Attorney General's Office

Rt Hon Suella Braverman QC MP
Attorney General

Attorney General's Office
102 Petty France
London
SW1H 9EA

Tel: 0207 271 2492

www.gov.uk/ago

Sir Robert Neill MP
Chair, Justice Select Committee
House of Commons
London
SW1A 0AA

By email to justicecom@parliament.uk

25th May 2022

Dear Sir Robert,

Publication of revised Attorney General Guidelines on Disclosure

Please find enclosed a copy of the first Annual Review of the Disclosure Guidelines alongside the updated Attorney General's Guidelines on Disclosure 2022. I am grateful to you and your organisations' assistance in the development of this work; the final products are a real reflection of true cross-system collaboration and I hope will improve upon the guidelines that I issued in December 2020. To enable frontline practitioners to prepare for the changes, these guidelines will become effective from Monday, 25th July 2022.

The Review process have provided me with the crucial opportunity to understand the operational impacts of the 2020 version of the guidelines. I appreciate the complexities and challenges faced by those who seek to investigate, prosecute, defend criminal cases. Whilst the review has overwhelmingly found that the principles in the guidelines provide helpful best practice for operational bodies, we understood that some changes were necessary. As a result, we have created a new annex on redaction this will ensure that the process is less burdensome for frontline officers. Further, we have taken steps to expand and clarify the process in relation to accessing third party material to help protect victims' privacy, while maintaining the unassailable right to a fair trial.

As you know, difficulties in relation to the process of disclosure are not a new problem for the criminal justice system. While I am confident that these revisions to the guidelines will bring about positive change, we will endeavour to keep their operation under review and continue to work closely with relevant partners and agencies. I very much hope that you and your colleagues will continue to be part of this important work.

Yours sincerely,

Suella Braverman

RT HON SUELLA BRAVERMAN QC MP
ATTORNEY GENERAL

Attorney General's Office

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Annual Review of Disclosure

May 2022

Attorney General's Office

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METHODOLOGY OF THE REVIEW

I. This review has focused on gaining qualitative assessments of the functional operation of the Attorney General's Disclosure Guidelines.[1] This has been achieved by in-person (including via digital technology) meetings held with key contributors from across the criminal justice system, alongside written submissions to pre-set questions. The review has been overseen by the Disclosure Review Panel, made up of members from across the criminal justice system.

II. Many agencies chose to provide a single representative response while others, most notably members of the judiciary and police service, provided individual responses. The police also provided a number of representative responses from an entire force.

III. The review received written responses from the following:
- Police Forces
- Crown Prosecution Service (CPS)
- Members of the judiciary
- National Crime Agency (NCA)
- Financial Conduct Authority (FCA)
- Her Majesty's Revenue and Customs (HMRC)
- Serious Fraud Office (SFO)
- National Police Chiefs' Council (NPCC)

IV. The review received oral contributions from the following:
- Victims' Representative Groups (via roundtable discussion)
- Legal Practitioners (via roundtable discussion)
- Police Forces
- Police Federation
- CPS Disclosure Leads

V. The review is designed to assess how well the Disclosure Guidelines are being delivered and whether adjustments to the Guidelines at this stage could offer valuable improvements. As the Guidelines were only revised in 2020, with the new iteration becoming effective on 1st January 2021, this review is not intended to produce new or significantly overhauled Guidelines. Rather, it makes an assessment about the functionality and practicality of the Guidelines as a standard for achieving efficient and effective disclosure.

[1] Unless otherwise stated, all references to the 'Attorney General's Disclosure Guidelines,' 'Disclosure Guidelines' or 'Guidelines' are to the Attorney general's Disclosure Guidelines 2020, which became effective on 1st January 2021.

OVERALL STATUS OF THE GUIDELINES

VI. This first annual review has heard that the current Disclosure Guidelines are a functional, clear and effective tool for managing the disclosure obligations created by the Criminal Procedure and Investigations Act (CPIA) 1996 alongside the CPIA Code of Practice. The Guidelines have implemented the key recommendations of the Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System (Disclosure Review 2018). The 2018 review was instituted on the back of significant disclosure failings and so the revised Guidelines called for a more rigorous regime ensuring an efficient and effective approach to disclosure.

VII. We have heard that:

- *'The simple answer is yes the guidelines have improved the thinking process at this time.'* (Police)

- *'I think the Guidelines are very clear and easy to read, and are an excellent all-round source for resolving queries around disclosure. They are very useful for practitioners to that extent.'* (Police)

- '*The guidelines support officers in making decisions on a case by case basis and state that there are times when there is no requirement to take the devices of a witness'* (Police)

VIII. This review agrees with the response by a police officer that:

- Disclosure *'should be a process that takes as long as is needed to ensure that it is done properly, at the earliest stage of the proceedings…Whilst disclosure can be tricky, I have no doubt that the vast majority of police officers and investigators I speak to about it are capable of understanding and applying the provisions given proper training, time, and consistency in what they are being asked to do.'*

IX. Nevertheless, while the overall structure and approach of the Guidelines has been effective, key areas of improvement in practice have been identified. For the purpose of this review these have been loosely divided into the general and the specific. The review seeks to outline the representations received and identify findings and recommendations – first in the general areas of 'Disclosure Training and Culture' and 'Defence Engagement' before examining specific areas of the Guidelines identified by contributors as of particular issue. These general issues by their nature relate to the specific concerns, either causing or exacerbating them. This relationship is reflected in the findings and subsequent recommendations.

1. DISCLOSURE TRAINING & CULTURE

1.1. This review has heard that investigative officers can lack the basic skills to effectively comply with their statutory disclosure obligations. Replies to this review in both written and oral form have demonstrated some confusion around the application of the Disclosure Guidelines by police, even among disclosure specialists and senior leaders.

1.2. We have heard repeatedly that officers struggle to understand the vital role disclosure plays in securing fair trials and why information is being provided to the defence.

1.3. Further, issues have been identified with the process of 'action plans' being returned to police from the CPS with disproportionate requests for further action and poor-quality Disclosure Management Documents (DMDs) leading to ineffective management of disclosure at trial.

Representations

1.4. In conversation with officers of all ranks this review has heard:

- Training on disclosure during induction is minimal – approximately half an hour's training was suggested by multiple junior officers.

- Limited or no dedicated in-person training is offered to embed the new guidelines, meaning even recently trained officers are not properly familiar with disclosure requirements.

- There is a deeply held culture which views disclosure as a merely bureaucratic or tick-box exercise, and that some officers view it as unreasonably assisting the defence.

- Junior officers could not explain the purpose of disclosure and how it underpinned a fair trial.

- Every police force visited noted that investigative requests from the CPS via action plans can be excessive – this may have led to disproportionate work for police.

- Disproportionate action plans also enhance the work being done under the rebuttable presumption and redaction.

1.5. In conversation with legal practitioners it was noted:

- Police officers have a lack of understanding generally about the requirements and purpose of disclosure.

- There can be a problem with DMDs prepared in a tokenistic fashion. At times it is evident the same content has been copied across multiple DMDs. DMDs are often not treated as a living document, rather they are quickly and inadequately created post-facto.

- The complexity of disclosure and the challenge that it can present to those early on in their operational career in the criminal justice system was something that was raised by some Crown Court Judges who responded. This was a theme that ran throughout their responses.

1.6. We have heard from police officers that:

- *'In principle I think the guidance provides a good balance. The application is a different matter; it will take some considerable time before police and CPS adjust their culture and thinking.'*

- *'This* [current training] *is a limited exposure and a grey subject. This type of training should be given face to face rather than via NCALT[2]. Training days worked when a presentation was given by an expert, the fact that the Force has resulted* [sic] *to NCALT is causing concern and loss of understanding. There is simply no time to complete NCALT compared to a divisional training day meant that you had to attend and therefore completed the relevant training.'*

- *'There is anecdotal evidence that suggests officers are delaying file submissions (and therefore justice) because they don't know how to manage their file submissions. Investigation Management Documents are routinely being prepared at the point of file submission rather than as a contemporaneous/living document.'*

- *'To date the cultural change to view disclosure as fundamental to effective investigation standards has not been realised. The requirements are viewed as an admin function completed at the conclusion of the investigation, rather than vital to the investigation and the right to a fair trial.'*

- *'Staff feel that the link between disclosure and data protection has not always been clear in training. Training has been delivered to all staff around disclosure although there is a need for more learning-based training around the processes involved.'*

[2] NCALT is the online training platform within policing and some other law enforcement agencies – It was previously known as the managed learning environment (MLE).

Findings

Police Training & Culture

1.7. Investigators are at the heart of disclosure. This is made clear in paragraphs 8, 63 and 64 of the Disclosure Guidelines:

> *8. Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met.*
>
> *63. Disclosure officers must bring to the prosecutor's attention any material which is potentially capable of meeting the test for disclosure. This material should be provided to the prosecutor along with the reasons why it is thought to meet the test.*
>
> *64. Disclosure officers must also draw material to the attention of the prosecutor for consideration where they have doubt as to whether it might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.*

1.8. Disclosure is a complex, principled and fact dependent exercise, but there are issues with pragmatic decision making around disclosure. For example, while an accurate decision to disclose a body worn video may be made, the entire length of the video may be disclosed rather than only the relevant portion.

1.9. Significant work has been done at a national level by the Joint Operational Improvement Board and National Disclosure Improvement Plan to support improvements in disclosure and adequate delivery of disclosure requirements across the criminal justice system.

1.10. We have however heard that this has not translated into training in disclosure for police officers. We have heard repeatedly and from across the system that police do not have access to adequate training in disclosure. Recourse to posters, online training or other less immersive methods does not appear to have sufficiently educated or supported officers to make the necessarily complex decisions required for effective and efficient disclosure. The review is bolstered in making this finding by the request of the Police Federation for '*constabularies to deliver in-depth, face to face and role specific Disclosure and Rebuttable Presumption Material Training for all Officers and Staff involved in the submission of files to the CPS.*'[3]

1.11. In turn, we find a lack of understanding and therefore difficulty in applying disclosure requirements has impacted effective disclosure practice. Officers are not adequately

[3] Police Federation Parliamentary Briefing - *2020 Changes to the CPS Director's Guidance on Charging: The Impact on Detectives,* November 2021

trained in disclosure at the outset, and ongoing training is not sufficiently robust. This has led to a low quality of disclosure across the system.

CPS Culture & Approach

1.12. The CPS is the lynchpin in the disclosure process, linking both police and defence activity as well as taking the final decisions on disclosure. As such, the highest standards of quality and engagement are rightly encouraged. However, we have found that this approach may at times lead to over-extensive requests to police as part of pre-charge action plans. This can lead to undue work by police and an unduly augmented disclosure requirement. A plan of work needs to be taken forward to assess the details of this issue and provide solutions based in organic and mutually supportive approaches to developing a file for charge.

1.13. Disclosure Management Documents are a crucial tool for effective disclosure, especially at the court stage. The review has found that this tool is not always being treated as a 'living document' and instead is often completed as a tokenistic exercise. DMDs must be sufficiently detailed so that they can thoroughly substantiate the reasoning around disclosure that is particular to each case. Only with appropriately created DMDs can the judiciary effectively manage the disclosure process and ensure errors are corrected or delays dealt with. The proper completion of DMDs and their corresponding use by counsel at preliminary hearings is a powerful tool to strengthen the culture around effective and efficient disclosure.

Actions

1A	Police training on disclosure needs to be clear, adequate and uniform across forces.
1B	Police forces must make every effort to alter the current culture around disclosure by educating and supporting officers in making complex and effective disclosure decisions.
1C	This review will be writing to Her Majesty's Inspector of the Crown Prosecution Service (HMCPSI) to request a close assessment of the use of action plans by the CPS.
1D	The Disclosure Guidelines should be amended to offer more structured tests and systems for delivering disclosure in order to promote a user-oriented set of Guidelines.
1E	An addendum to the Guidelines should be produced as an easy to use document for officers and officer training.

2. DEFENCE ENGAGEMENT ON DISCLOSURE

2.1. Defence engagement on disclosure should be a continuing and organic interaction between prosecuting authorities and the defence undertaken for the duration of the investigation and trial. The two instances of defence engagement most identified by contributors to this review were: pre-charge and at the point of initial disclosure.

2.2. Annex B of the Guidelines outlines the circumstances in which pre-charge engagement may be useful to investigators. The intention of pre-charge defence engagement is to provide a clear understanding of the issues in the case in order to focus, in an early and efficient manner, on likely areas of disclosure. This is especially important in complex cases and those with large amounts of information, especially digital information, though we have heard that the involvement of digital devices in an increasing number of offences is growing, augmenting the need for defence engagement at an early stage.

Representations

2.3. In oral responses legal practitioners noted:

- Defence practitioners are regularly not provided with initial disclosure until the day before or morning of hearings and as such do not have time to offer proper contributions to disclosure management at the initial hearing.

- The last-minute approach to disclosure increases the likelihood of the defence making challenges to initial disclosure at a later stage in proceedings and undermining the purpose of 'front loading' disclosure per the Guidelines.

- Defence practitioners are unable to contact prosecuting authorities in relation to their case and there is no early or dynamic dialogue between investigators, prosecutors and defence which would improve disclosure efficiency and quality.

- A barrister who practices as both a prosecutor and in defence noted that DMDs are regularly treated as tick-box exercises and fail to provide significant enough information to allow for defence counsel to scrutinise the quality of disclosure.

- Judges play a vital role in underscoring the need for useful and timely defence statements and to allay problems which may arise where statements are inadequate or not timeous.

2.4. Investigators and prosecutors noted:

- *'Early engagement between prosecution and defence could be an avenue for great cost and efficiency savings both for the Police, the CPS and the court system as a whole.'*

- *'The CPS and Police have sought to promote defence engagement through the regional and national disclosure forums. Feedback provided through the forums and more generally would indicate that there remains a real reluctance on the part of the defence to engage with this aspect of the Guidelines. Potential reasons for that reluctance include the unresolved issues around remuneration, the experience and capacity of defence representatives advising at the police station and the lack of any perceived advantage to the defendant of engaging in the process, which would only appear to arise from the potential revelation of exculpatory material.'*

- *'I believe closer work with reviewing lawyers and investigators will lead to a 'prosecution team approach', where the value of effective disclosure can speed up case progression and assist in pushing back on disproportionate defence requests. This in turn will lead to early engagement by defence in those cases that are likely to be contested.'*

- *'Exceeding time limits for providing documentation to the CPS has become a normal part of investigators' work; whilst it is not condoned or accepted, the quantity of work they have and the low resources means it is unfortunately unavoidable.'*

Findings

Timings of Disclosure

2.5. Initial details of the prosecution case should be provided as soon as practicable and always by the first hearing, as required by the Criminal Procedure Rules Part 8. This review has heard no concerns about the provision of such material, as such defence practitioners should be furnished with the fundamental information needed to provide practical defence case statements in a timely manner. It is imperative that investigators receive adequate and timely defence case statements in order to refine the lines of inquiry and focus disclosure efforts. Contributors have noted that currently this is not being achieved.

2.6. Initial disclosure is necessary to trigger the timetable for defence disclosure - the time limit for service of the defence statement and service of the details of any defence witnesses is 14 days in the Magistrates' Court and 28 days in the Crown Court, unless that period has been extended by the court. This review has heard that while disclosure timeframes are often being met, this is achieved only at the very last moment, with defence practitioners noting the vast majority of disclosure occurs the day before or morning of the first hearing at both Magistrates and Crown Court level. While this is within the time limits,

the earlier disclosure can be delivered the more use can be gained by defence case statements and high-quality preparatory hearings.

Defence Engagement

2.7. In some cases, contributors have noted that the Crown does not receive suitable defence case statements or is not informed of the defence position early enough to assist with complex disclosure exercises. This is due to many reasons, a good number of which may be outside the direct control of defence lawyers. Nonetheless, we have heard defence practitioners themselves take issue with a lack of openness between investigators and defence lawyers. Communication between all parts of the system must be mutual and effective.

2.8. We also note the requirement of the Disclosure Guidelines [80-81] that: '*The prosecutor must also encourage dialogue and prompt engagement with the defence about the likely issues for trial*…[and]… *The defence are under a duty to engage with the prosecutor in order to aid understanding about the defence case.'* There is a lack of organic engagement between the police, prosecution and defence which leads to each party being at a disadvantage. Every member of the criminal justice system has given comment to this review that increased, flexible communication with each other would be of value.

Pre-Charge Engagement

2.9. None of the above should be taken to suggest unpaid pre-charge engagement work need be undertaken by lawyers. This review is aware of the ongoing work to establish a pre-charge engagement fee scheme. We fully support the efforts being taken in this area. Feedback from across the contributors to this review suggests that giving effect to the pre-charge engagement provisions of the Disclosure Guidelines would improve disclosure significantly and we agree with this testimony. We are cognisant that this is a Ministry of Justice policy area and the AGO will offer all possible support to work in this area.

Actions

2A	The wording throughout the Disclosure Guidelines should be altered to make clear the vital need for defence engagement with the investigation and prosecution from an early stage.
2B	The police, CPS and criminal legal representative groups should work together to establish an effective system of flexible, organic interaction to facilitate information sharing which is distinct from but supports the formal processes of disclosure and service of defence case statements.

