETTER TO DEFENCE WHERE THERE IS MATERIAL TO DISCLOSE AT THE PRIMARY STAGE**

Dear Sirs

**R v *DEFENDANT'S NAME, COURT AND NEXT HEARING DATE***

Disclosure of Prosecution Material under Section 3 Criminal Procedure and Investigations Act 1996

I am required by section 3 Criminal Procedure and Investigations Act 1996 (CPIA) to disclose to you any prosecution material which has not previously been disclosed, and which in my opinion might undermine the case for the prosecution against you/your client.

Attached to this letter is a copy of a schedule of non-sensitive unused material prepared by the police in compliance with their duty under Part II CPIA and the provisions of the Code of Practice. The schedule has been prepared by the police Disclosure Officer, who in this case is *(name of disclosure officer).*

Unless the word 'evidence' appears alongside any item, none of the items listed on the schedule are intended to be used as part of the prosecution case. You will receive a written notice should the position change.

Where indicated, copies of the items listed are attached. Material marked as available for inspection can be viewed by arrangement with *(insert local access arrangements).*

***In addition, the following material not listed on the schedule is disclosed to you in accordance with the provisions of the CPIA: *(insert any non-scheduled material e.g. witness previous convictions or statements removed from the bundle of evidence).***

**This material is disclosed to you in accordance with the provisions of the CPIA, and you must not use or disclose it, or any information recorded in it, for any purpose other than in connection with these criminal proceedings. If you do so without the permission of the court, you may commit an offence.**

If you supply a written defence statement to me and to the court within 14 days, material which has not been disclosed at this stage will be further reviewed in the light of that statement.

A defence statement is required by section 5 CPIA in Crown Court cases. In magistrates' court cases, section 6 CPIA makes a defence statement optional. Please bear in mind that we will rely upon the information you provide in the statement to identify any remaining material which has not already been disclosed but which might reasonably assist the defence case as you have described it. The statement will also be relied on by the court if you later make an application under section 8 CPIA.

If you do not make a defence statement where one is required, or provide one late, the court may permit comment and/or draw an adverse inference.

If you request access to any item which is marked for disclosure by inspection, it is essential that you preserve this schedule in its present form, as access will only be granted upon production of the schedule to the person supervising access.

If you have a query in connection with this letter, please contact me.

Yours faithfully

**Specimen letter C2**

**LETTER TO DEFENCE WHERE THERE IS NO MATERIAL TO DISCLOSE AT THE PRIMARY STAGE**

Dear Sirs,

**R v *DEFENDANT'S NAME, COURT AND NEXT HEARING DATE***

**Disclosure of Prosecution Material under Section 3 Criminal Procedure and Investigations Act 1996**

I am required by section 3 Criminal Procedure and Investigations Act 1996 (CPIA) to disclose to you any prosecution material which has not previously been disclosed, and which in my opinion might undermine the case for the prosecution against your client.

Attached to this letter is a copy of a schedule of non-sensitive unused material prepared by the police in compliance with their duty under Part II CPIA and the provisions of the Code of Practice. The schedule has been prepared by the police Disclosure Officer, who in this case is *(name of disclosure officer).*

Unless the word 'evidence' appears alongside any item, none of the items listed on the schedule are intended to be used as part of the prosecution case. You will receive a written notice should the position change.

At this stage, it is my opinion that there is no prosecution material which requires disclosure to you.

If you supply a written defence statement to me and to the court within 14 days, the material will be further reviewed in the light of that statement.

A defence statement is required by section 5 CPIA in Crown Court cases. In magistrates' court cases, section 6 CPIA makes a defence statement optional. Please bear in mind that we will rely upon the information you provide in the statement to identify any remaining material which has not already been disclosed but which might reasonably assist the defence case as you have described it. The statement will also be relied on by the court if you later make an application under section 8 CPIA.

If you do not make a defence statement where one is required, or provide one late, the court may permit comment and/or draw an adverse inference.

If you have a query in connection with this letter, please contact me.

Yours faithfully

**Specimen memo C3**

**MEMO TO POLICE ENCLOSING DEFENCE STATEMENT**

*NB This is not a 'standard response' letter. Communications should always include freetext where appropriate to convey the issues relevant in each case.*

**TO:**

**R v *DEFENDANT'S NAME, COURT AND NEXT HEARING DATE***

I have received a defence statement under the Criminal Procedure and Investigations Act 1996 (CPIA) in relation to (***DEFENDANT'S NAME, URN AND DETAILS OF CHARGES.)***

I attach a copy with this memo.

I will now be considering whether there is any further unused material, which ought to be disclosed to the defendant under Section 7 CPIA.

In the light of the defence statement, please carry out a further review of the material listed on the MG6 schedules and in your possession, and consider whether there is any material, not already disclosed, which might reasonably be expected to assist the defence case.

***Options:***

**A**: I look forward to receiving a further MG6E in response to this defence statement, with the relevant certificate completed as soon as possible.
Or
**B**: I have written to the defence concerning the quality of their defence statement (my letter attached), which I believe to be inadequate. However, please complete your review as well as you are able and send a further MG6E in response to this defence statement, with the relevant certificate completed as soon as possible.

