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Judicial Protocol on the Disclosure of Unused Material in Criminal Cases

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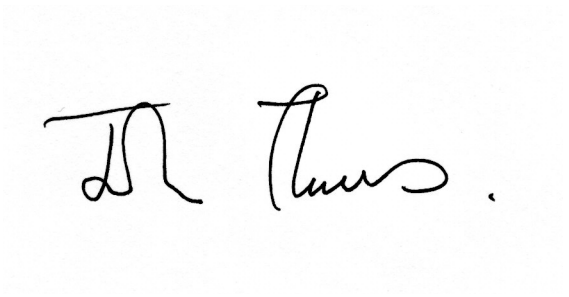
Foreword

We are pleased to publish a revised judicial protocol and revised guidance on the disclosure of unused material in criminal cases. Proper disclosure of unused material, made through a rigorous and carefully considered application of the law, remains a crucial part of a fair trial, and essential to avoiding miscarriages of justice. These new documents are intended to clarify the procedures to be followed and to encourage the active participation of all parties.

They have been prepared following the recommendations of Lord Justice Gross in his September 2011 'Review of Disclosure in Criminal Proceedings' and take account of Lord Justice Gross and Lord Justice Treacy's 'Further review of disclosure in criminal proceedings: sanctions for disclosure failure', published in November 2012.

There are important roles for the prosecution, the defence and the court in ensuring that disclosure is conducted properly, including on the part of the investigating, case progression and disclosure officers, as well as the lawyers and advocates. Lord Justice Gross particularly recommended that the guidance on disclosure of unused material in criminal cases should be consolidated and abbreviated. Given all of those involved in this process have separate constitutional roles, the judiciary and the Attorney-General have worked together to produce complementary guidance that is shorter than the previous iterations, but remains comprehensive. The two documents are similarly structured for ease of reference and should be read together.



The Rt. Hon. The Lord Thomas

Lord Chief Justice of England and Wales

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Attorney General

Introduction

This protocol is prescribed for use by CPD IV Disclosure 22A: Disclosure of Unused Material. It is applicable in all the criminal courts of England and Wales, including the Crown Court, the Court Martial[1] and the magistrates' courts. It replaces the previous judicial document 'Disclosure: a Protocol for the Control and Management of Unused Material in the Crown Court'[2] and it also replaces section 4 'Disclosure' of the Lord Chief Justice's Protocol on the Control and Management of Heavy Fraud and Other Complex Criminal Cases, dated 22 March 2005.[3]

This protocol is intended to provide a central source of guidance for the judiciary, although that produced by the Attorney General also requires attention.

In summary, this judicial protocol sets out the principles to be applied to, and the importance of, disclosure; the expectations of the court and its role in disclosure, in particular in relation to case management; and the consequences if there is a failure by the prosecution or defence to comply with their obligations.

Readers should note that a review of disclosure in the magistrates' courts is currently being undertaken by HHJ Kinch QC and the Chief Magistrate, on behalf of Lord Justice Gross, the Senior Presiding Judge. Amendments may therefore be made following the recommendations of that review, and in accordance with other forthcoming changes to the criminal justice system.

1 The timetables given here may vary in the Court Martial and reference should be made to the Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009 and to any practice note issued by the Judge Advocate General.

2 The previous judicial protocol was endorsed by the Court of Appeal in *R v K* [2006] EWCA Crim 724; [2006] 2 All ER 552 (Note); [2006] Crim LR 1012.

3 This protocol also replaces the Protocol for the Provision of Advance Information, Prosecution Evidence and Disclosure of Unused Material in the Magistrates' Courts, dated 12 May 2006, which was adopted as part of the Stop Delaying Justice initiative.

The importance of disclosure for fair trials

1. Disclosure remains one of the most important – as well as one of the most misunderstood and abused – of the procedures relating to criminal trials. Lord Justice Gross' review has re-emphasised the need for all those involved to understand the statutory requirements and to undertake their roles with rigour, in a timely manner.

2. The House of Lords stated in *R v H and C* [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 Cr App R 10:

> *"Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made." ([2004] 2 AC 134, at 147)*

The Criminal Cases Review Commission has recently noted that failure to disclose material to the defence to which they were entitled remains the biggest single cause of miscarriages of justice.