3. REBUTTABLE PRESUMPTION

3.1. Two distinct issues have been reported to this review in relation to the rebuttable presumption:

a) The application of the test is not clear or produces excessive disclosure.
b) The breadth of information disclosed under the presumption is leading to an excessive redaction burden.

This section will deal with each issue in turn.

Representations

Clarity of the Rebuttable Presumption

3.2. The review engaged in-person with frontline and senior police officers in regard to the impact of the rebuttable presumption. We heard:

- The rebuttable presumption list is too ambiguous and encourages excessive disclosure.
- There is a lack of discretion being used to 'rebut' material listed as presumption material where it is irrelevant or repetitious.
- The extent of Body Worn Video (BWV) and uncertainty about whether it is included as presumption material poses additional problems of excessive disclosure.

3.3. In written feedback from investigators and disclosure officers we have heard:

- *'The [rebuttable presumption] criteria does help streamline those key items of material and ensure they are at the forefront of an investigator's mind…[but] there is a fear that this is all officers are thinking about and are somewhat tunnel visioned into thinking that this is all they need to consider on their disclosure regimes.'*
- *'The guidelines advocate a thinking approach, however the introduction of the Rebuttable Presumptions material has made it what it essentially shouldn't be; a tick box exercise. Officers are so focused on the RP Criteria and what material goes in each section, there is a fear that they are overlooking the wider picture of relevancy in disclosure.'*
- *'Some police forces and now the NPCC have produced an interpretation table to explain what each category within para.87 is intended to mean. A far better solution would be for the AGO to make that explanation rather than rely on a third party's subjective interpretation.'*
- *'Tick lists rarely bring about considered thought and are in danger of removing a sense of personal responsibility for the disclosure officer.'*

3.4. Written responses from the CPS note:

- *'*[The Rebuttable Presumption] *has meant that prosecutors have had the material they need to consider the impact on the decision to charge and to comply with disclosure obligations at an early stage.'*

- *'There remain issues with the practical application and interpretation of RP material.* [Some forces are] *sending all BWV created during the incident, including all searches, house to house enquires etc. The material in turn has to be reviewed by prosecutors. For example, if multiple officers attend a public order incident and they all turn on their BWV on arrival, that can result in many hours' worth of footage which is technically a record of the incident. As a result, this is being provided to prosecutors who must then review it as potentially disclosable material.'*

- *'It might assist for further clarification of what RP material was intended to be provided as a "contemporaneous record of incident". In this regard, it may also be helpful to make clear that RP material should be sifted or clipped where appropriate so that only relevant material is supplied to the CPS.'*

Redaction & Rebuttable Presumption

3.5. The review has had its attention drawn repeatedly to the requirement being placed on police officers by the process of redacting or otherwise obscuring personal information before providing police files to the CPS for a charging decision.

3.6. The term 'redaction' will be used throughout this document and can be taken to include any method of obscuring personal information including but not limited to pixelization, physical and digital redaction, anonymisation, and pseudonymisation. The requirement to redact personal information is created by the General Data Protection Regulation (GDPR)[4] and Data Protection Act 2018 (DPA 2018).

3.7. Police officers have noted:

- *'Rebuttable presumption material…is so broad it could apply to all relevant material generated by an investigator. To include such a broad category into rebuttable presumptions routinely requires the revelation of an enormous range and volume of material, little of which would ordinarily meet the test for disclosure.'*

- *'The changes in respect of rebuttable presumption material have not been positive. The time burden upon investigators in providing the material is very onerous, particularly given DPA* [Data Protection Act 2018] *requirements.'*

[4] Now operating as retained law and typically referred to as 'UKGDPR' – the standard acronym is retained in the body of this document for simplicity.

- *'The new MG6 listing the rebuttable presumptions have enabled you to focus on the set required criteria. They have therefore given better guidance to less experienced officers in what is actually required. There is however a great deal of redaction involved making the process a more lengthy process.'*

3.8. The CPS state:

- *'The requirement to redact irrelevant personal data is increasing the burden on investigators and prosecutors. Over redaction is as much a problem as under redaction.*

Findings

Application of the Rebuttable Presumption

3.9. When investigators submit files to the CPS for charging decisions these include material they believe needs to be disclosed. This may involve providing rebuttable presumption material – that material which falls to be included in the list of presumption material at paragraph 87 of the Disclosure Guidelines. As set out at paragraphs 89 and 91 of the Disclosure Guidelines, there is a requirement not to provide presumption material where it is not relevant to the CPIA 1996 disclosure test – the rebuttable presumption is explicitly not intended to cause automatic disclosure.

3.10. This approach may be used to 'rebut' the presumption so that unnecessary material is not sent to the CPS. Investigators should at all times be thinking critically when making decisions in relation to disclosure. Unnecessary material, that is material which has no relevance to disclosure, should not be provided to the CPS under the presumption. For example, entire portions of Body Worn Video (BWV) need not be provided, rather the relevant content should be 'clipped' or edited down and provided. Currently, this approach is not being adopted by police. Practical decisions are often not being made to manage disclosure obligations efficiently, such as only providing the parts of video footage which are pertinent to the offence.

3.11. The review has found that rebuttable presumption material is being approached in a 'tick-box' fashion. Considered, context specific assessments are not being made on a regular basis. A mechanical approach by investigators is enhancing the burden on the CPS to review evidence and adding to the redaction obligations of investigators.

3.12. The review has also repeatedly heard that greater specificity of what content is covered by the presumption would aid investigators. We are conscious that, in devising the presumption, the intention was already to provide a clear range of material which was non-restrictive and encouraged a thinking approach. As such, increasing the detail of the presumption to a very fine grain would not be productive, and runs counter to the thinking approach required for effective disclosure.

3.13. While we appreciate the pressure placed on investigators and the need for decisive answers, disclosure obligations cannot be effectively delivered through tick-box

exercises. Rather, any changes should focus on clarity and applicability for investigators, subject to consideration of the full context of the investigation. The NPCC have helpfully provided a focused response on areas of particular uncertainty within the rebuttable presumption which should be the focus of clarifying amendments to the Guidelines.[5]

Redaction & Rebuttable Presumption

3.14. It has been suggested by police contributors to the review that the rebuttable presumption produces an over-extensive list of material, and thereby needlessly enhances the amount of redaction which officers need to undertake.

3.15. During in-person evidence gathering, frontline officers, disclosure experts and force leaders have all been questioned directly on how the rebuttable presumption would be applied in a variety of cases. The review finds, as a result of these questions, that the extent of rebuttable presumption material is broadly correct. Further, the 2018 review found that:

> *'…there are certain items of material that almost always assist the defence and therefore meet the test for disclosure. However, they are frequently not disclosed until there has been significant correspondence and challenge from the defence. This wastes time and resources that could be better spent by both sides.'*

Given the need to ensure appropriate disclosure in all cases, on balance the rebuttable presumption appears to be functioning effectively.

3.16. This review also finds that the police do not always apply their discretion when offering information for disclosure under the rebuttable presumption. This has led to over-provision of material and, consequently, needless redaction obligations. The Attorney General's Disclosure Guidelines contain an explicit requirement not to provide the CPS with information which is irrelevant or has already been provided. Disclosure officers must be willing to use this approach on a case-by-case basis to ensure that over-provision of material and consequent needless redaction is not occurring, enhanced training is likely to be of significant benefit.

3.17. Nonetheless, the expression of the rebuttable presumption could be clarified in order to assist officers. Nothing in this review should be taken to suggest that the rebuttable presumption can be ignored, generally disapplied or approached without careful consideration of the facts and issues in each case.

[5] This was provided as part of a joint law enforcement response and by the NPCC direct response. It focuses on disambiguating certain categories of the rebuttable presumption.

Actions

3A	The Rebuttable Presumption should be amended to clarify areas identified by responders as ambiguous and to restructure the presumption setting out a clear test to be applied by investigators and prosecutors when applying the presumption. This amendment should particularly take account of how Body Worn Video should be addressed.
3B	Enhanced training for officers, cultural change to embed a thinking approach towards disclosure and increased organic interaction between the CPS and police would all provide crucial improvements in this area.

4. REDACTION

Representations

4.1. We have heard evidence, from all members of the justice system but especially the police, that redaction of material for disclosure is placing a significant pressure on resources. We have heard:

- *'Redaction is a huge issue in terms of time needing to be spent on it and the understanding of what information needs redacting differs from officer to officer and lawyer to lawyer.'*

- *'The biggest problems affecting the police with disclosure is the provision of unused material pre-charge and the redaction of that material.'*

- We have heard from one force that they are investing £1 million in a disclosure specialist team to deal with redaction.

4.2. However, this review is also aware of divergent and erroneous approaches to redaction within police forces. A police disclosure lead noted:

- *'I know that a lot of investigators are wasting a lot of time redacting material that they do not need to.'*

- *'I speak to many officers who are straight out of training school who have a very poor understanding of disclosure. The training is clearly insufficient.*'

- *'Supervisors often have an even worse knowledge than their investigators.'*

A Detective Chief Inspector stated:

- *'To date the cultural change to view disclosure as fundamental to effective investigation standards has not been realised. The requirements are viewed as an admin function completed at the conclusion of the investigation, rather than vital to the investigation and the right to a fair trial.'*

4.3. These comments have been supported during in-person visits to police forces by the review, where erroneous claims about the Disclosure Guidelines were made by police disclosure leads, recently trained officers noted that they did not understand the purpose of disclosure in the justice system as a whole, and senior officers expressed very different understandings of disclosure requirements to their junior colleagues.

Findings

Redaction Requirements

4.4. While the NPCC and CPS have agreed a national standard for data protection where information is being passed from police to CPS, this review is also aware that some forces have produced internal guidance. Having reviewed some of this guidance we note that it has been over-extensive, requiring redaction which is not necessary to meet data protection standards. This divergent and sometimes erroneous approach inevitably leads to confusion and promotes excessive redaction. A single source of authoritative guidance would be preferable.

4.5. Redaction obligations have, by some contributors, been referred to as a 'bureaucratic' or a 'waste' where they are done in pursuit of a charging decision, and a charge is refused. This review would stress that lawful measures undertaken to protect the privacy and rights of all those involved in an investigation cannot be considered a waste. Further, that these procedures are, where properly applied, mandated by law.

4.6. Redaction and data protection are, strictly speaking, not aspects of disclosure or a feature of the disclosure guidelines. The protection of privacy ensured by legislation provides a vital bulwark against bloated data retention, unintentional revelation of personal material and promotes the rights of the data subjects. It is admirable that the police, despite the significant time and practical difficulties entailed by redaction, have gone to such lengths to ensure the privacy rights of those directly and indirectly involved in investigations are maintained.

4.7. It is acknowledged by this review that redaction has caused a burden on frontline policing, investigative officers and specialist disclosure experts. It is further acknowledged that requirements in the Attorney General's Disclosure Guidelines may enhance the strain of redaction by concentrating disclosure work at an early stage of the investigation and requiring certain material to regularly be disclosed under the rebuttable presumption. Each of these requirements will now be dealt with in turn.

Timing of Disclosure

4.8. The 2018 Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System made clear findings and recommendations that disclosure should be moved to the earliest reasonable point in the investigation. It is explicitly noted that '*a failure to do so leads to litigation 'drift' and a flurry of activity before and after court hearing dates. This is detrimental to victims, witnesses, suspects and the wider criminal justice system by using expensive court hearings to resolve issues*.' The revised disclosure guidelines enact recommendation 4A of the 2018 review:

Recommendation 4A

The Review recommends moving to a national position where there is a better balance between streamlining work and performing disclosure obligations earlier in order to progress any contested disclosure issues or problems much earlier in proceedings.

4.9. Given the problems identified with piecemeal disclosure prior to 2018, on balance this review finds that continued emphasis on early, considered and substantial disclosure, in conjunction with defence engagement, is the appropriate route by which to increase the efficiency and effectiveness of disclosure. No change is recommended to the current timings of disclosure.

Data Protection Law

4.10. The data protection requirements which are being applied during redaction existed for some time prior to the introduction of the 2021 version of the Disclosure Guidelines. As such the enhanced privacy protections the law requires exist separately to the Guidelines and already bound investigators before the introduction of revised Disclosure Guidelines in January 2021. It is accepted that the frontloading of disclosure obligations may enhance the effort to which police must go to redact information prior to charge. However, what information was required to be redacted has at no time been altered by the Disclosure Guidelines.

4.11. This review is aware, and entirely supports, work being done to ensure the standing interpretation of data protection law is not creating an undue redaction burden. The Attorney General's Office is actively examining the legal framework to provide clear and practical guidance aimed at reducing the amount of redaction officers are having to undertake without undercutting vital rights to privacy.

4.12. This review considers that continued embedding of the new guidelines; enhanced training and promotion of culture change within the police and further clarification on the extent of redaction required by law is the best route to diminish the current impact of redaction.

Actions

4A	All law enforcement agencies should use the nationally agreed NPCC and CPS joint guidance on redaction in preference to local guidance.
4B	The Attorney General's Office should continue to explore the legal framework regulating redaction before charge and provide clear and practical guidance aimed at reducing the amount of redaction officers are having to undertake without undercutting vital privacy rights.

4C	Enhanced training for police officers in relation to data protection should be delivered at a national level. Other law enforcement agencies should similarly offer substantial and engaging data protection training with a focus on disclosure to all relevant staff.

5. THIRD PARTY MATERIAL

Representations

5.1. The review has heard that requests for Third Party Material (TPM) are being undertaken haphazardly.

- Police officers have suggested that the extent and nature of TPM requests can vary from prosecutor to prosecutor.

- Officers in one force have reported that TPM requests are regularly occurring in RASSO cases but not domestic abuse, stalking or harassment cases even where similar issues are present. Whereas we heard from a different force that generalised or broad requests for TPM are regular occurrences in both RASSO and domestic abuse cases.

5.2. A police disclosure specialist noted:

- *'I have spoken to officers who make routine requests for certain material in certain types of investigations, and they don't know why they are doing it, other than it being a line of enquiry that they have always pursued.'*

5.3. The CPS responses stated:

- *'The new Guidelines emphasise that any requests for third party material should be pursuant to a reasonable line of enquiry and any generic request from the defence should be challenged. Areas report that the staged/proportionate approach set out in Bater-James[6] is not being seen in defence requests where blanket requests for third party material are still relatively common.'*

5.4. Discussions with victims' groups made clear:

- Many victims feel deep discomfort when material relating to their personal lives, including medical, local authority, school or counselling records is sought by an investigation. The review heard that in some cases the risk that counselling notes may be accessed is preventing victims from seeking the support and assistance they need in response to the trauma they have suffered.

[6] *R v Carl Bater-James & Sultan Mohammed* [2020] EWCA Crim 790 – In this case Lord Justice Fulford set out four principles for accessing and disclosing mobile data.

- Engagement with ISVAs and IDVAs[7] was not supposed to cover details of the offence and therefore access to this material as part of the investigation and so it is difficult to justify it being relevant to the investigation. Further, the risk of such notes being disclosable has prevented some victims forming a trusting relationship or seeking the support of their ISVA.

- There is a disproportionate focus by the Crown on the position, character and background of complainants which can encourage TPM requests that are not based on legitimate reasons. This fuels the perception that investigations are not focussing on the actions of the offender but are instead looking for material which might undermine a complainant's credibility.

- Complainants consider current guidance on obtaining TPM was unclear or even contradictory – The CPS also support clarification on the requirements for accessing TPM.

5.5. Both prosecution and defence lawyers from the Bar and solicitors' profession emphasised:

- There is a fundamental need for access to records both current and historic wherever relevant in order to ensure a fair trial.

- Suspects and defendants cannot be expected to know of all issues which may be relevant to their case. As such there should not be a requirement placed on the accused to direct the investigation to TPM before it is accessed.

- CPS lawyers should be more willing to ensure TPM is preserved for future by asking third parties to obtain and preserve that material where it may be but is not definitively relevant to a prosecution. In this way TPM can be secured without intrusive examination and a later assessment can be made of whether analysis of the material is necessary.

Findings

Enhancing Protections for Third Party Privacy

5.6. As is clearly set out in the current Disclosure Guidelines, the CPIA Code of Practice and the Guidelines themselves make clear the obligation on the investigator to pursue all reasonable lines of inquiry in relation to material held by third parties within the UK. TPM forms a fundamental part of many inquiries and is key to ensuring a fair and effective trial

[7] Independent Sexual Violence Advisors (ISVAs) and Independent Domestic Violence Advisors (IDVAs) provide individualised support to assist complainants throughout the criminal justice process and beyond.

for all those involved. Nevertheless, there is no justification for speculative examination of TPM without proper investigatory justification.

5.7. This position was made clear in *R v Carl Bater-James and Sultan Mohammed* [2020] EWCA Crim 790, where Fulford LJ stated:

> *'There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation. Furthermore…if there is a reasonable line of enquiry, the investigators should consider whether there are ways of readily accessing the information that do not involve looking at or taking possession of the complainant's mobile telephone or other digital device. Disclosure should only occur when the material might reasonably be considered capable of undermining the prosecution's case or assisting the case for the accused'*

5.8. As was noted by victims' groups, the phrasing of paragraphs 31 and 38 of the Disclosure Guidelines arguably provides momentum to investigators and prosecutors who are considering accessing TPM. There should at no point in an investigation be access to TPM without a clearly explicable set of reasons based on proper lines of inquiry. The Disclosure Guidelines should do more to stress the limitations on accessing TPM and clarify the principles for access in a user-oriented, practical and staged test. The Guidelines should also require a written record of the reasons for access to TPM be kept, this will assist with culture change against indiscriminate access and aid accountability.

