Annex C Sensitive Material - Additional Guidance

This additional guidance should be read in conjunction with Chapter 13 of this manual, 'Making a PII application'.

Arranging the Application

Once it becomes clear that a PII application will be required, the prosecutor should make a written application to the court in accordance with CPR 15.3. The application should include the following information:

- the case name;
- the indictment number(s);
- the trial date where known;
- the allocated trial judge where known (if no trial judge has been allocated, the court should be invited to allocate one urgently to avoid delays at the commencement of the trial);
- the type of application to be made (see below), and;
- the estimated length of hearing of the application.

The application must also satisfy the requirements of paragraph 36 of *R v H and C* [2004] UKHL 3, in relation to each item of material to be placed before the court for a ruling.

The Criminal Procedure Rules (part 15.3) distinguish between three types of application:

- Type One: the prosecutor must give to the defence notice of application and indicate at least the category of the material held. The defence must have the opportunity to make representations and there is an inter partes hearing conducted in open court.
- Type Two: the prosecutor must give to the defence notice of application but the nature of material is not revealed because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed. The defence have the opportunity to address the court on the procedure to be adopted but the application is made to the court in the absence of the defendant or representative.
- Type Three: the prosecutor makes an application to the court without notice to the defence because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed – a "highly exceptional" class.

The police and the CPS must be careful to maintain the confidence of the court by making the appropriate type of application. Applications where no part of the application is served on the defendant should be considered exceptional and should only be made where it is genuinely necessary to protect confidentiality. These applications require the express approval of the CCP (or DCCP), or Head of Central

Casework Division. Where the CCP (or DCCP) of the relevant CPS Area is not available, the approval of another CCP (or DCCP) is required.

Responsibility for Preparing the Application

The written application should be made to the court, prepared either by the reviewing prosecutor or the prosecuting advocate (on the basis of clear written instructions from the reviewing prosecutor). In large cases where an additional counsel has been instructed to deal solely with disclosure issues, or where the prosecuting advocate has a junior dealing with disclosure issues, disclosure counsel or the prosecuting advocate's junior may prepare the submission. In all cases the written application should be signed by the unit head or equivalent, and countersigned by a police officer of at least substantive Detective Inspector (or equivalent) rank. The officer should state that to the best of his or her knowledge and belief the assertions of fact on which the submission is based are correct. The officer may be required to attend court to give evidence in support of the application.

Where the material which is to be the subject of an application emanates from MG6Ds from more than one agency or police unit, e.g. where a separate MG6D has been submitted for intelligence material, an officer not below the rank of Detective Inspector (or equivalent) for each of the agencies or units who have submitted material must endorse the written submissions.

Whatever part the prosecution advocate may have played in the drafting of the application, responsibility for their form and content rests with the prosecutor.

Any notice should also contain a request to the defence to provide such further written particulars of the defence case as the prosecutor sees fit, to better inform the court's assessment of the competing public interests.

Contents of the written application

The written application should comply with CPR 15.3 as set out above and also satisfy the requirements of paragraph 36 of R v H and C, in relation to each item of material to be placed before the court for a ruling. It should contain:

- A summary of the facts of the case. Where a case summary or prosecution opening note has been served and this is believed still to be accurate and adequate, it should be annexed to the application
- a list of trial issues which the prosecutor has been able to identify
- a summary of the defence case which has been advanced in a defence statement, section 8 application or correspondence. A copy of the defence statement, relevant s8 application or correspondence should be annexed to the application
- the number of the item as it appeared on form MG6D. Where more than one MG6D has been submitted, e.g. where the case has generated 'highly sensitive' material and involves more than one disclosure officer, each MG6D should be given its own reference
- a detailed description of the material
- in the case of lengthy items, a summary of their content

- an assessment giving reasons why it is considered that each item over which PII is sought satisfies the disclosure test, or why the reviewing prosecutor is unable to determine whether or not the disclosure test is satisfied
- why it is considered that disclosure of each item over which PII is sought will cause a real risk of serious prejudice to an important public interest and the degree of sensitivity that attaches to the material
- why it would not be appropriate to provide to the accused a formal admission, summary, extract or edited version of the material
- why the prosecutor contends that the public interest in withholding the material outweighs the public interest in disclosing it and
- where the material is the subject of a Type Two application, why it is considered inappropriate to inform the defence of the category of material into which the material falls
- where, exceptionally, the material is the subject of a Type Three application, why it is considered inappropriate to inform the defence at all.

In cases involving a large quantity of material to be placed before the court for a ruling, the prosecutor may prefer to present the representations in tabular form.

Prosecutors should bear in mind that in particularly difficult cases, and as a last resort, the court may decide that it requires assistance from a special advocate. Prosecutors should therefore be prepared, when requested, to formulate submissions to assist with this aspect of the court's decision.

A bundle should be prepared for the trial judge comprising the written application and the annexed documents, together with any further particulars of the defence case provided in response to the notice of the hearing. The bundle should contain a front sheet listing the contents of the bundle. The front sheet to the bundle, or a covering letter, should emphasise the sensitivity of the attached documentation and request that it be stored in suitably secure conditions, especially when the material is not being worked on. This is particularly important where a Type Two or Three application is being made.

The PII hearing

When the judge's bundle has been provided to the court, the prosecutor should contact the court to ascertain whether the judge wishes to view the material giving rise to the application in advance of the hearing, or whether the court is content for the material to be brought to the hearing.

The prosecutor must make arrangements to facilitate inspection of all sensitive and highly sensitive material by the prosecution advocate well ahead of the hearing.

Where the judge requests sight of the material in advance of the hearing, the disclosure officer with responsibility for the material should make the necessary arrangements with the judge's clerk or court manager. There may need to be detailed discussions as to the handling and storage arrangements for the material when it is in the court's possession. In some circumstances, the police may wish to remain in the court building whilst the material is being considered so that they can

recover it once the judge has viewed it. This will be a matter for local arrangements on a case-by-case basis.

The oral representations in support of the written submissions may be made by the reviewing prosecutor, CPS higher court advocate, the prosecution advocate, his/her junior or disclosure counsel. A CPS or departmental representative should be present at the hearing. The hearing should also be attended by the officer in charge of the investigation and all disclosure officers who have provided schedules listing items that are subject of the application.

The manner in which the hearing should be conducted will be a matter for the judge to determine. At a hearing at which the defendant is present, the general rule is that the court must consider representations first by the prosecutor and any other person served with the application, and then by the defendant, in the presence of them all, and then further representations by the prosecutor and any such other person in the defendant's absence.

The court may direct other arrangements for the hearing.