3. However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material or by misconceived applications. Although the drafters of the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') cannot have anticipated the vast increase in the amount of electronic material that has been generated in recent years, nevertheless the principles of that Act still hold true. Applications by the parties or decisions by judges based on misconceptions of the law or a general laxity of approach (however well-intentioned) which result in an improper application of the disclosure regime have, time and again, proved unnecessarily costly and have obstructed justice. As Lord Justice Gross noted, the burden of disclosure must not be allowed to render the prosecution of cases impracticable.

4. The overarching principle is that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations. The test for disclosure will depend on the date the criminal investigation in question commenced, as this will determine whether the common law disclosure regime applies, or either of the two disclosure regimes under the CPIA 1996.

5. The test for disclosure under section 3 of the CPIA 1996 as amended will be applicable in nearly every case and all those involved in the process will need to be familiar with it. Material fulfils the test if – but only if – it 'might reasonably be considered capable of undermining the case for the prosecution … or of assisting the case for the accused.'

6. The disclosure process must be led by the prosecution so as to trigger comprehensive defence engagement, supported by robust judicial case management.

Active participation by the court in the disclosure process is a critical means of ensuring that delays and adjournments are avoided, given failures by the parties to comply with their obligations may disrupt and (in some cases) frustrate the course of justice.

Disclosure of unused material in criminal cases

7. The court should keep the timetable for prosecution and defence disclosure under review from the first hearing. Judges should as a matter of course ask the parties to identify the issues in the case, and invite the parties to indicate whether further disclosure is sought, and on what topics. For example, it is not enough for the judge to rely on the content of the PCMH form. Proper completion of the disclosure process is a vital part of case preparation, and it may well affect the progress of the case. The court will expect disclosure to have been considered from the outset; the prosecution and defence advocates need to be aware of any potential problems and substantive difficulties should be explained to the judge; and the parties should propose a sensible timetable. Realism is preferable to optimistic but unachievable deadlines which may dislocate the court schedule and imperil the date of trial. It follows that judges should not impose deadlines for service of the case papers or disclosure until they are confident that the prosecution advocate has taken instructions from the individuals who are best placed to evaluate the work to be undertaken.

8. The advocates – both prosecution and defence – must be kept fully informed throughout the course of the proceedings as to any difficulties which may prevent them from complying with their disclosure obligations. When problems arise or come to light after directions have been given, the advocates should notify the court and the other party (or parties) immediately rather than waiting until the date set by the court for the service of the material is imminent or has passed, and they must provide the court with a suggested timetable in order to resolve the problem. The progress of the disclosure process should be reviewed at every hearing. There remains no basis in practice or law for Counsel to Counsel disclosure.

9. If there is a preliminary hearing the judge should seize the opportunity to impose an early timetable for disclosure and to identify any likely problems including as regards third party material and material that will require an application to the Family Court. In an appropriate case the court should consider holding a Joint Criminal/Care Directions Hearing. See Material held by Third Parties, from paragraph 44 below.

10. For the PCMH to be effective, the defence must have a proper opportunity to review the case papers and consider initial disclosure, with a view to preparing a properly completed defence statement which will inform the judge's conduct of the PCMH, and

inform the prosecution of the matters required by sections 5, 6A and 6C of the CPIA. As the Court of Appeal noted in ***R v Newell*** [2012] EWCA Crim 650; [2012] 2 Cr App R 10, "a typed defence statement must be provided before the PCMH. If there is no defence statement by the time of the PCMH, then a judge will usually require the trial advocate to see that such a statement is provided and not proceed with the PCMH until that is done. In the ordinary case the trial advocate will be required to do that at the court and the PCMH resumed later in the day to avoid delay". There may be some instances when there will be a well-founded defence application to extend the 28-day time limit for serving a proper defence statement. In a proper case (but never routinely), it may be appropriate to put the PCMH back by a week or more, to enable an appropriate defence statement to be filed.

11. The defence statement can be admitted into evidence under section 6E(4) of the CPIA 1996. However, information included on the PCMH form (which is primarily an administrative form) will not usually be admitted in evidence when the defence advocate has complied with the letter and the spirit of the Criminal Procedure Rules.[4] Introducing the PCMH form (or part of it) during the trial is likely to be an exceptional event. The status of the trial preparation form in the magistrates' court is somewhat different, as discussed below.