5.9. This review considers that requests to access ISVA[8] notes are a very real concern and we would reiterate what has been said in CPS legal guidance that:

> *What represents a reasonable line of enquiry is a matter for the police and depends upon the circumstances of the individual case, but it would be unusual for notes made by an ISVA or equivalent service to represent a reasonable line of enquiry. It is not appropriate for the police to pursue speculative enquiries and routinely seek access to ISVA notes.*

Although the AG Guidelines do not go into the specificity of ISVA notes we would stress that there should be very clear and cogent reasons and a firm basis for requesting access to notes. The rationale for such a request should be clearly articulated. It should be remembered that even in the event that notes are accessed by investigators, they will not be disclosed without meeting the stringent legal tests established in the CPIA and Code of Practice. Data Protection laws and the principles of *Bater-James* must also be applied to ensure privacy for victims.

[8] Independent Sexual Violence Advisors (ISVAs) and Independent Domestic Violence Advisors (IDVAs) provide individualised support to assist complainants throughout the criminal justice process and beyond.

The Impact of *R v Alibhai*

5.10. It has been suggested to this review that the current standard for accessing third party material, that it is relevant to an issue in the case, may be inappropriate. It has been suggested that the case of *R v Alibhai* [2004] EWCA Crim 681 produces a binding precedent on the guidelines, requiring a return to the test as expressed in the 2000 Disclosure Guidelines: the Crown should suspect a third party has material that might be disclosable before obtaining it.

5.11. This suggestion has been extensively analysed. The 2000, 2005, 2011 (supplement), 2013 and 2020 editions of the Disclosure Guidelines have been closely examined, alongside relevant case law. Independent Treasury Counsel advice has also been obtained on the matter. The conclusion of this analysis, stated simply, is that the Court of Appeal in *Alibhai* were only applying the test as stated in the contemporaneous Disclosure Guidelines and did not set a binding standard for what the test should be.

5.12. The review also considered whether there was any independent reason to alter the standard for accessing third party material to the 'suspicion' test. It was found that there was no compelling reason to alter the standard away from the current test for any other reason. Doing so risked the Guidelines running counter to the requirements of the CPIA 1996 and Code of Practice as well as risking vital protections of the Right to Fair Trial.

5.13. We consider that the current standard for accessing third party material aligns with the statutory requirements of the CPIA 1996 and Code of Practice and consequently does not need changing. We consider that applying the principles set out in *Bater-James* will provide a rigorous, balanced and modern approach to third party material access. These principles should be clearly set out in a staged manner which draws the attention of investigators and prosecutors to the range of considerations necessary to balance the reasons for accessing material against the right to privacy.

Actions

5A	The Disclosure Guidelines should be amended to clarify and strengthen the test for accessing TPM in line with the CPIA and case law. This test should be set out in a straightforward and applicable way which is focused on practical utility.
5B	Law enforcement agencies and the CPS should ensure there is adequate training and policy in place to effectively apply the current standards for TPM access.
5C	Enhanced training and cultural focus needs to be placed on recording the reasons why third party material is being used. This should be recorded in the IMD and DMD for all third party material requests. The Guidelines should also be amended to specify this approach.

6. ECONOMIC CRIME

Representations

6.1. In assessing the application of the Disclosure Guidelines to economic crime or other highly complex investigations we have had the assistance of thorough submissions from the National Crime Agency (NCA) which houses the National Economic Crime Centre (NECC), the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA). We have also received joint law enforcement agency (LEA) evidence which included SFO, NCA and Her Majesty's Revenue and Customs (HMRC) contributions.

6.2. In relation to defence engagement in complex issues we have heard:

- *'There can be a lack of defence engagement at pre-charge and during the proceedings themselves. In particular…the timely service of CPIA compliant defence statements remains an issue, and it is not uncommon for defence statements to be served more than 12 months after proceedings have started.'*

- '*It is not uncommon to receive last minute defence requests for disclosure pursuant to s.8 of the CPIA.'*

- Investigators report that they have experienced difficulty in effectively challenging this untimely or insubstantial approach by the defence where it occurs.

6.3. A particular example cited:

- An investigation of '*four defendants, a PTPH was held in April 2018. The Defendants had been charged in October 2017. At the PTPH hearing all the defendants were ordered to serve Defence Statements by July 2018. In the event one defendant served a deficient Defence Statement in October 2018, whilst the other three defendants did not serve defence statements until April 2019. Eighteen months' worth of disclosure work had been conducted before* [the investigation] *was provided with full detail of the defence cases.'*

6.4. The impacts of increased digital information have exacerbated this issue:

- *'Given the advances in digital data and bulk data, there is no longer a "simple ask" from the defence to review a certain aspect of the file.'*

- Apparently simple requests could involve trawling through thousands of documents or gigabytes of digital media.

6.5. Law enforcement agencies are seeking more advanced, digital solutions to assist disclosure and redaction:

- *A technology/AI solution for redaction is desperately needed. City of London police have commissioned the ACE group to provide a solution to the LE community- this is being monitored via the Digital Disclosure Group.*

6.6. Enhanced guidance on 'Block Listing' alongside further guidance in regard to 'sifting digital evidence' under Annex A of the Guidelines were requested by a number of agencies.

6.7. Every agency also made comments on the impact of redaction, which has been well covered in the relevant section of this review. This evidence is not outlined in more detail here as it did not lead to recommendations that were distinct from those already made in the dedicated section of the review.

Findings

Defence Engagement

6.8. The issues cited with defence engagement mirror those examined in the dedicated sections on those issues within this review and the recommendations in the dedicated sections should be seen to apply equally here. These issues may, however, be enhanced in complex investigations where the amount of time taken to investigate and the scope of information means that defence statements are all the more necessary to ensure an effective investigation.

6.9. This review makes no comment on individual examples and does not have sufficient information to assess case-by-case decision making in detail.

Scale of Disclosure

6.10. This review welcomes the commitment to effectively disclosing extensive and complex information shown by law enforcement agencies, the examination of technological assistance for this task demonstrates this commitment. However, the scale or complexity of disclosure cannot be seen in any way to dampen its necessity nor to undercut its role as a fundamental pillar of ensuring fair trials. Every effort must be made by all law enforcement agencies to ensure disclosure is achieved in a thorough manner and in as timely a way as possible. It cannot be advised that agencies rely on technology as a panacea, and efforts should not be made to develop technological solutions where this is at the expense of immediate practical improvements.

6.11. This review finds further that significant determinations about the overall impact of the Disclosure Guidelines cannot be made at this point, given the length of time complex investigations typically take, and the relatively short period for which the Guidelines have been in place (January 2021). Future reviews may revisit disclosure in complex crime more comprehensively as necessary.

Actions

6A	We recommend the guidance on Block Listing and Digital Sifting is enhanced, in consultation with LEAs, to offer user friendly and comprehensive guidance in these growth areas of disclosure.

Attorney General's Office

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Attorney General's Guidelines on Disclosure

For investigators, prosecutors and defence practitioners

2022

Attorney General's Office

Contents

Foreword

Proper disclosure of unused material remains a crucial part of a fair trial and is essential to avoiding miscarriages of justice. Disclosure remains one of the most important and complex issues in the criminal justice system, and it is a priority for this Government to encourage improvements in disclosure practice in order to ensure the disclosure regime operates effectively, fairly and justly.

The Annual Review of Disclosure 2021/22 made a number of recommendations to alter the style and approach of these guidelines in order to enable effective and empowered decision making by all those involved in the criminal justice system. We are pleased to publish a revised version of the Attorney General's Guidelines to implement these changes.

The Rt. Hon. Suella Braverman QC MP

Attorney General

Alex Chalk QC MP

Solicitor General

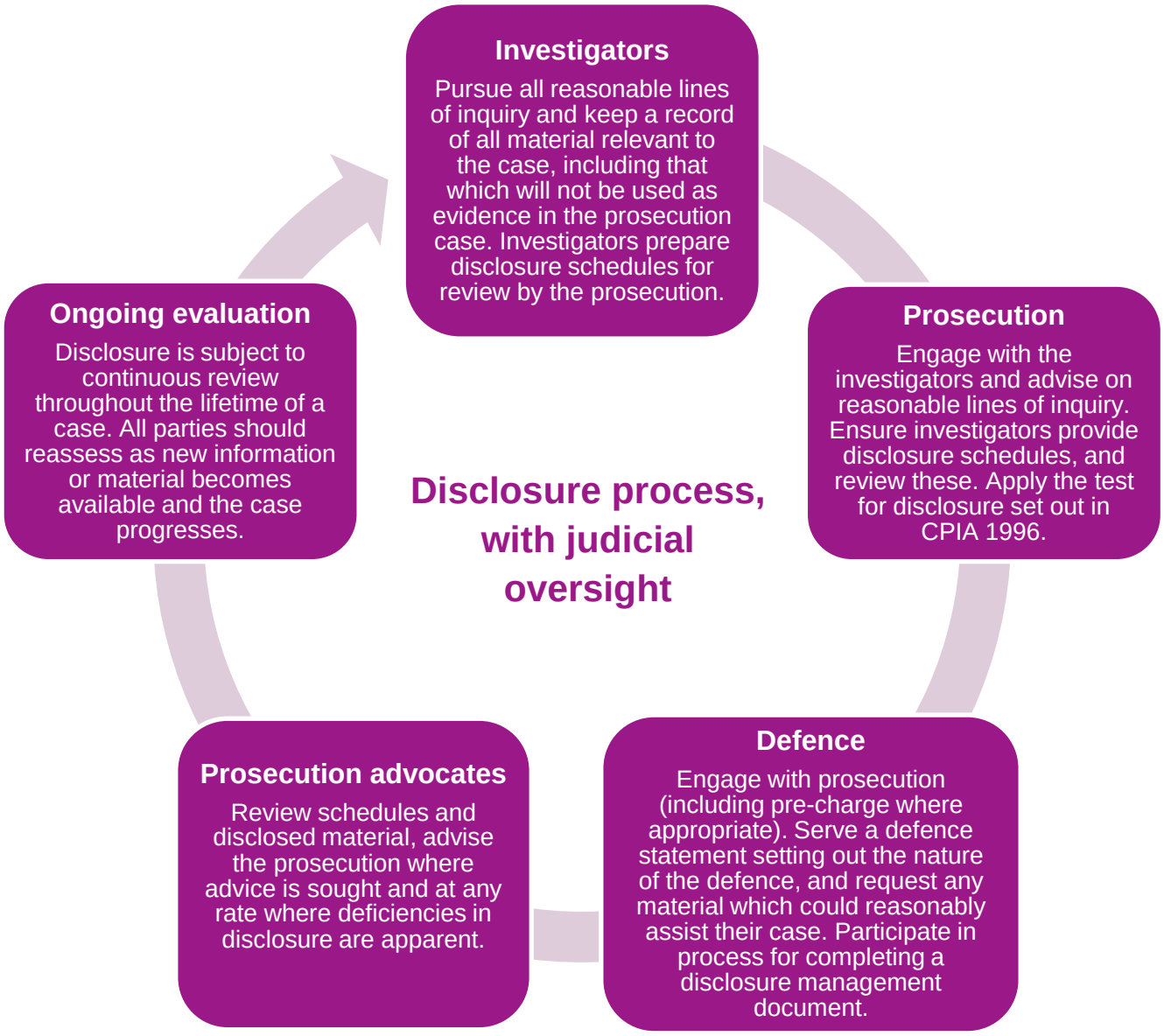
Introduction

These Guidelines are issued by the Attorney General for investigators, prosecutors and defence practitioners on the application of the disclosure regime contained in the Criminal Procedure and Investigations Act 1996 ('CPIA') Code of Practice Order 2020.

These Guidelines replace the existing Attorney General's Guidelines on Disclosure issued in 2013 and the Supplementary Guidelines on Digital Material issued in 2013, which is an annex to the general guidelines.

The Guidelines outline the high-level principles which should be followed when the disclosure regime is applied throughout England and Wales. They are not designed to be an unequivocal statement of the law at any one time, nor are they a substitute for a thorough understanding of the relevant legislation, codes of practice, case law and procedure.

Important principles



1. Every accused person has a right to a fair trial. This right is a fundamental part of our legal system and is guaranteed by Article 6 of the European Convention on Human Rights (ECHR). The disclosure process secures the right to a fair trial.

2. The statutory framework for criminal investigations and disclosure is contained in the Criminal Procedure and Investigations Act 1996 (the CPIA 1996). The CPIA 1996 is an important part of the system that ensures criminal investigations and trials are conducted in a fair, objective and thorough manner. The roles, responsibilities and terminology used in this document therefore mirror the definitions given in the CPIA 1996 and its Code of Practice.

3. A fair trial does not require consideration of irrelevant material. It does not require irrelevant material to be obtained or reviewed. It should not involve spurious applications or arguments which aim to divert the trial process from examining the real issues before the court.

4. The statutory disclosure regime does not require the prosecutor to make available to the accused either neutral material or material which is adverse to the accused[1]. This material may be listed on the schedule, alerting the accused to its existence, but does not need to be disclosed: prosecutors should not disclose material which they are not required to, as this would overburden the participants in the trial process, divert attention away from the relevant issues and may lead to unjustifiable delays. **Disclosure should be completed in a thinking manner,**[2] **in light of the issues in the case, and not simply as a schedule completing exercise.**[3] Prosecutors need to think about what the case is about, what the likely issues for trial are going to be and how this affects the reasonable lines of inquiry, what material is relevant, and whether material meets the test for disclosure.

5. There will always be a number of participants in prosecutions and investigations. Communication within the prosecution team is vital to ensure that all disclosure issues are given sufficient attention by the right person. The respective roles of an investigator, the officer in charge of an investigation, disclosure officer, and prosecutor are set out in the CPIA Code.[4]

6. A full log of disclosure decisions and the reasons for those decisions must be kept on file and made available to the prosecution team. Any prosecutor must be able to see and understand previous disclosure decisions before carrying out their continuous review function.

7. The role of the reviewing lawyer is central to ensuring that all members of the prosecution team are aware of their role and their duties. Where prosecution advocates are instructed, they should be provided with clear written instructions about disclosure

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[1] *R v H and others* [2004] UKHL 3, [2004] 2 AC 134 paragraphs [17] and [35].
[2] "Not undertaking the process in a mechanical manner…keeping the issues in mind…being alive to the countervailing points of view…considering the impact of disclosure decisions…keeping disclosure decisions under review". R v Olu, Wilson and Brooks [2010] EWCA Crim 2975, [2011] 1 Cr. App. R. 33 [42] – [44].
[3] *R v Olu, Wilson and Brooks* [2010] EWCA Crim 2975, [2011] 1 Cr. App. R. 33 [42] – [44].
[4] The CPIA Code (n2) paragraph 2.1.

and provided with copies of any unused material which has been disclosed to the defence.

8. Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. Investigators and disclosure officers should be familiar with the CPIA Code of Practice[5] - in particular their obligations to **retain and record** the relevant material, to **review** it and to **reveal** it to the prosecutor (see paragraphs 3-7 of the Code).

9. Investigators and disclosure officers should be deployed on cases which are commensurate with their training, skills and experience. The conduct of an investigation provides the foundation for the entire case, and may even impact on linked cases. The specific strategy and approach to disclosure that will be taken must always be considered at the start of each investigation.

10. Where there are a number of disclosure officers assigned to a case there should be a lead disclosure officer who is the focus for enquiries and whose responsibility it is to ensure that the investigator's disclosure obligations are complied with. Regular case conferences should be held, as required, to ensure that prosecutors are apprised of all relevant developments. Full records, including detailed minutes, should be kept of any such meetings. The parties involved should agree at the outset whose responsibility it will be to record the case conferences.

The balance between the right to a fair trial (Article 6 of the European Convention of Human Rights) and the right to private and family life (Article 8 of the European Convention of Human Rights)

11. Investigators and prosecutors need to be aware of the delicate questions which arise when both the right to a fair trial and the privacy of complainants and witnesses are engaged.[6]

12. Fulfilling disclosure obligations is part of ensuring a fair trial in accordance with Article 6 of the ECHR. To comply with Article 6, during the course of an investigation, the investigator or prosecutor may decide that it is necessary to request and/or process personal or private information from a complainant or witness to pursue a reasonable line of inquiry; this includes, but is not limited to, digital material.