***IN EITHER CASE, FREETEXT ANY PARTICULAR COMMENTS OR REQUESTS TO THE DISCLOSURE OFFICER DRAWING SPECIFIC ATTENTION TO THE ISSUES RAISED IN THE DEFENCE STATEMENT***

***Optional***: Please let me have your observations by **(*date*)**

Thank you.

**Specimen letter C4**

**LETTER TO DEFENCE WHERE THERE IS MATERIAL TO DISCLOSE AT THE SECONDARY STAGE.**

Dear Sirs,

**R v *DEFENDANT'S NAME, COURT AND NEXT HEARING DATE***

**Disclosure of Prosecution Material under Section 7 Criminal Procedure and Investigations Act 1996**

I have considered your defence statement dated (***date***), provided under Section 5/section 6 Criminal Procedure and Investigations Act 1996 (CPIA). Under section 7 CPIA I am required to disclose to you any prosecution material which has not been previously disclosed and which might reasonably be expected to assist your defence, as described in your statement.

A copy of a schedule of non-sensitive unused material prepared by the police has already been sent to you. The items listed below are those which I consider might reasonably be expected to assist your defence, as described in your statement, and which have not already been disclosed to you. The numbers refer to the numbers on the schedule previously provided. Where indicated, copies of the items listed are attached. Material marked as available for inspection can be viewed by arrangement with ***(insert local access arrangements)***.

| Item | Description | Copy | Inspect |
|---|---|---|---|
| | | | |
| | | | |

**This material is disclosed to you in accordance with the provisions of the CPIA, and you must not use or disclose it, or any information recorded in it for any purpose other than in connection with these criminal proceedings. If you do so without the permission of the court, you may commit an offence.**

If you consider that there is other prosecution material which might assist your defence and which has not already been disclosed, please let me know and I will reconsider my decision in the light of any further information that you provide. Alternatively, you may apply to the court under section 8 CPIA. The court will assess your application in the light of your defence statement.

If you request access to any item which has been marked for disclosure by inspection, it is essential that you preserve this letter in its present form, as access will only be granted upon production of this letter and the schedule previously provided to the person supervising access.

If you have a query in connection with this letter, please contact me.

Yours faithfully

**Specimen letter C4a**

**LETTER TO DEFENCE WHERE THERE IS AN INADEQUATE DEFENCE STATEMENT**

*NB This is not a 'standard response' letter. Communications should always include free text where appropriate to convey the issues relevant in each case.*

Dear Sirs,

**R v *DEFENDANT'S NAME, COURT AND NEXT HEARING DATE***

**Disclosure of Prosecution Material under section 7 Criminal Procedure and Investigations Act 1996**

I acknowledge receipt of your defence statement dated ***(date)***, provided under the Criminal Procedure and Investigations Act (CPIA). Under section 7 of the CPIA, I am required to disclose to you any prosecution material which has not been previously disclosed and which might reasonably be expected to assist your defence, as set out in your statement.

However, in my view the defence statement you have submitted does not comply with the requirements of section 5 of the CPIA because **(*FREETEXT: SPECIFY THE REASONS WHY THE DEFENCE STATEMENT DOES NOT COMPLY)***. As a consequence,

**A** I might not be able to identify any further prosecution material …

***Or***

***B*** I might be able to identify only limited further prosecution material …

… which may be of assistance to you in preparing your defence.

I would ask that you provide me with further information so that I can consider whether any prosecution material falls to be disclosed under secondary disclosure. Failure to provide me with the information may lead to the prosecution raising this issue before the Court to enable it to make any appropriate directions.

If you have reasonable cause to believe that there is prosecution material, which might be reasonably expected to assist your defence as disclosed in the defence statement, you may apply to the Court under section 8 CPIA. The Court will assess your application in the light of the defence statement.

If you have a query in connection with this letter, please contact me.

Yours faithfully

**Specimen letter C5**

**LETTER TO DEFENCE WHERE THERE IS NO MATERIAL TO DISCLOSE AT THE SECONDARY STAGE**

Dear Sirs,

**R v** ***DEFENDANT'S NAME, COURT AND NEXT HEARING DATE***

**Disclosure of Prosecution Material under Section 7 Criminal Procedure and Investigations Act 1996**

I have considered your defence statement dated ***(date)*** provided under section 5/section 6 Criminal Procedure and Investigations Act (CPIA). Under section 7 CPIA I am required to disclose to you any prosecution material which has not been previously disclosed and which might reasonably be expected to assist your defence, as described in your statement.

On the basis of the defence statement that you have provided, I have not identified any further prosecution material which may be of assistance to you in preparing your defence.

If you consider that there is other prosecution material which might assist your defence and which has not already been disclosed, please let me know and I will reconsider my decision in the light of any further information that you provide. Alternatively, you may apply to the court under section 8 CPIA. The court will assess your application in the light of your defence statement

If you have a query in connection with this letter, please contact me.

Yours faithfully

**Specimen memo C6**

# MEMO TO POLICE ENCLOSING MG6C

**TO:**

**R v *DEFENDANT'S NAME, URN, COURT AND NEXT HEARING DATE***

**Disclosure of Unused Material**

The CPIA rules on disclosure of unused material are applicable in this case.

***Options:***

**A:** I have reviewed the unused material in this case and return a copy of the MG6C endorsed with my review decisions.

***OR***

**B:** I have reviewed the unused material in this case and return a copy of the MG6C endorsed with my review decisions together with a copy of the letter sent to the defence.