13. When seeking to obtain and review such material, investigators and prosecutors should be aware that these lines of inquiry may engage that individual's Article 8 rights and those rights in respect of other parties within that material. Such material may also include sensitive data.[7] When seeking to satisfy their disclosure obligations in these circumstances, investigators and prosecutors should apply the following principles:

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[5] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 Code of Practice* (2020) (the CPIA Code)
[6] Guidance is given by the Court of Appeal in *Bater-James and Mohammed* [2020] EWCA Crim 790
[7] See Section 35(8) of the Data Protection Act 2018 for data that requires sensitive processing

a. Collecting and/or processing personal or private material can only be done when in accordance with the law, strictly necessary,[8] and proportionate.
b. In order to be in accordance with the law and necessary, an investigator must be pursuing a reasonable line of inquiry in seeking to obtain the material. What constitutes a reasonable line of inquiry may be informed by others, including the prosecutor and the defendant. Seeking the personal or private information of a complainant or witness will not be a reasonable line of inquiry in every case – an assessment of reasonableness is required (see below for an example).
c. The assessment of reasonableness must be made on a case-by-case basis and regard may be had to:
    (i) the prospect of obtaining relevant material; and
    (ii) what the perceived relevance of that material is, having regard to the identifiable facts and issues in the individual case;
d. If, by following a reasonable line of inquiry, it becomes necessary to obtain personal or private material, investigators will also need to consider:
    (i) what review is required;
    (ii) how the review of this material should be conducted;
    (iii) what is the least intrusive method which will nonetheless secure relevant material;
    (iv) are particular parameters for searching best suited to the identification of relevant material;
    (v) is provision of the material in its entirety to the investigator strictly necessary; or alternatively, could the material be obtained from other sources, or by the investigator viewing and/or capturing the material in situ? An incremental approach should be taken to the degree of intrusion.
e. The rationale for pursuing the reasonable line of inquiry and the scope of the review it necessitates should be open and transparent. It should be capable of articulation by the investigator making the decision. It should provide the basis for:
    (i) consultation with the prosecutor,
    (ii) engagement with the defence and,
    (iii) the provision of information to the witness about how their material is to be handled.
f. The refusal by a witness to provide private or personal material requires an investigator and prosecutor to consider the information the witness has been provided (and could be provided) with regard to the use of their personal material, the reasons for refusal, and how the trial process could address the absence of the material.
g. Disclosure of such material to the defence is in accordance with the law and necessary if, but only if, the material meets the disclosure test in the CPIA 1996.

[8] The processing must relate to a pressing social need, and where the investigator or prosecutor cannot reasonably achieve it through less intrusive means. See Part 3 and Schedule 8 of the Data Protection Act 2018

Personal information which does not meet this test but is contained within the material to be disclosed should be redacted.

h. Where there is a conflict between both of these rights, investigators and prosecutors should bear in mind that the right to a fair trial is an absolute right. Where prosecutors and investigators work within the framework provided by the CPIA, any unavoidable intrusion into privacy rights is likely to be justified, so long as any intrusion is no more than necessary.

For retention of data, see paragraphs 21-25 of Annex A on Digital Material and paragraph 5(a) and (b) of the Code.

Example

There will be cases where there is no requirement for the police to take the devices of a complainant/witness or others at all, and no requirement for any examination to be undertaken.

Examples of this could include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will contain any material relevant to the period in which the conduct is said to have occurred and/or the complainant through age or other circumstances did not have access to a phone at that time.

However, decisions will depend on the facts of the case in question. For example, in the case of a sexual offence committed opportunistically against a stranger, a mobile phone could contain first complaint evidence. Investigators should always carefully consider what is relevant for the case in question.

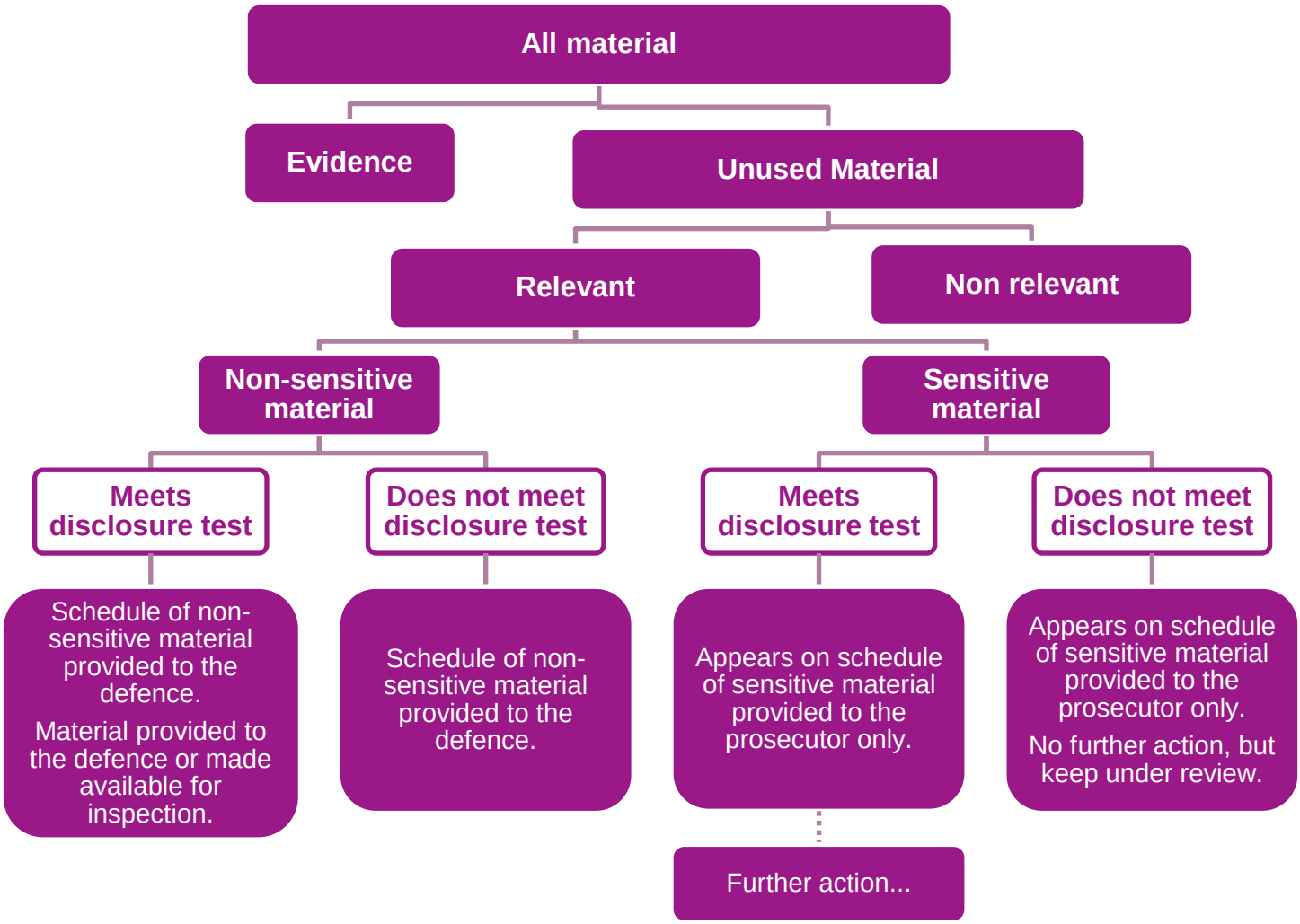
A case might, for example, involve a complainant contacting the police to make an allegation of an offence against a person they had met that same day. The suspect may accept that they met the complainant but deny the allegation. The complainant and suspect communicated on a single medium. The investigator may consider it is a reasonable line of enquiry to view the messages from the day on which the two persons met as, before and after, they are highly likely to be relevant. They may contain material about what was expected or not expected when the complainant and suspect met, the nature of their relationship, and the response after they met, all of which may cast light on the complainant's account and the suspect's account. That is unlikely to require the investigator taking custody of the phone or obtaining a large volume of data. If, by way of example and contrast, the complainant alleged coercive and controlling behaviour over a period of years, including manipulative conduct over various platforms, a larger quantity of data may be relevant and require review and retention by the investigator by different means.

The investigation

14. Consideration of disclosure issues is an integral part of an investigation and is not something that should be considered in isolation.

15. Investigators should approach the investigation with a view to establishing what actually happened. They are to be fair and objective.

16. The following diagram illustrates how material that forms part of an investigation may be categorised and consequently treated. Further information on sensitive material can be found at here.



17. Investigators should ensure that all reasonable lines of inquiry are investigated, whether they point towards or away from the suspect. What is 'reasonable' will depend on the context of the case. A fair investigation does not mean an endless investigation. Investigators and disclosure officers must give thought to defining and articulating the limits of the scope of their investigations. When assessing what is reasonable, thought

should be given to what is likely to be obtained as a result of the line of inquiry and how it can be obtained. An investigator may seek the advice of the prosecutor when considering which lines of inquiry should be pursued where appropriate.

18. When conducting an investigation, an investigator should always have in mind their obligation to retain and record all relevant material.[9] Material which is presumed to meet the test for disclosure, as set out in the dedicated section of these guidelines, must always be retained and recorded. All relevant material must be retained, whereas non-relevant material does not need to be retained.

Definitions

Relevant Material

Material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.[10]

Reasonable Line of Inquiry

A reasonable line of inquiry is that which points either towards or away from the suspect. What is reasonable will depend on the circumstances of the case and consideration should be had of the prospect of obtaining relevant material, and the perceived relevance of that material.

Disclosure Test

Material that might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.

All definitions correspond to the CPIA and CPIA Code of Practice

19. The decision as to relevance requires an exercise of judgment and, although some material may plainly be relevant or non-relevant, ultimately this requires a decision by the disclosure officer or investigator.

20. Disclosure officers and/or investigators must inspect, view, listen to, or search all relevant material. The disclosure officer must provide a personal declaration that this task has been completed. In some cases a detailed examination of every item of material

[9] The CPIA Code paragraphs 4 and 5
[10] The CPIA Code paragraph 2

seized would be disproportionate. In such cases the disclosure officer can apply search techniques using the principles contained in Annex A. Whatever the approach taken by disclosure officers in examining material, it is crucial that disclosure officers record their reasons for a particular approach in writing. Where third party material is under consideration, reference should be made to paragraph 26 et seq. of these Guidelines.

21. Disclosure officers should seek the advice and assistance of prosecutors when in doubt as to their responsibility as early as possible. They must deal expeditiously with requests by the prosecutor for further information on material, which may lead to disclosure.

22. Where prosecutors have reason to believe that the disclosure officer has not inspected, viewed, listened to or searched relevant material, or has not done so sufficiently or has not articulated a reason for doing so, they should raise this issue with the disclosure officer and request that it is addressed. Prosecutors should also assist disclosure officers and investigators in defining the parameters of review and the methodology to be adopted.

23. It may become apparent to an investigator that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was inextricably linked to material that was relevant, is in fact incapable of impacting on the case.[11] It is not necessary to retain such material. However, the investigator should also exercise considerable caution in reaching that conclusion. The investigator should be particularly mindful of the fact that some investigations continue over some time. Material that is incapable of impact may change over time and it may not be possible to foresee what the issues in the case will be. The advice of the prosecutor may be sought where necessary. Ultimately, however, the decision on whether to retain material is one for the investigator, and should always be based on their assessment of the relevance of the material and the likelihood of it having any impact on the case in future.

24. Prosecutors must be alert to the need to provide advice to and, where necessary, probe actions taken by the investigator to ensure that disclosure obligations are capable of being met. This should include advice on potential further reasonable lines of inquiry. There should be no aspects of an investigation about which prosecutors are unable to ask probing questions.

25. In some investigations it may be appropriate for the officer in charge of the investigation to seek engagement with the defence at the pre-charge stage. This is likely to be where it is possible that such engagement will lead to the defence volunteering additional information which may assist in identifying new lines of inquiry. Annex B sets out the process for any such pre-charge engagement.

Third party material

26. Third party material is material held by a person, organisation, or government department other than the investigator and prosecutor, either within the UK or outside

[11] The CPIA (section 23 (1))

the UK. Third parties are not directly involved in the case in question but may hold information relevant to it.

27. The CPIA addresses material once it has come into the possession of an investigator or prosecutor. These guidelines prescribe the approach to be taken to disclosure of material held by third parties, either when it comes into the possession of the investigator or prosecutor or remains in the possession of the third party.

Principles of accessing third party material

Step 1: Establishing a Reasonable Line of Inquiry

28. The CPIA Code and these guidelines make clear the obligation on the investigator to pursue all reasonable lines of inquiry in relation to any offence under investigation, its surrounding circumstances or any person being investigated. This requires the investigator to pursue all lines of inquiry, whether they point towards or away from the suspect, that may reveal material **relevant**[12] to the investigation or the likely issues at trial. This obligation is the same in respect of material held by third parties within the UK.

29. It is for investigators, in consultation or discussion with prosecutors where appropriate, to identify and pursue all reasonable lines of inquiry. Prosecutors can advise on additional reasonable lines of inquiry and should satisfy themselves that such reasonable lines of inquiry have been pursued.

Step 2: Establishing Relevance

30. Third party material should only be requested in an individual case if it has been identified as relevant to an issue in the case. This will depend on the circumstances of the individual case, including any potential defence, and any other information informing the direction of the case. Access to third party material should never occur as a matter of course. It should never be assumed that because of the nature of an offence that is being investigated that particular types of material will need to be accessed. There will be cases where no investigation of third party material is necessary at all, and others where detailed scrutiny is needed. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation[13].

31. A written record must be made of any decision to access third party material in the Investigation or Disclosure Management Document as appropriate. This record must also detail the underlying basis or rationale for the decision to access third party material. Disclosure Management Documents should be drafted to include the lines of inquiry pursued relating to third party material. This will assist in demonstrating to the defence and court the steps that have or have not been taken and why.

[12] For the definition of 'relevant' please refer to the definitions section of these Guidelines.
[13] Bater-James and Mohammed [2020] EWCA Crim 790 at paragraph 77

32. Investigators and prosecutors, when deciding whether third party material should be requested in an individual case, should consider the following, although this list is not exhaustive, and the considerations will vary depending on the circumstances of the case:

    i. What relevant information is the material believed to contain?

    ii. Why is it believed that the material contains that relevant information? If it is likely that no relevant information will be contained within the material, a request should not be made.

    iii. Will the request for the material intrude on a complainant's or witness's privacy?

    iv. If the material requested does amount to an invasion of privacy, is it a proportionate and justifiable request to make in the circumstances of the individual case and any known issues? Consider vi. below or whether the information which may result in access amounting to an invasion of privacy can be redacted to remove anything that does not meet the disclosure test.[14]

    v. Depending on the stage of the case, does the material need to be obtained or would a request to preserve the material suffice until more information is known?

    vi. Is there an alternative way of readily accessing the information such as open-source searches, searches of material obtained from the suspect, or speaking directly to a witness, that does not require a request to a third party?

    vii. Consider the scope of the material required, for example are the entirety of an individual's medical records required or would a particular month or year be sufficient? Ensure the request is focused so that only relevant information is being sought.

    viii. The process of disclosure and its role in the justice system should be clearly and understandably expressed to the third party. They must be kept appraised of any ongoing disclosure decisions that are made with regard to their material.

Step 3: Balancing Rights

33. If as a result of the duty to pursue all reasonable lines of inquiry, the investigator or prosecutor obtains or receives material from a third party, then it must be dealt with in accordance with the CPIA 1996, (i.e. the prosecutor must disclose material only if it meets the disclosure test, subject to any public interest immunity claim). The person who has an interest in the material (the third party) may make representations to the court concerning public interest immunity (see section 16 of the CPIA 1996).

34. In some cases, third party material may reveal intimate, personal or delicate information. Prosecutors should give close scrutiny to such material and only disclose

[14] See Annex D on Redaction for further information.

it where absolutely necessary. Further guidance and best practice on obtaining third party material can be found in the Joint Protocol on Third Party Material and Chapter 5 of the CPS Disclosure Manual. Investigators and prosecutors must also comply with data protection law when accessing third party material which contains personal information; they must consider closely how to balance the right to fair trial and right to privacy as set out at paragraph 11 et seq. For more information, please consult Annex A on Digital Material and Annex D on Redaction.

Material held by Government departments

35. During an investigation or prosecution it may become apparent that a Government department or another Crown body has material that may be relevant to an issue in the case. Investigators or prosecutors should seek access to this material if and only if they have met **the principles for accessing third party material** as set out above. Any access must be in accordance with those principles.

36. The investigator or prosecutor should inform the Government department or Crown body at the earliest opportunity of the nature of the case and the relevant issues in the case, and ask whether it has any relevant material. They should assist the Government department or Crown body in understanding what may be relevant in the context of the case in question.

37. Crown Servants have a duty to support the administration of justice and should take reasonable steps to identify and consider such material. This extends to revealing to the investigator or prosecutor the extent of the searches conducted and the existence of any information which they believe may be relevant to the issues in the case, to supply them with that information unless it is protected to the issues in the case, and to supply them with that information unless it is protected in law, subject to legal professional privilege or attracts public interest immunity.

38. If access is denied to relevant material, the investigator or prosecutor should consider the reasons given by the Government department or Crown body and what, if any, further steps might be taken to obtain the material. The final decision on further steps rests with the prosecutor.

39. Investigators and prosecutors cannot be regarded to be in constructive possession of material held by Government departments or Crown bodies simply by virtue of their status as Government departments or Crown bodies.

40. The steps taken to identify and obtain relevant material held by a Government department or Crown body should be recorded by the investigator and the prosecutor.

41. Where appropriate, the defence should be informed of the steps taken to obtain material and the results of the line of inquiry.

Other domestic bodies

42. If an investigator, disclosure officer or a prosecutor considers a third party (for example a local authority, social services department, hospital, doctor, school, provider of forensic services, or CCTV operator) has material or information that is relevant to an

issue in the case, they should seek access to this material if and only if they have met **the principles for accessing third party material** as set out above. A third party has no obligation under the CPIA to reveal material to investigators or prosecutors. There is also no duty on the third party to retain material which may be relevant to the investigation and, in some circumstances, the third party may not be aware of the investigation or prosecution.

43. If access to the material is refused and, despite the reasons given for refusal of access, it is still believed that it is reasonable to seek production of the material or information and that the requirements of a witness summons[15, 16] are satisfied (or any other relevant power), then the prosecutor or investigator should apply for the summons causing a representative of the third party to produce the material to court. A witness summons is only available once a case has been charged. If the material is sought pre-charge, investigators and prosecutors should request that the third party preserve the material. This request should be documented.

44. When the third party material in question is personal data, investigators and prosecutors must refer to paragraphs 11 - 13 of these guidelines to ensure that there is no unjust intrusion of privacy.

45. The defence should be informed of what steps have been taken to obtain material and what the results of the inquiry have been. Disclosure Management Documents should be used in Crown Court cases.

International enquiries

46. The obligations under the CPIA Code to pursue all reasonable lines of inquiry apply to material held overseas.

47. Where it appears that there is material relevant to an issue in the case held overseas, the investigator or prosecutor should seek access to this material if and only if they have met **the principles for accessing third party material** as set out above. If this standard is met, they must take reasonable steps to obtain it while acting in accordance with the principles. Investigators or prosecutors may do so either informally or by making use of the powers contained in the Crime (International Co-operation) Act 2003, the Criminal Justice (European Investigation Order) Regulations 2017 and any international conventions.

48. There may be cases where a foreign state or court refuses to make the material available to the investigator or prosecutor. There may be other cases where the foreign state, though willing to show the material to investigators, will not allow the material to be copied or otherwise made available and the courts of the foreign state will not order its provision.

49. It is for these reasons that there is no absolute duty on the prosecutor to disclose relevant material held overseas by entities not subject to the jurisdiction of the courts in

[15] Criminal Procedure (Attendance of Witnesses) Act 1965, s2
[16] Magistrates Court Act 1980, s97

England and Wales. However, consideration should be given to whether the type of material believed to be held can be provided to the defence.

50. The obligation on the investigator and prosecutor under the CPIA Code is to take reasonable steps. Where investigators are allowed to examine the files of a foreign state but are not allowed to take copies, take notes or list the documents held, there is no breach by the prosecution in its duty of disclosure by reason of its failure to obtain such material, provided reasonable steps have been taken to try and obtain it. Prosecutors have a margin of consideration as to what steps are appropriate in the particular case, but prosecutors must be alive to their duties and there may be some circumstances where these duties cannot be met. Whether or not a prosecutor has taken reasonable steps is for the court to determine in each case if the matter is raised.

51. Where it is apparent during the investigation that there may be relevant material held overseas then investigators and prosecutors should consider engaging with the defence at the pre-charge stage, applying the principles contained in Annex B, to ensure that all reasonable lines of inquiry are followed.

52. It is important that the position taken in relation to any material held overseas is clearly set out in a document such as a disclosure management document (DMD) so that the court and the defence know what the position is. Further information on DMDs can be found below.

53. In the DMD, investigators and prosecutors must record and explain the situation and set out, insofar as they are permitted by the foreign state, such information as they can and the steps they have taken to obtain it.

54. The defence should be informed of what steps have been taken to obtain material and what the results of the enquiry have been.

Electronic material

55. The exponential increase in the use of technology in society means that many routine investigations are increasingly likely to have to engage with digital material of some form. It is not only in large and complex investigations where there may be large quantities of such material. When dealing with large quantities of digital material prosecutors and investigators should apply the principles contained in Annex A to these guidelines.

56. Where investigations involve a large quantity of digital material it may be impossible for investigators to examine every item of such material individually. Therefore there should be no expectation that this should happen. Investigators and disclosure officers will need to decide how best to pursue a reasonable line of inquiry in relation to the relevant digital material, and ensure that the extent and manner of the examination are appropriate to the issues in the case. In reaching any such decisions, investigators and disclosure officers must bear in mind the overriding obligation to ensure a fair trial of any suspect who is charged and the requirement to provide disclosure in the trial process.

57. Prosecutors and investigators must ensure that any line of inquiry pursued in relation to the digital devices of victims and witnesses are reasonable in the context of the likely issues in the case. Digital devices should not be obtained as a matter of course and the

decision to obtain and examine a digital device will be a fact-specific decision to be made in each and every case.[17] Where digital devices are obtained, if it becomes apparent that they do not contain relevant material they should be returned at the earliest opportunity.

58. Prosecutors should be consulted, where appropriate, to agree a strategy for dealing with digital material. This strategy should be set out in a disclosure management document (DMD) and shared with the defence at the appropriate time.

Revelation of material to a prosecutor

59. Prosecutors only have knowledge of the matters which are revealed to them by investigators and disclosure officers. The schedules are the means by which that revelation takes place. Therefore it is crucial that the schedules detail all of the relevant material and that the material is adequately described. This process will also enable defence practitioners to become appraised of relevant material at the appropriate stage of the investigation. More detail on what constitutes relevant material can be found here.

60. Schedules must be completed in a form which not only reveals sufficient information to the prosecutor, but which demonstrates a transparent and thinking approach to the disclosure exercise. The speed with which the schedule is produced should not reduce the quality of the material contained therein.

61. Descriptions on the schedules must be clear and accurate and must contain sufficient detail to enable the prosecutor to make an informed decision on disclosure. Abbreviations and acronyms should be avoided as they risk significant material being overlooked.

62. Investigators and disclosure officers must ensure that material which is presumed to meet the test for disclosure, as set out in paragraph 86 of these guidelines and paragraph 6.6 of the CPIA Code, is placed on the schedules. The requirement to schedule this material is in addition to the requirement to schedule all other relevant unused material.

63. Where relevant unused material has been omitted from the schedule or where material is not described sufficiently, and the prosecutor asks the disclosure officer to rectify the schedule, the disclosure officer must comply with this request in a timely manner.

64. Disclosure officers must bring to the prosecutor's attention any material which is potentially capable of meeting the test for disclosure. This material should be provided to the prosecutor along with the reasons why it is thought to meet the test.

65. Disclosure officers must also draw material to the attention of the prosecutor for consideration where they have doubt as to whether it might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.

[17] *R v E*, [2018] EWCA 2426 (Crim)

Revelation of sensitive material

What is sensitive material?

66. Sensitive material is material that, if disclosed, would give rise to a **real** risk of **serious** prejudice to an **important** public interest. Investigators must ensure that all relevant unused sensitive material is retained, reviewed and revealed to the prosecutor. Sensitive material should be revealed to a prosecutor on a separate schedule to the non-sensitive material.

    Examples of sensitive material can be found in paragraph 6.14 of the CPIA Code.

Sensitive material as defined by the CPIA Code of Practice is distinct from personal information requiring strict necessity processing under the Data Protection Act 2018, which is sometimes referred to as 'sensitive personal information/data.'

67. When making a decision about the sensitivity of an item, investigators should have regard to the types of material listed in paragraph 6.14 of the CPIA Code. The disclosure officer must ensure that the sensitive material schedule includes the reasons why it is asserted that items on the schedule are considered sensitive.

68. Where a document contains a mix of sensitive and non-sensitive material, the sensitive material must be redacted, with a copy of the redacted document placed on the non-sensitive unused material schedule and the original placed on the sensitive schedule.

69. Investigators must ensure that the descriptions of sensitive unused material are sufficiently clear to enable the prosecutor to make an informed decision as to whether or not the material itself should be viewed, to the extent possible without compromising the confidentiality of the information.

70. Prosecutors must carefully review the sensitive unused material schedule in order to be satisfied that there are no omissions, that the items have been correctly identified as sensitive, and that the items are adequately described. If a prosecutor identifies that a schedule is inadequate, the investigator must provide an adequate schedule as soon as possible. This may involve items being moved from the sensitive unused material schedule to the non-sensitive unused material schedule.

The timing of revelation

71. In order to support prosecutors' assessment of the impact of unused material on any proposed prosecution, it is essential that prosecutors are provided with the schedule of unused material at an early stage, as well as any material which the disclosure officer considers potentially capable of meeting the test for disclosure. This will allow for a thorough review of the case and enable the prosecutor to consider what the disclosure strategy should be.

72. The timing of revelation of material should be in accordance with paragraph 7.1 of the Code. The point at which the case file is submitted to the CPS will depend on the circumstances of the charging decision and on the anticipated plea:

    a. Where the police are seeking a charging decision under the Full Code Test from the CPS, and it is anticipated that the defendant will plead not guilty, the unused material schedules should be provided to the prosecutor by the disclosure officer at the same time as seeking this charging decision.
    b. Where the police have charged a suspect on the Full Code Test under the arrangements contained in the Director's Guidance on Charging, and a not guilty plea is anticipated, then the unused material schedule should be provided to the prosecutor at the point at which the case file is submitted to the CPS.
    c. In all other cases the disclosure officer must provide the schedules as soon as possible after a not guilty plea has either been indicated or entered.

73. There may be instances where an investigator is seeking a charging decision on the Full Code Test and anticipating a not guilty plea, but where it is not feasible to provide the unused material schedules to the prosecutor at the same time as seeking a charging decision. This may be the case where an arrest is not planned, and the suspect cannot be bailed.

74. For large and complex investigations, particularly those conducted by the Serious Fraud Office, it is recognised that the preparation of schedules continues beyond the point of charge due to the quantity and complexity of data to be analysed, and that it may not be feasible or necessary to provide the schedules at the same time that a charging decision is sought.

75. Disclosure officers should apply the criteria contained in the Director's Guidance on Charging when making a decision about a suspect's likely plea and must follow any additional guidance provided by the prosecutor.

The charging decision

76. Prosecutors must ensure that all reasonable lines of inquiry likely to affect the application of the Full Code Test have been pursued before the Test is applied, unless the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the Full Code Test[18]. The failure to pursue reasonable lines of inquiry may result in the application of the Full Code Test being deferred, or in a decision that the Test cannot be met.

77. If a decision is made to charge a case under the Threshold Test, then prosecutors and investigators need to be proactive in ensuring that any outstanding lines of inquiry are pursued and that the case is kept under continuous review.

[18] Crown Prosecution Service, *The Code for Crown Prosecutors* paragraph 4.3

Common law disclosure

78. A prosecutor's statutory duty of disclosure applies from the point of a not guilty plea in the magistrates' court and from the point a case is sent to the Crown Court.[19] However, prosecutors must also consider their duties under the common law which apply at all stages of a case, from charge to sentence and post-conviction (see paragraphs 139 and 140) and regardless of anticipated or actual plea.

79. These duties may require the prosecutor to disclose material to the accused outside the statutory scheme in accordance with the interests of justice and fairness. An example of this is where it would assist the accused in the preparation of the defence case, prior to plea and regardless of anticipated plea. This would include material which would assist in the making of a bail application, material which may enable the accused to make an early application to stay the proceedings as an abuse of process, material which may enable the accused to make representations about the trial venue or a lesser charge, or material which would enable an accused to prepare for trial effectively.[20]

Initial disclosure

80. The defence must be provided with copies of, or access to, any prosecution material not previously disclosed, which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.[21] Paragraphs 101 et seq. of these Guidelines contain guidance as to when initial disclosure should be served.

81. In order for the prosecutor to comply with their duty of initial disclosure they must analyse the case for the prosecution, the defence case, and the likely trial issues. A prosecutor can anticipate the likely issues on the basis of information available (such as any explanation provided by the accused in interview).

82. The prosecutor and defence are both under a duty to engage promptly in order to aid understanding of the defence case and the likely issues for trial at an early stage. This engagement assists in ensuring compliance with the overriding objective of the Criminal Procedure Rules[22] [23] and that any further reasonable lines of inquiry can be identified and pursued. Without engagement from defence at an early stage, the accuracy of disclosure can be compromised. Significant cooperation should be a regular occurrence and all parties should consider the Criminal Practice Direction CPD1, para 1A.1 which includes the statement of Lord Justice Auld that '*a criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself'.*

[19] Criminal Procedure and Investigations Act 1996 (CPIA 1996), s1(1)(a) and (2)(cc)
[20] *R v DPP, ex p. Lee* [1999] 1 WLR 1950 [1962] – [1963]
[21] CPIA 1996, s3
[22] The Criminal Procedure Rules 2020 SI No. 759 (L.19) (the CrimPR), part 1
[23] *R v R and others* [2015] EWCA Crim 1941, [2016] 1 WLR 1872, paragraph [35]

83. Prosecutors must review schedules prepared by disclosure officers thoroughly at an early stage and must be alert to the possibility that relevant material may exist which has not been revealed to them or material included which should not have been. If no schedules are provided, if there are apparent omissions from the schedules, or if documents or other items are inadequately described or are unclear, the prosecutor must request properly completed schedules from the investigator. Investigators must comply with any such request. A log of such communications should be kept by the prosecutor.

84. In deciding whether material satisfies the disclosure test, consideration should include:

    a. The use that might be made of it in cross-examination;
    b. Its capacity to support submissions that could lead to:
        i. The exclusion of evidence;
        ii. A stay of proceedings, where the material is required to allow a proper application to be made;
        iii. A court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the European Convention of Human Rights;
    c. Its capacity to suggest an explanation or partial explanation of the accused's actions;
    d. Its capacity to undermine the reliability or credibility of a prosecution witness;
    e. The capacity of the material to have a bearing on scientific or medical evidence in the case.

85. Material relating to the accused's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered when in the investigator's custody is likely to meet the test for disclosure.

    Material should not be viewed in isolation as, whilst items taken alone may not be reasonably considered capable of undermining the prosecution case or assisting the case for the accused, several items together can have that effect.

Material which is likely to meet the test for disclosure

86. **The following material, which is produced and obtained in the majority of investigations is likely to include information which meets the test for disclosure:**

a) records which are derived from tapes or recordings of telephone messages (for example 999 calls) containing descriptions of an alleged offence or offender;

b) any incident logs relating to the allegation;

c) **crime reports and crime report forms**, or where not already contained within the crime report**:**

- an investigation log;
- any record or note made by an investigator (including police notebook entries and other handwritten notes) on which they later make a statement or which relates to contact with suspects, victims or witnesses;
- an account of an incident or information relevant to an incident noted by an investigator in manuscript or electronically;
- records of actions carried out by officers (such as house-to-house interviews, CCTV or forensic enquiries) noted by a police officer in manuscript or electronically;
- CCTV footage, or other imagery, of the incident in action;

d) the defendant's custody record or voluntary attendance record;

e) any previous accounts made by a complainant or by any other witnesses;

f) interview records (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);

g) any material casting doubt on the reliability of a witness e. g. relevant previous convictions and relevant cautions of any prosecution witnesses and any co-accused.

87. When providing CCTV footage, or other imagery, of the incident in action as material which is likely to meet the test for disclosure, investigators should include all **relevant** body-worn footage that is not provided as evidence. It may be that the entirety of the footage contains both relevant and irrelevant material. Irrelevant footage should not be provided to prosecutors in the first instance. It may be the footage requires clipping or editing to achieve this. Where multiple body worn cameras capture the same content, it may be that only one set of footage needs be provided. The remainder should be listed clearly on the unused material schedule. This decision must be made on a case-by-case basis, as it may be that similar but distinct footage has been captured, in which case multiple sets of footage should be provided.

88. This list is reflected in paragraph 5.4 and 6.6 of the Code. This material, in addition to all other material which may be relevant to an investigation, must, in the first instance, be **retained** and **listed** on the schedule by the investigator. It is likely that some of this material will need to be redacted (see paragraph 6(c) of the Code and the sensitive material provisions of these guidelines for redaction and revelation of sensitive material.)

Assessment by the Investigator

89. Before any of this material is provided to the prosecutor, investigators should apply the disclosure test to the material to ascertain if in fact it is disclosable. When providing the material to the prosecutor the investigator should highlight the material they consider is disclosable and why.

Assessment by the Prosecutor

90. Once the material has been provided to the prosecutor, as this material is likely to contain information which meets the test for disclosure, prosecutors should start their review of the material with a presumption that this material should be disclosed to the defence. However, in every instance the disclosure test should be applied in a thinking manner.

91. After applying the disclosure test, a prosecutor must record on the unused material schedule whether each item of this material does or does not meet the test for disclosure and they must record the reason for that decision.

92. This list of material is not intended to cause automatic disclosure – investigators and prosecutors should always apply the disclosure test and consider each list of material carefully in the context of the case in question. Defence should not expect to be provided with this material as of right in every case. The material is always subject to the disclosure test first before any material is provided.

Disclosure management document (DMD)

What is a disclosure management document?

93. A disclosure management document (DMD) outlines the strategy and approach taken in relation to disclosure and should be served to the defence and the court at an early stage. DMDs will require careful preparation and presentation which is tailored to the individual case. The investigator should provide information for use in the DMD and the prosecutor should prepare it.