Please ensure that the person appointed to supervise any access to unused material by the defence has a copy of the schedule.

Any enquiries regarding the schedule should be addressed to (***insert name of CPS contact***) who can be contacted at the above address.

Thank you

**ANNEX D**

# 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)

**MG6C** (cont'd)
Crime reports*
Log of messages (CAD/OIS)*
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 (*specify*)
Plans or video of crime scene
Details of whether any witness has sought or received a reward+

**MG6D**
Collators record
Informant report
Offender profiles
Port warnings
Wanted/missing circulations
Crimestoppers anonymous
Force intelligence bureau material
Material in police possession from Social Services or Local Authority

## Administration

**MG6B**
*R v Edwards* material (disciplinary findings/ convictions etc)

**MG6C**
Police accident 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 +
Form 66 property recovered from crime scenes +

## Investigation

**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+

**MG6D**
Operational briefing/debriefing sheets
Policy files
Information in support of search or arrest warrants
RIPA intercept documentation
Observations/surveillance logs

## Forensic and Medical Records

**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

### MG6D
Medical records unrelated to the offence charged

## 3rd Party

### MG6
Medical and dental records
Media material
Special procedure applications
Records held by other agencies

### MG6D
Records/material held by Social Services or local authority

+Enter on MG6C unless would reveal sensitive material in which case list on MG6D
* Edit address telephone numbers from copies to be disclosed to defence

**ANNEX E**

**OPERATIONAL AND THERAPEUTIC DEBRIEFING**

1. This is a particularly difficult and sensitive area in relation to the prosecution's duty of disclosure. Whilst the confidentiality of debriefing exercises is fully recognised, information and documents generated by the exercises can only be withheld in accordance with current law.

2. A distinction is sometimes drawn between operational and therapeutic debriefing. The object of such procedures is obviously different; one is aimed at identifying the strengths and weaknesses of the strategy and tactics adopted, whilst the other looks to the psychological needs of the participants. Such de-briefings may be carried out on an individual or group basis.

3 Debriefings should be distinguished from counselling, which is carried out to address the needs of an individual officer. It need not be specific to a case and usually looks at the longer term effect an incident may have on an officer.

4. The distinction between operational and therapeutic debriefing may, however, be more apparent than real in terms of disclosure. 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. Though not without controversy, communications between the doctor and patient and medical records do not attract privilege as the law stands. Privilege per se cannot therefore be relied upon to withhold disclosure of material in relation to therapeutic debriefing.

5. Whatever the nature of the debriefing exercise, the following points should be borne in mind:

- the need to ensure that debriefing, especially operational debriefing, does not invite rehearsal of evidence or coaching of witnesses. Such practices have been strongly discouraged by the Court of Appeal (see *R v Dye and Others* [1992] Crim LR 449*; R v Arif* TLR 22 June 1993; *R v Skinner* 99 Cr App R 212);

- the need to record witness accounts before debriefings in order to avoid any later suggestion that the evidence in the case has been manipulated;

- the need to record information given during debriefings to enable investigators and prosecutors to carry out their duties in disclosing unused material.

6. 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.

7. 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.

8. On the other hand, 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 for 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.

9. What passes in a debriefing exercise may be disclosable to the defence. Two issues of obvious and significant concern will be immediately apparent, namely, 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; and that during the process the officer may give an account which is inconsistent with previous accounts.

10. Medical privilege is not a class of privilege recognised by the law. Unless Public Interest Immunity can be relied on as a reason for non-disclosure, such material should prima facie be disclosed. 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. Personnel should not be misled and should be informed that confidentiality cannot be guaranteed.

**Disclosure**

11. The Criminal Procedure and Investigations Act 1996 (the Act), the Code of Practice made under the Act (the Code) and the Attorney General's Guidelines published in November 2000, govern what unused material must be disclosed to the defence, and how disclosure can be made.

12. If inconsistencies arise between accounts given before and during debriefing, they should be addressed, recorded and revealed to the CPS. This is because such inconsistencies might fall within either or both tests for disclosure as provided by the Act. Of course, 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 CPS should be fully informed so that the proper decision on disclosure can be made.

13. The fact that a debriefing has taken place should be noted on form MG6. Any records of the debriefing 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 draw this to the attention of the prosecutor via form MG6E. Copies of the record should be given to the prosecutor.

14. Not all information revealed to the prosecutor will be disclosed. The prosecutor must consider the tests for prosecution disclosure provided by the Act, and will only disclose material which falls within either test.

**Child witnesses**

15. Special provisions exist for pre-trial therapy for child witnesses. The two broad categories of therapeutic work undertaken prior to a criminal trial are counselling and psychotherapy. Prosecutors are reminded to follow the guidance set out in the

'Provision of Therapy For Child Witnesses Prior to a Criminal Trial', which can be found on the CPS intranet.

16. Additional guidance for dealing with vulnerable or intimidated adult witness may be found in the Practice Guidance 'Provision of Therapy Prior to a Criminal Trial' issued on 24 January 2002 as part of the Home Office co-coordinated Action for Justice programme.

**ANNEX F**

**PRE-TRIAL MEETINGS OF WITNESSES**

**Introduction**

1. Where a pre trial meeting takes place between prosecution witnesses, if evidence and/or the prosecution case is discussed, this is likely to be the subject of judicial criticism.