94. A DMD is a living document which should be amended in light of developments in the case and kept up to date as the case progresses. DMDs are intended to assist the court in case management and will also enable the defence to engage from an early stage with the prosecution's proposed approach to disclosure.

95. DMDs may set out:

    a. Where prosecutors and investigators operate in an integrated office, an explanation as to how the disclosure responsibilities have been managed.

    b. A brief summary of the prosecution case and a statement outlining how the prosecutor's general approach will comply with the CPIA 1996 regime and these guidelines

c. The prosecutor's understanding of the defence case, including information revealed during interview. The prosecutor may wish to explain their understanding of what is in dispute and what is not in dispute, the lines of inquiry that have been pursued in light of these issues, and specific disclosure decisions that have been taken.

d. An outline of the prosecution's general approach to disclosure, which may include detail relating to:

   i. The lines of inquiry pursued, particularly those which may assist the defence.

   ii. The timescales for disclosure and, where relevant, how the review of unused material has been prioritised.

   iii. The method and extent of examination of digital material, in accordance with the Annex A to these guidelines.

   iv. Any potential video footage.

   v. Any linked investigations, including an explanation of the nexus between investigations and any memoranda of understanding and disclosure agreements between investigators.

   vi. Any third party material, including the steps taken to obtain the material.

   vii. Any international material, including the steps taken to obtain the material.

   viii. Credibility of prosecution witnesses (including professional witnesses).

96. In cases heard in the magistrates' court and the youth court, prosecutors should always consider whether or not a disclosure management document (DMD) would be beneficial. DMDs are most likely to be beneficial in cases with the following features:

    a. Substantial or complex third party material;
    b. Digital material in which parameters of search, examination or analysis have been set;
    c. Cases involving international enquiries;
    d. Cases where there are linked operations;
    e. Non-recent offending;
    f. Cases involving material held or sought by the investigation that is susceptible to a claim of legal professional privilege.

97. DMDs should be prepared in all Crown Court cases.

98. In order for the prosecutor to complete a DMD at an early stage, the investigator should, at the point of or prior to charge, provide written details as to the lines of inquiry that have been pursued.

99. Where a DMD has been prepared, it should be served at the same time as initial disclosure.

100. An example template for a DMD is contained in Annex C.

The timing of initial disclosure

101. In all cases it is essential that the prosecution takes a grip on the case and its disclosure requirements at an early stage. Prosecutors must adopt a considered and appropriately resourced approach to providing initial disclosure. Initial disclosure in this context refers to the period post-charge; more detailed timings for this are set out below.

Cases expected to be tried in the magistrates' courts

102. Where a case is charged on the Full Code Test and a not guilty plea is anticipated, initial disclosure should be served in advance of the first hearing.

103. Where a guilty plea was originally anticipated but a not guilty plea is entered then initial disclosure should be served as soon as possible after a not guilty plea is entered.

104. Where a case is charged on the Threshold Test, initial disclosure should be served as soon as possible after the Full Code Test is applied and in accordance with any order made by the court.

Cases sent to the Crown Court for trial

105. Where it is expected that the accused will maintain a not guilty plea, it is encouraged as a matter of best practice for initial disclosure to be served prior to the Plea and Trial Preparation Hearing (PTPH).

106. It is accepted that it may not be appropriate or possible to serve initial disclosure prior to the PTPH for cases charged on the Threshold Test. Where initial disclosure has not been served at the PTPH it should be served as soon as possible after that hearing and in accordance with any direction made by the court.

107. In cases prosecuted by the Serious Fraud Office, or other similarly large or complex cases, it is accepted that full initial disclosure may not be capable of being served prior to the PTPH. In such cases, best practice is to adopt a phased approach to disclosure, ensuring that robust judicial case management during Further Case Management Hearings, and in line with the Criminal Procedure Rules and Criminal Practice Directions, manages the on-going disclosure process. Utilising an initial DMD at the PTPH which outlines the intended plan for onwards staged disclosure of remaining materials and associated schedules, can be an effective mechanism for this approach and is to adopted where possible.

108. Nothing in these guidelines should undermine the established principles of the Better Case Management Framework.

Case management

109. In order for the statutory disclosure regime to work effectively all parties should ensure compliance with the Criminal Procedure Rules. The rules require the court to actively manage the case by identifying the real issues[24]. Each party is obliged to assist the court with this duty[25].

110. It is important that prosecutors keep a record of all correspondence which relates to disclosure and keep a record of any disclosure decisions made.

111. Any party who takes the view that another party is not complying with their obligations under the disclosure regime should bring this to the attention of the court as soon as possible.

Magistrates' court

112. Following a not guilty plea being entered in the magistrates' court, the defence must ensure that the trial issues are clearly identified both in court and on the preparation for effective trial form. Prosecutors should ensure that any issues of dispute that are raised are noted on file. The preparation for effective trial form should be carefully reviewed, alongside the DMD (where this exists). Consideration of any issues raised in court or on the form will assist in deciding whether any further material undermines the prosecution case or assists the accused.

Crown Court

113. A focus of the Plea and Trial Preparation Hearing (PTPH) must be on the disclosure strategy. This will involve the defence identifying the likely trial issues, a discussion of any additional lines of inquiry, and scrutiny of the DMD.

114. Prosecutors must ensure that the disclosure strategy and any disclosure decisions taken previously are reviewed in light of any issues raised at the PTPH and on the plea and trial preparation form.

115. Where the defence do not feel that the prosecution have adequately discharged their obligations then this must be brought to the court's attention at an early stage. The defence should be proactive in ensuring that any issue is addressed, and must not delay raising these issues until a late stage in the proceedings. The DMD may be relevant in any challenge raised.

116. Where any party has not complied with their obligations, the court will consider giving any direction appropriate to ensure compliance and progression of the case.

[24] The CrimPR, rule 3.2(2)(a)
[25] The CrimPR, rule 3.3(1)(a)

Applications for non-disclosure in the public interest

117. The CPIA 1996 allows prosecutors to apply to the court for an order to withhold material which would otherwise fall to be disclosed if disclosure would give rise to a real risk of serious prejudice to an important public interest. Before making such an application, prosecutors should aim to disclose as much of the material as they properly can (for example, by giving the defence redacted or edited copies or summaries). Neutral material or material damaging to the defendant should not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on whether material in its possession should be disclosed.

118. Prior to the hearing, the prosecutor and the prosecution advocate must examine all material which is the subject matter of the application and make any necessary enquiries of the investigator. There is an additional duty of candour on the advocate at this hearing, given the defendant will not be present. In order to assist the court, it is best practice for the advocate to prepare a note that is either written in conjunction, or agreed with, the prosecutor and disclosure officer.

119. The investigator must also be frank with the prosecutor about the full extent of the sensitive material. Prior to, or at the hearing, the court must be provided with full and accurate information about the material.

120. The prosecutor and/or investigator should attend such applications. Section 16 of the CPIA 1996 allows a person claiming to have an interest in the sensitive material to apply to the court for the opportunity to be heard at the application.

121. The prosecutor should carefully consider the series of questions contained in paragraph 36 of *R v H and others* [2004] UKHL 3. These are the questions that the court must address before it makes a decision to withhold material. It is essential that these principles are scrupulously adhered to, to ensure that the procedure for examination of material in the absence of the accused is compliant with Article 6 of the ECHR.

122. If the prosecutor concludes that a fair trial cannot take place because material which satisfies the test for disclosure cannot be disclosed and that this cannot be remedied by an application for non-disclosure in the public interest, through altering the presentation of the case or by any other means, then they should not continue with the case.

The defence statement

123. Defence statements are an integral part of the statutory disclosure regime. A defence statement should help to focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify material which may meet the test for disclosure. The defence must serve their defence statement in a timely manner, in accordance with any court directions made.

124. There is no requirement for a defence statement to be served in the magistrates' court but it should be noted that if one is not provided the court does not have a power to hear an application for further prosecution disclosure under section 8 of the CPIA 1996.[26]

125. Defence practitioners must ensure that defence statements are drafted in accordance with the requirements in the CPIA 1996.[27] Defence statements must not make general and unspecified allegations in order to seek far reaching disclosure[28] and should not describe the defence in ambiguous or limited terms (such as self-defence, mistaken identify, consent).

126. It is vital that prosecutors consider defence statements thoroughly. Prosecutors should challenge the lack of (in the Crown Court) or inadequate defence statements in writing, copying the document to the court and the defence and seeking directions from the court to require the provision of an adequate defence statement from the defence as soon as possible.

127. Prosecutors must send a copy of the defence statement to the investigator as soon as reasonably practicable after receipt and, at the same time, provide guidance to the disclosure officer about the key issues. The advice should contain guidance on whether any further reasonable lines of inquiry need to be pursued, guidance on what to look for when reviewing the unused material and guidance on what further material may need to be disclosed. On receipt of a defence statement, disclosure officers must re-review retained unused material and draw to the attention of the prosecutor any material which is potentially capable of meeting the test for disclosure and consider whether any further reasonable lines of inquiry need to be pursued. They should address the matters raised in guidance given by the prosecutor.

128. Defence requests for further disclosure should ordinarily only be answered by the prosecution if the request is relevant to, and directed to, an issue identified in the defence statement. If it is not, then a further or amended defence statement should be sought and obtained by the prosecutor before considering the request for further disclosure.

Continuing disclosure

129. The obligation of continuing disclosure is crucial and particular attention must be paid to understanding the significance of developments in the case on the unused material and earlier disclosure decisions. After service of initial disclosure, a prosecutor must keep under review whether or not there is prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, which has not been previously been disclosed. This obligation is a continuous one,[29] and it can be beneficial for it to take place in tranches, particularly in large and/or complex cases.

[26] CPIA 1996, s 8(1)
[27] CPIA 1996, s 6A
[28] *R v H and others*
[29] CPIA 1996, s 7A

130. In particular, prosecutors should consider any issues raised by the defence at the first hearing in the magistrates' court or the PTPH in the Crown Court, as well as during any further hearings and after receipt of a defence statement. Any matters raised on the preparation for effective trial form or the PTPH form should also be carefully considered.

Applications for disclosure under Section 8 of the CPIA

131. An application for disclosure can only be made if the defence have provided an **adequate** defence statement. [30]

132. Any application for disclosure must describe the material which is subject to the application and explain why there is reasonable cause to believe that the prosecutor has the material and why it meets the test for disclosure. There must not be any speculative requests for material.

133. Prosecutors must carefully review any application for disclosure and consider whether any items described in the application meet the test for disclosure. This may require the prosecutor asking the disclosure officer for copies of the items or inspecting the items.

The trial

134. Prosecutors must ensure that advocates in court are provided with sufficient instructions regarding the disclosure strategy and any disclosure decisions taken.

135. Prosecution advocates should ensure that all material which ought to be disclosed under the CPIA 1996 is disclosed to the defence. Prosecution advocates must ensure that they are fully informed about disclosure so that they are able to make decisions. Prosecution advocates must consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been fully instructed regarding disclosure matters. If the advocate considers that further information or action is required then written advice should be provided setting out the aspects that need clarification or action.

136. All decisions regarding disclosure must be kept under review until the conclusion of the trial, whenever possible in consultation with the reviewing prosecutor. The prosecution advocate must in every case specifically consider whether they can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to reconsider the unused material schedule and/or unused material.

137. Prosecution advocates must not abrogate their responsibility under the CPIA 1996 by disclosing material which does not pass the test for disclosure. This is especially so where it is proposed to disclose material engaging Article 8 rights.

138. There is no basis in practice or law for counsel-to-counsel disclosure. It is of critical importance that, even where prosecution counsel is advising and leading on disclosure,

[30] CPIA 1996, s5 and Part 15 Criminal Procedure Rules may be considered for a more detailed examination of the meaning of 'adequate'.

the duty to disclose material that meets the test for disclosure remains with the prosecutor. A record of material disclosed made must be kept, not least in the event of an appeal or a re-trial.

Material relevant to sentence

139. At sentence, the prosecutor should disclose any material which might reasonably be considered capable of ensuring fairness in the sentencing process. This material could include information which might mitigate the seriousness of the offence or the level of the defendant's involvement.

Post-conviction

140. Where, at any stage after the conclusion of the proceedings, material comes to light which might reasonably be considered capable of casting doubt upon the safety of the conviction, the prosecutor should disclose such material.

Confiscation Proceedings

141. The disclosure regime in the CPIA ceases to have effect post-conviction and the continuing duty of disclosure does not apply to confiscation proceedings (see section 7A(1)(b) of the CPIA).

142. Part 2 of the Proceeds of Crime Act 2002 provides the legislative scheme for confiscation in the Crown Court following a conviction. The prosecutor is required to set out relevant matters in accordance with Section 16 of the Proceeds of Crime Act 2002 apply and the disclosure requirements at common law also apply meaning that there may be a requirement to disclose material in the interests of justice and fairness in the proceedings.

Annex A – Digital Material

1. This annex is intended to supplement the Attorney General's Guidelines on Disclosure. It is not intended to be a detailed operational guide but is intended to set out a common approach to be adopted when seeking to obtain and handle digital material, whether that be from a suspect or from a complainant. This annex aims to set out how relevant material and consequently material satisfying the test for disclosure can best be identified, revealed and if necessary disclosed to the defence without imposing unrealistic or disproportionate demands on the investigator and prosecutor. This annex also seeks to recognise the considerations investigators and prosecutors should have when obtaining and handling sensitive personal information, in accordance with obligations under data protection legislation.

2. In cases involving large amounts of digital material, investigators should complete an investigation management document (IMD) which will inform the disclosure management document (DMD) that prosecutors should complete. The DMD allows prosecutors to be open and transparent with the defence and the court about how the prosecution has approached complying with its disclosure obligations in the specific context of the individual case.

3. In cases where there may be a large amount of digital material, the investigator should consult the prosecutor, ideally before it is seized, and in turn they may consider seeking the advice of a digital forensic specialist on the strategy for the identification and review of digital material, including potential timings for this.

4. The defence must also play their part in defining the real issues in the case. This is required by the overriding objective of the Criminal Procedure Rules[31]. The defence should be invited by the prosecution at an early stage to participate in defining the scope of the reasonable searches that may be made of digital material in order to identify material that might reasonably be expected to undermine the prosecution case or assist the case for the defence.

5. This approach enables the court to use its case management powers robustly to ensure that the prosecution's obligation of disclosure is discharged effectively.

General principles for investigators

6. These general principles must be followed by investigators in handling and examining digital material:[32]

    a. No action should be taken which changes data on a device which may subsequently be relied upon in court.

[31] The CrimPR, part 1
[32] Association of Chief Police Officers, *ACPO Good Practice Guide for Digital Evidence* (2012), para 2.1

b. If it is necessary to access original data then that data should only be accessed by someone who is competent to do so and is able to explain the relevance and implications of their actions to a court.
c. An audit trail should be kept of all processes followed. Another practitioner should be able to follow the audit trail and achieve the same results.
d. The investigator in charge of the investigation has responsibility for ensuring that the law and these principles are followed.

7. Where an investigator has reasonable grounds for believing that digital material may contain material subject to legal professional privilege then this may not be seized unless the provisions of the Criminal Justice and Police Act 2001 apply. This is addressed in more detail later on in this Annex.

8. The legal obligations in relation to seizure, relevance and retention are found in the Police and Criminal Evidence Act 1984, the Criminal Justice and Police Act 2001 and the Criminal Procedure and Investigations Act 1996.

Obtaining devices by seizure or co-operation

9. Digital material may be seized from suspects using legal powers but this material may be obtained from suspects and witnesses with their co-operation as well. Before searching a suspect's premises where digital material is likely to be found, consideration must be given to:

a. What sort of material is likely to be found, and in what volume;
b. Whether it is likely that relevant material at the location will be able to be viewed and copied; and
c. What should be seized.

10. Investigators will need to consider the practicalities of requesting/seizing digital devices, especially where there are a large number of devices. They will also need to consider the effect that taking possession/seizure will have on a business, organisation or individual; and where it is not feasible to obtain an image of the digital material, the likely timescale for returning the obtained items.

11. In deciding whether to obtain and retain digital material, it is important that the investigator either complies with the procedure under the relevant statutory authority, relying on statutory powers or a search warrant, or obtains the owner's permission.

12. When seeking to obtain digital material, whether from a suspect or a witness/complainant, investigators should be guided by the principles set out in paragraphs 11-13 in the Attorney General's Guidelines. Any intrusion into the personal and private lives of individuals should be carried out only where deemed necessary and using the least intrusive means possible to obtain the material required, adopting an incremental approach. Further guidance has been published by the CPS which has been endorsed by the Court of Appeal.[33]

[33] CPS Guidance on 'Reasonable lines of Enquiry and Communications Evidence' and 'Disclosure – Guidance on Communications Evidence', endorsed in the case of R v E [2018] EWCA 2426 (Crim)

13. A computer hard drive is a single storage entity. This means that if any digital material found on the hard drive can lawfully be obtained or seized, the computer hard drive may, if appropriate, be seized or imaged. In some circumstances investigators may wish to image specific folders, files or categories of data where it is feasible to do so without seizing the hard drive or other media. Digital material may also be contained across a number of digital devices and so more than one device may be required in order to access the information sought.