2. Two Court of Appeal cases (*R v Arif TLR 22 June 1993* and *R v Skinner* 99 Cr. App R 212) refer to such meetings. The following guidance seeks to ensure that witnesses' evidence is not excluded by the courts by reason of a failure to adhere to the recent Court of Appeal guidelines.

3. However, the Youth Justice & Criminal Evidence Act 1999 introduces certain 'special measures' to assist witnesses to give their evidence. In order to implement these measures, pre trial meetings between the prosecutor, the police and vulnerable or intimidated witnesses and supporters, may be required. These meetings are held specifically to deal with the requirements of individual vulnerable or intimidated witnesses. They are not held in order to facilitate discussion of the evidence the witness will give. Records of such meetings will be made. (See paragraphs 11 to 13 below).

**Pre-trial meetings**

4. Meetings between witnesses (including police officers) involved in a case in order to discuss the evidence to be given, or to rehearse it, are not permitted. Furthermore, witnesses must not be coached in the giving of their evidence.

5. This principle applies equally to waiting time at court. Witnesses who are gathered for the purpose of a trial should not discuss the evidence, prior to any of them giving their evidence. Officers should take care to ensure that the circumstances in which they wait to be called to give evidence are not liable to be misinterpreted.

6. Pre-trial meetings, in advance of the hearing date, between officers involved in a case may be justifiably held if their purpose is to ensure that the necessary witnesses, exhibits or case papers etc, will be readily available at the trial.

7. Such meetings should be authorised by the officer in charge of the investigation, or the senior investigating officer in major enquiries That officer should be present to supervise the meeting and to explain its purpose to those attending. A record should be made showing when and why the meeting was held, what was discussed and who was present. The record should be revealed to the CPS in accordance with the Codes of Practice issued under the Criminal Procedure and Investigations Act 1996.

8. Original evidence should be secure to ensure its integrity. Officers who supervise meetings will need to ensure that witnesses do not have access to written statements, particularly those of other witnesses.

9. Nothing in this notice prevents individual officers from refreshing their memories about a case from their contemporaneous notes (or civilian witnesses reading their statements) before giving evidence.

**Case conferences with members of the CPS or with counsel**

10. Case conferences with members of the CPS or with the Bar do not appear to be affected by the rulings in *Arif* and *Skinner.* Officers will be advised by CPS representatives of any necessary action.

**Meetings between prosecutors and vulnerable or intimidated witnesses**

11. Police officers and prosecutors involved in a meeting with a vulnerable or intimidated witness, to discuss special court measures to enable the witness to give best evidence, should be aware of and comply with the principles set out in the document 'Early Special Measures Meetings between the Police and the Crown Prosecution Service and Meetings between the Crown Prosecution Service and Vulnerable or Intimidated Witnesses: Practice Guidance.'

12. Paragraph 55 of the Guidance states that there is to be **no** discussion with the witness as to the evidence in the case.

13. Paragraphs 57-59 of the Guidance provide that **a record of the meeting** with the witness is to be made and that the record will be disclosed to the defence unless it contains sensitive material.

**Direct communication with victims (DCV)**

14. Where letters are generated as a result of the DCV initiative, and the case to which they relate remains live (i.e. because the charge is reduced or because there are co-defendants) DCV letters do not come within the ambit of unused material covered by the Act and therefore should not routinely be disclosed to the defence. Given the nature of the initiative, it is unlikely that the letters would contain any material/information which will satisfy either of the disclosure tests set out under the Act in any events.

15. 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 Act. Further guidance regarding DCV practice can be found in the DCV Manual.

**ANNEX G**

**DISCLOSURE OF UNUSED MATERIAL CREATED IN THE COURSE OF FINANCIAL INVESTIGATIONS**

**Introduction**

1. Financial investigations may fall into three categories:

- Those supporting a criminal investigation, i.e. obtaining financial intelligence and/or evidence to assist with the prosecution;

- A confiscation investigation being carried out alongside the criminal investigation and prosecution of a suspect.

- A confiscation investigation occurring after conviction.

2. There can be no doubt that where a financial investigation is supporting a criminal investigation or a confiscation investigation is running alongside a prosecution case, there is a duty on the financial investigator to ensure that disclosure of all material on the relevant forms to the prosecutor, is undertaken in accordance with the existing procedure set out within the Criminal Procedure and Investigations Act (the Act). In normal circumstances this will be via the disclosure officer.

3. The question whether prosecution material created or obtained following conviction is covered by the Act is undecided. However, given the underlying principles of the common law and ECHR, all such material should be dealt with in the same manner. This will include the need for secondary disclosure, if appropriate, following the receipt of any response to a confiscation statement.

4. In cases involving the confiscation of assets, financial investigations will be made by the police under a number of statutes. These include the Proceeds of Crime Act 2002 (PoCA), the commencement date for which is 24th February 2003 for the investigations provisions. The PoCA will apply to offences where investigations began on or after the implementation date. Investigations beginning after the implementation date in respect of offences committed before the implementation date may in some circumstances be made pursuant to PoCA or pursuant to the previous legislation; that is, the Drug Trafficking Act 1994, the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995) and the Criminal Justice (International Co-operation) Act 1990.