14. Digital material must not be requested or seized if an investigator has reasonable grounds for believing it is subject to legal professional privilege, other than where sections 50 or 51 of the Criminal Justice and Police Act 2001 apply. If such material is seized it must be isolated from other seized material and any other investigation material in the possession of the investigation authority.

The Police and Criminal Evidence Act 1984

15. The Police and Criminal Evidence Act 1984 provides the power to seize anything from a suspect in the following circumstances:

    a. Where a search has been authorised pursuant to a warrant – the search must fall within the scope of the warrant issued;[34]
    b. After arrest;[35]
    c. Where evidence or anything used in the commission of an offence is on a premises and it is necessary to seize it to prevent it being concealed, lost, altered or destroyed[36].

16. An image of the digital material may be taken at the location of the search. Where an image is taken the original does not need to be seized. Where it is not possible to image the digital material it will need to be removed from the location for examination elsewhere. This allows the investigator to seize and sift material for the purpose of identifying material which meets the test of retention.[37] If digital material is seized in its original form, investigators must be prepared to copy or image the material for the owners of that material when reasonably practicable.[38]

The Criminal Justice and Police Act 2001

17. The additional powers of seizure in sections 50 and 51 of the Criminal Justice and Police Act 2001 (CJPA 2001) only extend the scope of existing powers of search and seizure under the Police and Criminal Evidence Act 1984 and other specified statutory

[34] The Police and Criminal Evidence Act 1984 (PACE 1984), s. 8
[35] PACE 1984, s 18
[36] PACE 1984, s. 19
[37] Special provision exists for investigators conducted by Her Majesty's Revenue and Customs in the application of their powers under PACE 1984 (see s. 114(2)(b) of PACE and the CJPA)
[38] The Home Office, *PACE 1984 Codes of Practice Code B* (2013), para 7.17

authorities[39] where the relevant conditions and circumstances specified in the legislation apply.

18. Investigators must be careful to only exercise powers under the CJPA 2001 when it is necessary and to not remove any more material than is justified. The removal of large volumes of material, much of which may not ultimately be retainable, may have serious consequences for the owner of the material, particularly when they are involved in business or other commercial activities.

19. A written notice must be given to the occupier of the premises where items are seized under sections 50 and 51.[40]

20. Until material seized under the CJPA 2001 has been examined, it must be kept securely and separately from any material seized under other powers. Any such material must be examined as soon as reasonably practicable to determine which elements may be retained and which should be returned. Consideration should be given as to whether the person from whom the property was seized, or a person with interest in the property, should be given an opportunity of being present or represented at the examination.

Retention

21. Where material is seized under the powers conferred by PACE 1984 the duty to retain it under the Code is subject to the provisions on retention under section 22 of PACE 1984. Material seized under sections 50 and 51 of the CJPA 2001 may be retained or returned in accordance with sections 53 to 58 of the CJPA 2001. Where material is obtained through co-operation and not using powers conferred on investigators by legislation, these principles should also be observed, including retaining the material for only as long as is necessary (see paragraph 5(b) of the Code).

22. Retention is limited to evidence and relevant material (as defined in the CPIA Code). Where either evidence or relevant material is inextricably linked to non-relevant material which it is not reasonably practicable to separate from the other linked material without prejudicing the use of that other material in any investigation or proceedings, that material can also be retained.

23. However, inextricably linked material must not be examined, imaged, copied or used for any purpose other than for providing the source of or the integrity of the linked material.

24. There are four categories of material that may be retained:

    a. Material that is evidence or potential evidence in the case. Where material is retained for evidential purposes there will be a strong argument that the whole thing (or an authenticated image or copy) should be retained for the purpose of proving provenance and continuity.

[39] Criminal Justice and Police Act 2001 (CJPA 2001), sch 1
[40] CJPA 2001, s 52

b. Where evidential material has been retained, inextricably linked non-relevant material which it is not reasonably practicable to separate can also be retained (PACE Code B paragraph 7).
c. An investigator should retain material that is relevant to the investigation and required to be scheduled as unused material. This is broader than but includes the duty to retain material which may satisfy the test for prosecution disclosure. The general duty to retain relevant material is set out in the CPIA Code at paragraph 5.
d. Material which is inextricably linked to relevant unused material which of itself may not be relevant material. Such material should be retained (PACE Code B paragraph 7).

25. The balance of any digital material should be returned in accordance with sections 53-55 of the CJPA 2001 if seized under that Act.

Legal professional privilege

26. No digital material may be requested or seized which an investigator has reasonable grounds for believing to be subject to legal professional privilege (LPP), other than under the additional powers of seizure in the CJPA 2001.

27. The CJPA 2001 enables an investigator to seize relevant items which contain LPP material where it is not reasonably practicable on the search premises to separate LPP material from non-LPP material.

28. Where LPP material or material suspected of containing LPP is seized, it must be isolated from the other material which has been seized in the investigation. Where suspected LPP material is discovered when reviewing material, and it was not anticipated that this material existed, again it must be isolated from the other material and the steps outlined below taken. The prosecution will need to decide on a case by case basis if the material is LPP material or not – defence may be able to assist with this.

29. Where material has been identified as potentially containing LPP it must be reviewed by a lawyer independent of the prosecuting authority. No member of the investigative or prosecution team involved in either the current investigation or, if the LPP material relates to other criminal proceedings, in those proceedings should have sight of or access to the LPP material.

30. If the material is voluminous, search terms or other filters may have to be used to identify the LPP material. If so this will also have to be done by someone independent and not connected with the investigation.

31. It is essential that anyone dealing with LPP material maintains proper records showing the way in which the material has been handled and those who have had access to it, as well as decisions taken in relation to that material.

32. LPP material can only be retained in specific circumstances in accordance with section 54 of the CJPA 2001. It can only be retained where the property which comprises the LPP material has been lawfully seized and it is not reasonably practicable for the item

to be separated from the rest of the property without prejudicing the use of the rest of the property. LPP material which cannot be retained must be returned as soon as practicable after the seizure without waiting for the whole examination of the seized material.

Excluded and special procedure material

33. Similar principles to those that apply to LPP material apply to excluded or special procedure material.[41] [42] By way of example, this may include material a journalist holds in confidence from a source.

Encryption

34. Part III of the Regulation of Investigatory Powers Act 2000 (RIPA 2000) and the Investigation of Protected Electronic Information Code of Practice govern encryption.

35. RIPA enables specified law enforcement agencies to compel individuals or companies to provide passwords or encryption keys for the purpose of rendering protected material readable. Failure to comply with RIPA 2000 Part III orders is a criminal offence. The Code of Practice provides guidance when exercising powers under RIPA, to require disclosure of protected electronic data in an intelligible form or to acquire the means by which protected electronic data may be accessed or put in an intelligible form.

Sifting and examination

36. In complying with its duty of disclosure, the prosecution should follow the procedure as outlined below.

37. Where digital material is examined, the extent and manner of inspecting, viewing or listening will depend on the nature of the material and its form.

38. It is important for investigators and prosecutors to remember that the duty under the CPIA Code is to "pursue all reasonable lines of inquiry including those that point away from the suspect".

39. Lines of inquiry, of whatever kind, should be pursued only if they are reasonable in the context of the individual case. It is not the duty of the prosecution to comb through all the material in its possession (e.g. every word or byte of computer material) on the lookout for anything which might conceivably or speculatively undermine the case or assist the defence. The duty of the prosecution is to disclose material which might reasonably be considered capable of undermining its case or assisting the case for the accused which they become aware of, or to which their attention is drawn.

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[41] CJPA 2001, s 55

[42] Special provision exists for investigators conducted by Her Majesty's Revenue and Customs in the application of their powers under PACE 1984 (see s. 114(2)(b) of PACE and the CJPA)

40. In some cases, the sift may be conducted by an investigator and/or disclosure officer manually assessing the content of the computer or other digital material from its directory and determining which files are relevant and should be retained for evidence or unused material.

41. In other cases, such an approach may not be feasible. Where there is a large volume of material, it is perfectly proper for the investigator and/or disclosure officer to search by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers. For the avoidance of any doubt, mobile phones are capable of storing a large volume of material. Technology that takes the form of search tools which use unambiguous calculations to performproblem-solving operations, such as algorithms or predictive coding, are an acceptable method of examining and reviewing material for disclosure purposes.

42. In cases involving very large quantities of data, the person in charge of the investigation will develop a strategy setting out how the material should be analysed or searched to identify categories of data. This strategy may include an initial scoping exercise of the material obtained to ascertain the most effective strategy for reviewing relevant material. Any such strategy should be agreed with the prosecutor and communicated to the court and defence using a DMD

43. Where search terms are to be used, investigators and prosecutors should consider whether engagement with the defence at the pre-charge stage would assist in the identification of relevant search terms. It will usually be appropriate to provide to the accused and their legal representative with a copy of the reasonable search terms used, or to be used, and to invite them to suggest any further reasonable search terms. If search terms are suggested which the investigator or prosecutor believes will not be productive, for example where the use of common words is likely to identify a mass of irrelevant material, the investigator or prosecutor should discuss the issues with the defence in order to agree sensible refinements.

44. The digital strategy must be set out in an IMD and subsequently a DMD. This should include the details of any sampling techniques used (including key word searches) and how the material identified as a result was examined.

45. It may be necessary to carry out sampling and searches on more than one occasion, especially as there is a duty on the prosecutor to keep duties of disclosure under review. To comply with this duty, further sampling and searches may be appropriate (and should be considered) where:

    a. Further evidence or unused material is obtained in the course of the investigation; and/or
    b. The defence statement is served on the prosecutor; and/or
    c. The defendant makes an application under section 8 of the CPIA 1996 for disclosure; and/or
    d. The defendant requests that further sampling or searches be carried out (provided it is a reasonable line of inquiry).

Record keeping

46. A record or log must be made of all digital material seized or imaged and subsequently retained as relevant to the investigation.

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

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

    a. A record of all searches carried out, including the date of each search and the person(s) who conducted it.
    b. A record of all search words or terms used on each search. However, where it is impracticable to record each word or term it will usually be sufficient to record each broad category of search.
    c. A log of the key judgements made while refining the search strategy in light of what is found, or deciding not to carry out further searches.
    d. Where material relating to a “hit” is not examined, the decision not to examine should be explained in the record of examination or in a statement. For instance, a large number of “hits” may be obtained in relation to a particular search word or term, but material relating to the “hits” is not examined because they do not appear to be relevant to the investigation. Any subsequent refinement of the search terms and further hits should also be noted and explained as above.

49. Just as it is not necessary for the investigator or prosecutor to produce records of every search made of hard copy material, it is not necessary to produce records of what may be many hundreds of searches or analyses that have been carried out on digitally stored material simply to demonstrate that these have been done. Instead, the investigator and the prosecutor should ensure that they are able to explain how the disclosure exercise has been approached and to give the accused or suspect’s legal representative an opportunity to participate in defining the reasonable searches to be made, as described in the section on sifting/examination.

Scheduling

50. The disclosure officer should ensure that scheduling of relevant material is carried out in accordance with the CPIA Code of Practice. This may require each item of unused material to be listed separately on the unused material schedule and numbered consecutively (which may include numbering by volume and sub-volume). The description of each item should make clear the nature of the item and should contain

sufficient detail to enable the prosecutor to decide whether they need to inspect the material before deciding whether or not it should be disclosed.

51. It will generally be disproportionate in cases involving large quantities of digital data to list each item of material separately. Unless it is necessary or otherwise appropriate to separately list each item, the material should be listed in a block or blocks and described by quantity and generic title. Where the material is listed in a block or blocks, the search terms used and any items of material which might satisfy the disclosure test should be listed and described separately. In practical terms this will mean, where appropriate, cross referencing the schedules to the DMD.

52. Where material has been listed in a block and metadata is available for the material within the block, consideration should be given to creating a file of that metadata and listing this separately and linked to the block listing to which it relates.

53. Where continuation sheets of the unused material schedule are used, or additional schedules are sent subsequently, the item numbering must be, where possible, sequential to all other items on earlier schedules. This may include numbering by volume or sub-volume.

Annex B – Pre-charge engagement

The scope of pre-charge engagement

1. These Guidelines are intended to assist prosecutors, investigators, suspects and suspect's legal representatives who wish to enter into discussions about an investigation at any time after the first PACE interview, up until the commencement of criminal proceedings.

2. These Guidelines are not intended to cover discussions regarding pleas to an allegation of serious or complex fraud. Nor do they apply to formal agreements relating to the provision of information or evidence about the criminal activities of others. In such cases, where appropriate, the parties should refer to the relevant guidance and follow the advised procedures:

    a. In cases of serious or complex fraud, see the Attorney General's Guidelines on Plea discussions in cases of serious or complex fraud.
    b. In cases where the suspect wishes to enter into a formal agreement to provide information or evidence, see sections 71-75 of the Serious Organised Crime and Police Act (SOCPA) 2005 and the CPS legal guidance on SOCPA 2005 – Queen's Evidence.

What is pre-charge engagement?

3. Pre-charge engagement in these guidelines refers to voluntary engagement between the parties to an investigation after the first PACE interview, and before any suspect has been formally charged. Pre-charge engagement is a voluntary process and it may be terminated at any time. It does not refer to engagement between the parties to an investigation by way of further PACE interviews, and none of the guidance in this Annex is intended to apply to such circumstances. Should a defendant choose not to engage at this stage, that decision should not be held against him at a later stage in the proceedings.

4. Pre-charge engagement may, among other things, involve:

   a. Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
   b. Ascertaining whether the suspect can identify any other lines of inquiry.
   c. Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
   d. Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
   e. Agreeing any key word searches of digital material that the suspect would like carried out.
   f. Obtaining a suspect's consent to access medical records.
   g. The suspect identifying and providing contact details of any potential witnesses.
   h. Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.

5. Pre-charge engagement is encouraged by the Code for Crown Prosecutors and may impact decisions as to charge.[43]

When is pre-charge engagement appropriate?

6. It may take place whenever it is agreed between the parties that it may assist the investigation. Where a suspect is not yet represented, an investigator should take care to ensure that the suspect understands their right to legal advice before the pre charge engagement process commences. Sufficient time should be given to enable a suspect to access this advice if they wish to do so.

7. Pre-charge engagement should not, however, be considered a replacement to a further interview with a suspect. Investigators and prosecutors should be conscious that adverse inferences under section 34 of the Criminal Justice and Public Order Act 1994 are not available at trial where a suspect failed to mention a fact when asked about a matter in pre-charge engagement. An adverse inference may only be drawn where the suspect failed to mention a fact while being questioned under caution by a constable trying to discover whether or by whom the offence had been committed. Moreover, investigators and prosecutors should be aware of the advantages of holding a further

[43] The Code for Crown Prosecutors, paragraph 3.4.

formal interview, including the fact that suspects will have been appropriately cautioned and that any answers given will be recorded.

8. Accordingly, investigators and prosecutors should not seek to initiate, or agree to, pre-charge engagement in respect of matters where they are likely to seek to rely on the contents of the suspect's answers as evidence at trial. Pre-charge engagement should not therefore be used for putting new summaries of the case to the defence, and where deemed necessary such accounts should be put to the suspect in a further interview.

9. A no comment interview does not preclude the possibility of pre-charge engagement. When taking into account paragraph 8 above, while a no comment interview may limit the scope of any such discussions, pre-charge engagement may still be pursued where appropriate, but consideration should be given to a further PACE interview with the suspect before there is any agreement to engage in pre-charge engagement.

10. There are a number of potential benefits that may arise from pre-charge engagement:

    a. Suspects who maintain their innocence will be aided by early identification of lines of inquiry which may lead to evidence or material that points away from the suspect or points towards another suspect.
    b. Pre-charge engagement can help inform a prosecutor's charging decision. It might avoid a case being charged that would otherwise be stopped later in proceedings, when further information becomes available.
    c. The issues in dispute may be narrowed, so that unnecessary inquiries are not pursued, and if a case is charged and proceeds to trial, it can be managed more efficiently.
    d. Early resolution of a case may reduce anxiety and uncertainty for suspects and complainants.
    e. The cost of the matter to the criminal justice system may be reduced, including potentially avoiding or mitigating the cost of criminal proceedings.

Who may initiate and conduct pre-charge engagement?

11. Depending on the circumstances, it may be appropriate for an investigator, the prosecutor, the suspect's representative or an unrepresented suspect to initiate pre-charge engagement.

12. When referring a case to a prosecutor, the investigator should inform the prosecutor if any pre-charge engagement has already taken place and should indicate if they believe pre-charge engagement would benefit the case.

13. The prosecutor may advise the investigator to initiate and carry out pre-charge engagement, or do so themselves.

14. In cases in which statutory time limits on charging apply, it will usually be more practical for the investigator, rather than the prosecutor, to initiate and conduct pre-charge engagement.

15. Prosecutors and investigators should be alert to use of pre-charge engagement as a means to frustrate or delay the investigation unnecessarily. Engagement should not be initiated or continued where this is apparent. In particular, pre-charge engagement is not intended to provide an opportunity for the suspect to make unfounded allegations against the complainant, so that the complainant becomes unjustly subject to investigation. Prosecutors and investigators should be alert to prevent this happening and investigators are not obliged to follow any line of inquiry suggested by the suspect's representative: a line of inquiry should be reasonable in the circumstances of the case. What is reasonable is a matter for an investigator to decide, with the assistance of a prosecutor if required. Refer to Annex A and paragraphs 11-13 for more guidance on reasonable lines of inquiry, particularly in relation to the obtaining of a complainant's mobile or other personal devices.

Information on pre-charge engagement

16. The investigator should provide information on pre-charge engagement to the suspect or their representative either before or after interview.

17. The pre-charge engagement process should be explained orally or in writing, in simple terms.

18. The explanation may include the aim and benefits of the process, any relevant timescales and a police point of contact to make any future representations at the pre-charge stage.

Conducting pre-charge engagement

19. Pre-charge engagement discussions may take place face to face or via correspondence.

20. It need not always be undertaken via a formal process, but a written record should always be made and kept. For instance, the process may be initiated immediately after interview, when the investigator and suspect's representative may agree on the further lines of inquiry that have arisen from interview.

21. However, in some circumstances the parties will require a more formal mechanism to enable them to begin the process at any stage post-interview and before charge. This may be done by the investigator, prosecutor or suspect's representative sending a letter of invitation to the other party, which:

    a. Asks whether the other party wishes to enter into pre-charge engagement in accordance with these Guidelines.

    b. Explains in what way the engagement may assist the investigation. The prosecutor or investigator may wish to include the information sought, or sought to be discussed.

Disclosure during Pre-Charge Engagement

22. Since pre-charge engagement takes place prior to the institution of any proceedings, the statutory disclosure rules will not be engaged. However, disclosure of unused material must be considered as part of the pre-charge engagement process, to ensure that the discussions are fair and that the suspect is not misled as to the strength of the prosecution case.

23. Accordingly, before, during and after pre-charge engagement, the investigator/prosecutor should consider whether any further material, additional to that contained in the summary of the allegation, falls to be disclosed to the suspect. The investigator/prosecutor should at all stages bear in mind the potential need to cease pre-charge engagement and to put further evidence to the suspect in a PACE interview.

24. As the suspect provides information during the process, the investigator/prosecutor should continually be alive to the potential need to make any further disclosure.

Recording the discussions

25. A full written, signed record of the pre-charge engagement discussions should be made.

26. Additionally, the prosecutor and/or investigator should record every key action involved in the process, such as the provision of written information on pre-charge engagement to the suspect, any informal discussions with the suspect's representative about entering into the process, or any formal letter of invitation sent or received.

27. A record should be made of all information provided by the suspect's representative, such as potential lines of inquiry, suggested key word searches of digital material and any witness details.

28. The law may require the prosecutor to disclose any information provided by the suspect's representative to another party, including a defendant in criminal proceedings.

29. A record should also be made of all information and material provided to the suspect's representative, including any disclosure material.

30. The prosecutor and investigator should ensure that the records of the pre-charge engagement are provided to each other. Information or material generated by the process will need to be assessed for evidential and disclosure purposes.

Annex C – Disclosure Management Documents (DMDs)

Template “Disclosure Management Document”

This Disclosure Management Document sets out the approach of the prosecution to relevant non-sensitive material in this case. Unless otherwise indicated, all the material on the non-sensitive schedule has been inspected by the disclosure officer.

R v [Name]

Prosecutor:
Disclosure officer:
Prosecution counsel instructed:

1. Reasonable lines of inquiry

The rationale for the identification and scheduling of relevant material is based upon the reasonable lines of inquiry that were conducted within this investigation. The Disclosure Officer’s understanding of the defence case is as follows;

- [What explanation has been offered by the accused, whether in formal interview, defence statement or otherwise. How has this been followed up? This should be set out.]
- [What are the identified/likely issues in the case e.g identification, alibi, factual dispute, no intention etc]
- [Insert summary of reasonable lines of inquiry pursued, particularly those that point away from the suspect, or which may assist the defence]
- The time frame selected is considered to be a reasonable line of inquiry, and represents [e.g. the date that the victim first met the suspect to a month after the suspect’s arrest]

2. Electronic material

This section should cover the following issues:

- What mobile telephones/communication devices/computers were seized during the investigation (from all suspects, complainants, witnesses).
- Identify the items with reference to the schedule of materials – i.e. telephone, download
- Have the devices been downloaded? If not, why not. If so, what type of download?
- Set out the method of examination of each download – were key words deployed, was the entire download inspected, were date parameters employed?
- What social media accounts of suspect/complaint/witness have been considered a reasonable line of inquiry.
- Were any phones from the complainant or suspect not seized? If not, why not?

- Set out the method by which the defence will be given disclosure of material that satisfies the disclosure test explaining, if relevant, why the whole item is not being provided.
- What CCTV/multi-media evidence has been seized and how it has been examined?

A suggested presentation and wording of the information is set out below:

Exhibit ref	**Description**	**Inquiry undertaken**	**Result**
AB/1	*I-phone seized from defendant*	*This telephone has been downloaded using the XRY software. This has resulted in 40,000 pages of data which includes telephone calls to and from the suspect, contact list, text messages, WhatsApp messages and internet search history. No further data has been downloaded from the phone.* *The internet search history does not appear to be relevant to the issues in the case and has not been reviewed.* *The contact list has been reviewed to identify whether the complainant is a contact, no further checks have been made.* *The telephone call list has been reviewed for any contact between the suspect and complainant between dates x and Y. All identified contact has been produced as exhibit AB/2.* *Text messages and WhatsApp messages have been searched using the following keywords [A, B, C, D] all responsive messages which correspond with the keywords have been disclosed.*	*Relevant evidential material has been served.* *Material which has been identified through keyword searching has been collated and scheduled. The defence are invited to identify any further keywords which might represent a reasonable line of inquiry. If further interrogation of the telephone is considered to be necessary the defence are invited to identify what enquiries should be undertaken and identify the relevance of such enquiries to the issues in this case.*

		No further checks have been conducted upon the phone.	

3. Third Party Material

The prosecution believe that the following third parties have relevant non sensitive material that might satisfy the disclosure test if it were in the possession of the prosecution (e.g. Medical and dental records, Records held by other agencies, Records/material held by Social Services or local authority):

The reason for this belief is …

The type of relevant material is…

The following steps have been taken to obtain this material:

The defence have a critical role in ensuring that the prosecution are directed to material that meets the disclosure test. Any representations by the defence on the contents of this document, including identifying issues in the case and why material meets the test for disclosure should be received by *[insert date/ timescale]*

Signed:

Dated:

Annex D – Redaction

Overview

1. This annex relates to the obligation on investigators to redact material provided to the CPS when a charging decision is sought. While it focuses on unused material at the pre-charge stage, the principles may also apply to evidence and to other stages of the prosecution process. The term redaction in this annex refers to any way of obscuring personal data, including but not limited to redaction, clipping, pixelization, anonymisation or pseudonymisation.

2. Providing data to the CPS or any other party from the police is an action regulated by data protection law. There may be a number of reasons why data is processed: if it is for law enforcement purposes it will fall under the Data Protection Act 2018, Part 3; otherwise, it may fall within the UK GDPR and other parts of the DPA 2018.

3. Redaction is a vital tool, mandated by law, to protect fundamental rights when personal data is handled.

4. It is not an automatic legal requirement that every piece of data passed by the police to the CPS must be redacted of all personal data. Cases need to be considered on their own facts.

The Redaction Decision-Making Process

Reviewing for Relevance

5. The first consideration must be to review the material and assess its relevance.

6. The investigator should review the material and decide if it is relevant to seeking a charging decision. This does not need to be weighed to a nicety but requires a clear idea of why the material is to be provided to the CPS and what is relevant. Irrelevant material is neither evidential nor disclosable and does not need to be provided to the CPS.

Establishing the Data is Personal

7. Once the relevant data is identified the next consideration before redacting is to decide whether that data requires protecting.

8. Personal data is information which relates to an identified or identifiable individual. If the data is not personal data, it will not need redacting for UK GDPR/DPA 2018 reasons (there may be other grounds for redaction such as sensitivity).

9. Where the information is personal data, but the person does not have a reasonable expectation of privacy, it will not need to be redacted.

    a. Typically, helicopter or drone footage of people in public locations, vehicle registrations on public roads, staff and customers in shops and openly recorded interviews of witnesses would not likely fall to be redacted.[44]

    b. Typically, covert recordings, recordings in a domestic setting or footage of other persons detained at a police station would likely fall to be redacted.

Applying the Necessity Test

10. Where the data is relevant, personal and there is a reasonable expectation of privacy, investigators will need to go on to consider whether it is nonetheless necessary or strictly necessary to provide it to the CPS in an unredacted form for the purposes of making a charging decision. Where it is necessary or strictly necessary to do so, the data need not be redacted; where data does not meet this standard, it should be redacted.

Officers should have, at the front of their minds, the purpose for which the data is being provided. In the case of this annex, the purpose is for the CPS to make a charging decision.

For example: Footage of an assault may capture a number of people's faces. While this will be personal information, it is highly likely that this information will be necessary to provide – this is likely to be the case whether the assault is in public or private. The faces of any suspects and complainants will be necessary for the CPS to identify key figures in the video. The faces of witnesses will likely be necessary for the CPS to assess whether they have provided witness statements, their proximity to the incident, their involvement in the incident, and to verify any statements made are plausible in the context of the person's actions in the footage.

A considered approach is needed from investigators to make an informed judgement about whether data will be necessary to provide. These decisions must take account of the full context of the case and not be based on standardised processes.

[44] Remember that some public footage will need special consideration, such as places of worship, polling stations or political protests.

11. Necessity tests are a balancing exercise, the reasons in favour of disclosing must outweigh those against. This balance should be assessed objectively and on a case-by-case basis. The purpose of the data being used must always be at the centre of any decision. Whether the test is of necessity or strict necessity will not change this approach. However, a strict necessity standard requires a greater evidential basis to justify providing the data unredacted.

    - 'Necessity' has its natural meaning. It does not mean there is absolutely no other possible option. Investigators must balance the rights of the individual(s) involved with the legitimate public interest in an informed charging decision.

    - 'Strict necessity' is a higher standard than necessary and applies to sensitive personal data. Data about criminal convictions and offences is sensitive and so is any data which is categorised as sensitive by the UK GDPR. This is:
        i. personal data revealing racial or ethnic origin;
        ii. personal data revealing political opinions;
        iii. personal data revealing religious or philosophical beliefs;
        iv. personal data revealing trade union membership;
        v. genetic data;
        vi. biometric data (where used for identification purposes);
        vii. data concerning health;
        viii. data concerning a person's sex life; and
        ix. data concerning a person's sexual orientation.

12. When deciding whether data is necessary or strictly necessary to provide unredacted, investigators should take into consideration the balance of rights and legitimate need.

    - The greater the expectation of privacy over the data, the more likely it is to require redaction.

        - For example, greater consideration will likely need to be given to whether to provide medical or financial data unredacted than names or dates of birth.

    - The greater the detriment to a person if their privacy is not maintained, the more likely it is to require redaction.

        - For example, information which is of an intimate or revealing nature will need greater consideration than that which is not.

- The greater the value of the data to the function being undertaken, the less likely it is to require redaction.

    - For example, the date of birth of a person in a prosecution may be critical (e.g. to proving an offence where the prosecution must show the victim was under a certain age), important (e.g. to illustrate the relative age of two persons in the case) or of no apparent importance.

13. In some instances, redaction of the data may not be proportionate. Where this is the case the data may be provided to the CPS unredacted – subject to the standards set out below.

Providing Material that is Disproportionate to Redact

14. If an officer suspects that the exercise of reviewing material and redacting it will be disproportionate, they should seek approval of that assessment by an officer of inspector rank or higher[45] and record it, ideally in communication with the CPS.

15. Disproportionate means: the resources (having regard to volume, time and/or expense) required to redact clearly outweigh the merits of redaction. If it would be disproportionate to conduct a review and redaction exercise, that can justify not redacting. Practical considerations such as time and resourcing **will likely only be relevant in marginal cases**, where there is not an obvious reason for or against redacting. The greater the impact on resource considerations such as time, money and delay, the stronger the reasons for not redacting.

16. The scope for redaction to be considered disproportionate is by no means unlimited and **a blanket approach can never be adopted**. Individual cases must always be considered on their own facts.

17. Any decision on proportionality will need to closely consider the following non-exhaustive range of factors:

    - The scope for finding redaction disproportionate is limited.

    - The greater the expectation of privacy, the more likely it is proportionate to redact it.

    - Where in an individual case it is agreed with the CPS and there are restrictions ensuring the material will only be provided to, and be capable of being accessed by, the CPS, it may be proportionate to provide material unredacted.

[45] Or a person of equivalent rank in other organisations.

- Where, in an individual case, protections have been put in place against onwards disclosure. For example, secure computer systems or password protection may significantly enhance the proportionality of not redacting. They mean the CPS does not take possession of personal data without the scope for it being accessed being very reduced and controlled.

18. Where data is provided to the CPS unredacted for a charging decision due to being disproportionate, it will need to be reviewed when the charging decision is made. The responsibility for additional redaction of such material which then becomes necessary remains with the party that provided the data to the CPS initially. Where data is instead provided to the CPS unredacted because it is necessary or strictly necessary to provide it, the CPS has responsibility for any additional redaction (e.g., where required before disclosure to the defence).

Example 1

The police are called to an address to respond to an allegation of assault. The investigating officer preparing a charging decision file for the CPS has an electronic file containing body worn footage from one of the officers attending the address.

Reviewing for Relevance

The investigating officer reviews the file. It contains a quantity of footage from the attending officer's day. The investigating officer decides that this is not all relevant: only the footage of the response to the incident is relevant. The footage is clipped to reduce it to just this section. The officer has not reached a final conclusion about the evidential value of the footage but is clear that the prosecutor must see the scene captured as part of the charging decision, including:

(i) the reaction of the persons present, and
(ii) items which are strewn around and damaged.

Establish the Data is Personal

The footage captures images of persons on the street. It captures the image of a witness to whom the attending officer speaks, who is informed that a recording is being made. This is unlikely to need redaction as there is no realistic expectation of privacy. The officer then enters a dwelling. The images of the persons inside may be personal.

Applying the Necessity Test

The investigating officer considers the images of the persons in the dwelling and decides that the necessity test is met. The officer decides the prosecutor does need to see the reactions of those present because they are probative of an assault having taken place, they are therefore provided unredacted. The officer decides that the images of items on the floor is not personal data so does not need to be redacted.

The attending officer also enters a bedroom. There is material present relating to a person's political opinions, including a party membership card, books, posters and leaflets. It may not be necessary to provide this material if the scene in the bedroom is unrelated to the assault. If it is necessary, for instance because the complainant's political opinions are relevant backdrop to why the assault took place, it may not be strictly necessary, because the prosecutor could understand what was present from witnesses including the attending officer without needing to see all of the detail captured in the footage.

Providing Material that is Disproportionate to Redact

The investigating officer considers that the prosecutor does not strictly need to see the material from the bedroom. Having regard to the time and expense of redacting a small part of the body worn footage, and the fact that the decision is a marginal one – the material is something it is necessary for the prosecutor to see given it forms the background to the incident – the investigating officer concludes that redaction would be disproportionate.

Example 2

Officers respond to the theft of a car from the driveway of a residential property. Although the owner of the property was at work, a local resident calls the police and provides an eye-witness account of the theft. The investigator is preparing a file for submission to the CPS. She has the transcript of the 999 call. The call describes the events that occurred and gives a description of the thief; the caller gives their own name, date of birth and address to the call handler. They also provide the names and addresses of three other neighbours, who they believe might have witnessed the theft. The caller goes on to provide a statement which is consistent with the descriptions given on the calls. It later becomes apparent that none of the neighbours saw or heard anything related to the theft.

Reviewing for Relevance

The investigating officer comes to the conclusion that the witness statement will form part of the evidence in the case, but that the call is not required. Nonetheless, the call remains relevant as it contains content which clearly relates to the offending. She is also aware the call will need to be provided to the CPS as material likely to be disclosable as a contemporaneous record of the incident.

Establishing the Data is Personal

The call transcript contains personal details, of both the caller and their neighbours, given in the context of reporting an offence. It is capable of identifying living persons who have a reasonable expectation of privacy. On a first assessment, it may need redacting. The investigator considers the type of information and realises the strict necessity standard does not apply to the personal data involved.

Applying the Necessity Test

The investigator assesses that the personal details of the caller, including their name, address and date of birth are necessary to provide to the CPS to identify them as the witness. The personal details of the neighbours are not likely to be important to the CPS charging decision, as they are unrelated to the substance of the offence being investigated. The investigator contacts the prosecutor in the case, who agrees that these names wouldn't be necessary for him to know. As there is no need for the CPS to know the personal information, it is likely that this material will require redaction.

Providing Material that is Disproportionate to Redact

While assessing the transcript, the investigating officer considers the disclosure test. She knows that material only needs to be disclosed where it is not already available to the defence. As the witness statement will be available to the defence, the investigating officer decides that the CPS are unlikely to disclose the transcript – it will be listed on the unused material schedule instead. As the transcript is only likely to be assessed by the CPS, and the time and resources required to provide redacted copies would be significant, she decides it would not be proportionate to redact the details of the other neighbours. She confirms this with the CPS prosecutor and provides the transcript unredacted.