5. Such investigations will often result in the creation of a substantial amount of documentation. The duties of disclosure required by the Act will need to be considered in relation to this documentation. In PoCA cases, the reviewing prosecutor will handle the confiscation aspects of the cases, with the applications for restraint and confiscation orders being made to the relevant Crown court. In cases under the pre-PoCA legislation, the confiscation aspects of cases take the form of civil proceedings to restrain assets whereby the Central Confiscation Branch will often become involved.

6. Given the wide definition of unused material under the Act, financial investigation material should be recorded and dealt with under the normal rules of disclosure.

7. The paragraphs below set out the responsibilities of the financial investigation officer (FIO), the disclosure officer, the prosecutor and the Central Confiscation Branch (CCB) in dealing with financial investigation material. The procedures recommended below must be read in conjunction with the Joint Operational Instructions (JOPI) in relation to unused material.

**Financial investigation officer actions**

8. 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 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;
- disclosures concerning suspected criminality from suspicious activity reports and any other source.

9. The material above is *prima facie* relevant material under the Act. 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 assessment of the material against the disclosure tests and the subsequent items required to be listed on the MG6E.

10 It is important that a separate schedule is provided for each defendant. Financial investigation unused material is likely to be confidential and should not be routinely disclosed to co-defendants. There is no requirement to copy the material. The schedule will be provided to the relevant defence solicitor by the prosecutor. See paragraph 18 below for further advice regarding pre-POCA cases.

11. The position in relation to sensitive material is exactly the same as that set out in the JOPI concerning unused material.

12. 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**

13. The disclosure officer will receive the schedules of unused material from the FIO. The disclosure officer should consider the material scheduled and itemise on the MG6E any material that might undermine the prosecution case (at primary disclosure) or assist that of the defence (at secondary disclosure). The disclosure officer should seek the assistance of the FIO in this task. The disclosure officer will append the FIO's schedules to the MG6C, MG6D and MG6E for onward submission to the prosecutor. It is important to ensure that the defence case statement is served on the FIO to ensure that the material held by the FIO is considered at secondary disclosure stage.

**Central Confiscation Branch actions (pre-PoCA cases only)**

14. The CCB provides advice and support to CPS Areas and Headquarters in relation to confiscation matters and will often be involved in proceedings in the High Court in relation to restraint and receivership provisions of the pre-PoCA legislation mentioned above. Some of the material received by FIOs will be copied to the CCB but the responsibility for notifying the prosecutor of such material will remain with the FIO (via the disclosure officer) as set out at paragraphs 8-12 above.

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

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

16. All these documents (other than drafts) could in the normal course of events be served on the defendant so no problem in relation to disclosure of unused material will arise in respect of that defendant. The difficulty that will arise, however, is in connection with disclosure to any co-defendant. In relation to unused material generally, disclosure will be to all defendants who are jointly indicted with the offence(s) (subject to JOPI paragraph 3.22). Disclosure of the material which features in civil proceedings must be an exception. The orders and witness statements are prepared for civil proceedings. Unless the permission of the High Court is obtained, disclosure to a third party, even a co-defendant, cannot be justified.

17. The CCB prepares, or assists in the preparation of, financial statements to be served under the DTA 1994 or the CJA 1988 for use in the Crown court. The original statement is served on the relevant defendant and again the question of disclosure of such statements to a co-defendant as unused material is raised. It is considered that there should be no disclosure to a co-defendant when the information in the statement has been supplied by the defendant following an order by the High Court unless the consent of the High Court has been obtained. In other circumstances, where information has been elicited in questioning sanctioned by paragraph C 11.4 of the PACE Codes of Practice, there can be no objection to disclosure to a co-defendant.

18. It will be the responsibility of the CCB to provide the prosecutor with a list of material held in connection with the civil proceedings and to inform the reviewing lawyer, on the list, what has been disclosed to a particular defendant and what should not be disclosed to any co-defendant. There is no need to provide copies of documents unless the prosecutor considers it necessary. It will be the responsibility of the prosecutor to inform the solicitor of the defendant of the position (as set out at paragraph 10 above).

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

**Reviewing prosecutor actions – CPS Areas**

20. Local CPS Areas can, under the PoCA, undertake restraint and receivership proceedings in the Crown court for those offences in respect of which a PoCA confiscation order may be made.

21. As with all other disclosure obligations in relation to unused material, the prosecutor will also have the responsibility for disclosing to the defence unused financial investigation material. The prosecutor will receive schedules of financial investigation material which will be attached to the schedules MG6C, MG6D and MG6E. Disclosure to the defence will be dealt with in exactly the same way as is detailed in the JOPI. The prosecutor should ensure that a separate schedule is provided in relation to the financial investigation material for each defendant. Financial investigation material is likely to be confidential and should not be routinely disclosed to co-defendants. Where material gathered in respect of a defendant falls for disclosure to a co-defendant applying one of the disclosure tests, where such material is confidential, such disclosure should only be made following a court order made following an application to the court. This application should be made on notice to allow all interested defendants to make representations to the court. This will not apply to information elicited in questioning sanctioned under paragraph C 11.4 of the PACE Codes of Practice, which should routinely be disclosed.

22. In pre PoCA cases, where CCB are involved the prosecutor will also receive from the CCB a list of material held by that CCB together with details of what has been served already on the defendant and what should not be served on any co-defendant without the consent of the High Court. The solicitor for any co-defendants should be informed in writing of the existence of material (for example, witness statement of disclosure, restraint order) relating to a co-defendant and told that the material will not be disclosed without the consent of the High Court. If the solicitor considers such

material to be relevant he or she must make application to the High Court or they may wish to have the mater listed for mention in the Crown court beforehand.

## ANNEX H

## SCIENTIFIC SUPPORT MATERIAL: FINGERMARKS AND PHOTOGRAPHS

1. All scientific support departments should follow procedures and working practices which ensure compliance with the requirements of the 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, the record should indicate that this has been done.

2. The Code of Practice requires the recording and retention of relevant material and information obtained in a criminal investigation. This will include negative information, for example where no fingermarks are 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.

3. The records of scientific support units in relation to a criminal investigation should be made available to the disclosure officer. This will ensure that the disclosure officer can carry out the task of scheduling unused material for the prosecutor. If necessary, scientific support staff should help the disclosure officer identify material which might undermine the prosecution case, or which might assist the defence.

### Fingermarks and photographs

4. All fingermarks lifted or photographed at the scene must be recorded, retained and made available to the disclosure officer.

5. Where an exhibit is examined in the fingerprint laboratory, all relevant fingermarks must be recorded, and any lifts or photographic negatives retained. Again, this information should be made available to the disclosure officer.

6. If the fingerprint bureau decides that a fingermark is of insufficient value to determine identity, the mark should still be retained and the disclosure officer informed.

7. Where a fingermark is eliminated from the enquiry because it is identified as belonging to a person having legitimate access, it must still be retained. A record should be kept of the identity of the person eliminated from the enquiry. Once the elimination process has been completed, ten print elimination forms should be disposed of by either returning to the donor or by destruction.

8. Where photographs are taken, all the negatives 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.

## ANNEX I

## DISCLOSURE OF UNUSED FORENSIC SCIENCE MATERIAL

### Introduction

1.1 This annex provides guidance on how unused material in the possession or control of forensic science providers (FSPs) should be revealed to the police and then to the prosecutor. It also reflects the agreement reached between the CPS, ACPO, and the FSPs as to the best way to comply with the legal duties of disclosure to the defence imposed under the Criminal Procedure and Investigations Act 1996 (the Act).

1.2 Police and CPS should read this guidance in conjunction with the general instructions contained in the JOPI. FSPs should incorporate the guidance into their Quality Management Systems.

1.3 This document sets out:

- a brief explanation of the legal duties of disclosure arising at common law and under the Act;
- general principles regarding the preservation of material held by FSPs;
- agreed periods of retention for material held by FSPs;
- procedures agreed between FSPs, the police and CPS as to how the existence of material should be notified to the police and prosecutor.

1.4 The procedures set out in this annex have been agreed between CPS, the police, and FSPs. in relation to work carried out by FSPs in criminal cases.

### The duty of disclosure: general

2.1 The disclosure of material or information (eg records, tests, calculations, etc) that support the opinion of the scientist giving evidence for the prosecution in cases tried at the Crown Court is governed by the Crown Court (Advance Notice of Expert Evidence) Rules 1987. Similar rules operate in respect of cases in the magistrates' courts (see Magistrates' Court (Advance Notice of Expert Evidence) Rules 1997).

2.2 The Act has been in force since 1 April 1997. It applies to all criminal investigations begun on or after that date. Those started prior to that date are still governed by the common law principles laid down in *R v Keane, R v Maguire* and *R v Ward.*

### The common law duty

3.1 At common law, ie cases where the investigation began prior to 1 April 1997, 'the prosecution' will include the prosecutor; the investigator and any expert witness

instructed by the prosecutor or the investigator eg forensic scientists, psychiatrists, pathologists, police surgeons, etc

3.2 Disclosure principles will therefore apply equally to all members of the 'prosecution team' and all must reveal the existence of all unused material to the prosecutor. The prosecutor will then decide whether it needs to be disclosed to the accused.

3.3 It should be noted that the case of *R v Ward* placed a further important duty upon the expert:

'…..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….'

This obligation remains upon the expert. When it applies, the experiment or test material should be supplied to the disclosure officer and prosecutor.

**The Criminal Procedure and Investigations Act 1996**

4.1 The Act places obligations upon the prosecutor and the police, but not upon the expert.

4.2 The Act's 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 have to be recorded and retained in accordance with the provisions of the Code.

4.3 The Act's disclosure regime is explained in the main body of the JOPI.

4.4 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 (section 2 Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 Magistrates Courts Act 1980) unless the information is volunteered.

**Preservation of material**

5.1 The Act and the Code do not impose any specific duties upon forensic experts regarding the preservation of material, but the guidance in this section sets out principles of good practice which should be followed.

5.2 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.

5.3 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.

5.4 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 form the suspect;

- any information generated during the course of the examination that might have an impact on the investigation.

5.5 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);

- 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.

5.6 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 the **preservation** of the item.

**Retention periods**

6.1 Detailed arrangements for the retention of case material are set out in a Memorandum of Understanding on the Retention of Case Material agreed between ACPO and the FSS. All FSPs should adopt these arrangements as best practice wherever possible.

**Procedures: general**

7.1 The police and the CPS procedures for the revelation and disclosure of unused material are contained in sections 2 and 3 of the JOPI.

7.2 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**

8.1 The FSP should provide to the police an index of all material in their possession. When the index is prepared, it will not necessarily be known what material is to be used as part of the prosecution case, and which will remain unused. Therefore the index should take the form of a list describing the material held by the FSP.

8.2 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.

8.3 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, inappropriate use of generic listing may result in requests from the CPS or defence to see the items, with consequent delay and wasting of resources).

8.4 Any single item which is known to be of particular significance should be separately listed.

8.5 If not mentioned in the report or statement, the reporting officer should indicate on the index any material that it is thought might undermine the prosecution case or reasonably assist the defence, so far as these are known. Wherever practicable, copies of material that might undermine or assist should be sent to the disclosure officer with the index.

8.6 The index must be kept up to date. Where material is generated or fresh material received after the initial preparation and submission of the index, a supplementary index should be supplied to the police disclosure officer.

**Police actions: dealing with the forensic index**

9.1 Where an investigator 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 Code.

9.2 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. The index may be described generically; for example: 'Forensic Science Service Index – compiled 21 January 03 – list of all material in possession of FSS'. The prosecutor should disclose the index to the defence in accordance with 10.2 below.

9.3 Where the disclosure officer believes that any of the material appearing on the index might undermine the prosecution case, or assist the defence, the item should be listed on form MG6E. The disclosure officer should consult the reporting officer where he or she is in any doubt.

9.4 The schedules, the index and any undermining or assisting material should be sent to the CPS with the full file in the usual way in accordance with section 2 of the JOPI.

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

**CPS actions: disclosure to the defence**

10.1 Prosecutors should be alert to the distinctions between used and unused material, and to the different legal obligations of disclosure to the defence that arise under the Act, the Crown Court (Advance Notice of Expert Evidence) Rules, and the Magistrates' Courts (Advance Notice of Expert Evidence) Rules.

10.2 Upon receipt of the index, the prosecutor should review the listed items in the same way as he or she would for items on an MG6C schedule and record disclosure decisions *'D' 'I'* or *'CND'* on the index itself. The prosecutor should then disclose the index itself to the defence at the same time the MG6C is disclosed. The FSP should be notified of the prosecutor's disclosure decisions via the disclosure officer.

10.3 Upon receipt of a defence statement, the prosecutor should consider with the disclosure officer whether any issues are raised which might have a bearing on any forensic examination carried out. Situations where this may occur are mentioned at paragraph 11.3 below. A copy of the defence statement should be sent to the police for submission to the FSP where further advice is required as a result.

10.4 It will be important to maintain clear lines of communication between police, CPS and forensic scientist in any case where there is forensic material.

**Police actions: defence statements**

11.1 The defence statement should be provided to the FSP in all cases where the circumstances in 11.3 below arise, or where further work is required as a result, or where the forensic scientist requests it.

11.2 When a defence statement is received, or where information comes to light from any source which might 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.

11.3 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 an impact 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
- 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 an impact on forensic material, either used or unused

- where a new line of enquiry is indicated, and the officer in the case considers that it should be pursued.

11.4 Where the disclosure officer is not clear whether the defence statement has any impact 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.

11.5 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.

**FSP actions: defence statements**

12.1 If the defence statement reveals information that may have a bearing upon any opinion expressed by the forensic scientist, or which might affect the interpretation of any material held by the FSP, the disclosure officer should provide a copy of the defence statement to the scientist. This should be accompanied by further instructions, detailing any further work or report which may be required as a result.

**CPS actions: defence requests for FSP material**

13.1 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.

13.2 Consideration should be given to obtaining the material in accordance with JOPI paragraphs 3.139 et seq.

13.3 If, following such a request and consultation as outlined in the preceding paragraphs, 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 volunteer to provide access.

**FSP actions: access arrangements for the defence**

14.1 The FSP is a third party under the Act. 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 whether it will respond to informal requests for access, but obviously must comply strictly with the terms of any witness summons.

14.2 The following paragraphs represent the principles and the procedures to be adopted when making arrangements for defence access to, and examination of, retained FSP material.

14.3 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;

- notify the police if the forensic scientist's views are likely to change as a result of the defence examination.

14.4 The prosecutor will have provided the defence with an endorsed copy of the index and the schedule of non-sensitive unused material (form MG6C). 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, and any letter at secondary stage to the forensic scientist.

14.5 The FSP should grant the defence access to the unused material that the prosecutor has indicated should be disclosed. This should be done on production of a copy of the MG6C schedule or index (or covering letter, if the latter refers to the material directly). The material to be disclosed will be marked upon the schedule or index by the prosecutor by a *'D'* or an *'I'* endorsed against an item in accordance with JOPI paragraph 3.33). Items that do not meet either disclosure test, and thus do not require disclosure to the defence will be marked the prosecutor with *'CND'*. The FSP will use the copy MG6C supplied by the police as a checklist, and to identify material that does not require disclosure at that time.

14.6 Supervision of access to non-sensitive unused material by the FSP will be governed by way of local arrangements. As best practice, this should require that the investigator or disclosure officer is present wherever possible when the defence examine any forensic material.

14.7 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 the Crown Court (Advance Notice of Expert Evidence) Rules 1997 or the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997. 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.

**ANNEX J**

**AN EXPLANATORY LEAFLET 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**

1. This document 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.

2. The law governing material held by third parties is contained in the Criminal Procedure and Investigations Act 1996 (CPIA) and the Attorney General's Guidelines published in November 2000.

**Who are third parties?**

3. 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**

4. 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.

5. 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.

6. 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.

7. 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.

8. Where you do not allow the prosecution access to the material, the prosecution may apply to the court for a witness summons, and 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 considers that the material sought is likely to be material to the proceedings. You do have the right to make representations to the court against the issue of a witness summons.

9. 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 might undermine the prosecution case or might reasonably assist the defence case, a public interest immunity application must be made to prevent disclosure to the defence. Where you have an interest in that material, 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.

10. Failure by the prosecution to take action that should have lead to the disclosure of relevant material may result in a wrongful conviction or dismissal of the proceedings.

**The prosecution procedures in dealing with third parties**

11. In the course of an investigation, the investigator will write to you setting out the circumstances of the case and specifying the relevant material that he or she believes is in your possession.

12. Where you acknowledge that you hold relevant material which may have some bearing on the issues in the case, the investigator will request a copy from you or request to inspect the material.

13. Where you provide the material to the police in the course of the investigation, the police will discuss with you whether any sensitivity attaches to the material. Your view will be passed on to the Crown Prosecution Service.

14. Where the material is sensitive, and a public interest immunity application is made to withhold the material from the defence, you have a right to make representations to the court on issues of the sensitivity of the material. The Crown Prosecution Service will notify you of the time and place of the application.

15. Where you refuse to provide all or part of the material, or refuse to allow the police to inspect it, the police will request you to retain the material in case they receive a request for its disclosure or the court later requires the material to be disclosed.

16. Where an accused has been charged with an offence and you have refused to reveal the material to the police, or failed to respond to a request for the material, the Crown Prosecution Service may consider applying to the court for a witness summons. The procedure relating to witness summonses is set out below.

**Rules relating to witness summonses in the Crown court (Criminal Procedure (Attendance of Witnesses) Act 1965)**

17. Where the trial has not commenced, an application for a summons for a person to produce a document or thing to the court must be made in writing, to the appropriate officer of the Crown court. The application should contain:

    - A brief description of the required document or thing;
    - Reasons why the person will not voluntarily produce it;
    - Reasons why the document or thing is likely to be material evidence;
    - A supporting affidavit setting out the charge and specifying: the evidence which will enable the person to identify it; the grounds for believing that the person is likely to be able to produce the document or thing; and the grounds for believing that it will be material evidence.

18. A copy of the application and the supporting affidavit will be served on the person by the Crown Prosecution Service/police. It will inform the person of their right to make representations in writing and at the hearing, and that they have 7 days to inform the court if they wish to make representations.

19. If the person does not request a hearing, the appropriate officer of the Crown court will refer the papers to the judge. The judge will decide whether or not to issue a witness summons in the light of the information before him.

20. If the person requests a hearing, the court will set a time, place and date and will notify both the person and the Crown Prosecution Service. The hearing shall be in private unless the judge directs otherwise.

21. Where the person produces the document or thing prior to the hearing of the summons, the Crown Prosecution Service will notify the court that the requirements imposed by the summons are no longer needed.

22. A person may make an application to the Crown court to make a summons which has been issued ineffective on the grounds that he had not received a notice of application to issue the summons and that he had not been present or represented at any hearing of the application and would not be able to produce any document or thing likely to be material evidence.

**Rules relating to witness summonses in the magistrates' court**

23. If the proceedings are before the magistrates' court, an application can be made for a witness summons for a person to produce a document or thing under section 97 or 97A (committal proceedings) of the Magistrates' Court Act 1980.

24. Where an indictable only offence has been sent to the Crown court and before service of the prosecution case, an application can be made to the magistrates' court for a person to produce a document or other exhibit (Schedule 3, paragraph 4 of the Crime and Disorder Act 1998).

**DRAFT LETTER TO THIRD PARTIES**

**Dear Sir/Madam**

**REQUEST FOR DISCLSOURE OF MATERIAL HELD BY……..**

*(  )* Police are conducting a criminal investigation into allegations made against *(name and address, if appropriate, of the alleged offender).*

The allegations being investigated are, in general terms, that *(set out the nature of the allegations and the issues in the case).*

I believe that you hold material which may be relevant to the investigation, namely *(set out what material it is believed the third party holds).*

The reasons why I am seeking access to this material is because I believe that *(list the reasons which may include; material which might affect the credibility and reliability of a witness; material which might undermine the prosecution case; and material which might reasonably assist the defence case).*

I would be grateful if you would confirm whether or not you hold any such material and if so, whether you are prepared to disclose it for the purposes of the investigation. I would also be grateful if you could let me know whether you consider the material to be sensitive and the reasons for any sensitivity.

If you object to disclosing the material, I would be grateful if you could specify your reasons. I request that you retain the material in case the court requires you to disclose some or all of the material.

I enclose for your assistance, an explanatory leaflet that sets out the role of the prosecution in dealing with material in the possession of third parties. It explains what will happen with the material if you disclose it. Further, it explains what may happen if you refuse to disclose it.

It would be of great assistance if you could reply by *(insert date).*

If you wish to discuss this request, or any further information, please do not hesitate to contact me on *(insert contact number).*

Thank you in advance for your assistance.

Yours faithfully,

*(Officer in charge of the investigation/investigator/disclosure officer).*