12. The court should not extend time lightly or as a matter of course. If an extension is sought, it ought to be accompanied by an appropriate explanation. For instance, it is not sufficient for the prosecutor merely to say that the investigator has delivered the papers late: the underlying reasons are to be provided to the court. The same applies if the defence statement is delayed. Whichever party is at fault, realistic proposals for service are to be set out.

13. Judges should not allow the prosecution to avoid their statutory responsibility for reviewing the unused material by the expedient of permitting the defence to have access to (or providing the defence with copies of) the material listed in the schedules of non-sensitive unused prosecution material irrespective of whether it satisfies, wholly or in part, the relevant test for disclosure. Additionally, it is for the prosecutor to decide on the manner of disclosure, and it does not have to mirror the form in which the information was originally recorded. Rose LJ gave guidance on case management issues in this context in ***R v CPS*** (Interlocutory Application under sections 35/36 CPIA) [2005] EWCA Crim 2342. Allowing the defence to inspect items that fulfil the disclosure test is also a valid means of providing disclosure.

14. The larger and more complex the case, the more important it is for the prosecution to adhere to the overarching principle and ensure that sufficient prosecution attention and resources are allocated to the task. Handing the defendant the "keys to the warehouse" has been the cause of many gross abuses in the past, resulting in considerable expenditure by the defence without any material benefit to the course of justice. The circumstances relating to large and complex cases are outlined below.

15. The court will require the defence to engage and assist in the early identification

4 *R v Newell* [2012] EWCA Crim 650; [2012] 2 Cr App R 10.

of the real issues in the case and, particularly in the larger and more complex cases, to contribute to the search terms to be used for, and the parameters of, the review of any electronically held material (which can be very considerable). Any defence criticisms of the prosecution approach to disclosure should be timely and reasoned; there is no place for disclosure "ambushes" or for late or uninformative defence statements. Admissions should be used so far as possible to narrow the real issues in dispute.

16. A constructive approach to disclosure is a necessary part of professional best practice, for the defence and prosecution. This does not undermine the defendant's legitimate interests, it accords with his or her obligations under the Rules and it ensures that all the relevant material is provided. Delays and failures by the prosecution and the defence are equally damaging to a timely, fair and efficient trial, and judges should be vigilant in preventing and addressing abuses. Accordingly, whenever there are potential failings by either the defence or the prosecution, judges, in exercising appropriate oversight of disclosure, should carefully investigate the suggested default and give timely directions.

17. In the Crown Court, the defence statement is to be served within 28 days of the date when the prosecution complies with its duty of initial disclosure (or purports to do so) and whenever section 5(5) of the CPIA applies to the proceedings, and the defence statement must comply with section 6A of the CPIA. Service of the defence statement is a most important stage in the disclosure process, and timely service is necessary to facilitate proper consideration of the disclosure issues well in advance of the trial date. Judges expect a defence statement to contain a clear and detailed exposition of the issues of fact and law. Defence statements that merely rehearse the suggestion that the defendant is innocent do not comply with the requirements of the CPIA.

18. The prosecutor should consider the defence statement carefully and promptly provide a copy to the disclosure officer, to assist the prosecution in its continuing disclosure obligations. The court expects the Crown to identify any suggested deficiencies in the defence statement, and to draw these to the attention of the defence and the court; in particular in large and complex cases, it will assist the court if this is in writing. Although the prosecution's ability to request, and the court's jurisdiction to give, an adverse inference direction under section 11 of CPIA is not contingent on the prosecution having earlier identified any suggested deficiencies, nevertheless the prosecutor must provide a timely written explanation of its position.

19. Judges should examine the defence statement with care to ensure that it complies with the formalities required by the CPIA. As stated in *R v H and C* (supra) (paragraph 35):

> *"If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to*

make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court."

20. If no defence statement – or an inadequate defence statement – is served within the relevant time limits, the judge should investigate the position. At every PCMH where there is no defence statement, including those where an extension has been given, or the time for filing has not yet expired, the defence should be warned in appropriate terms that pursuant to section 6E(2) of the CPIA an adverse inference may be drawn during the trial, and this result is likely if there is no justification for the deficiency. The fact that a warning has been given should be noted.

21. An adverse inference may be drawn under section 11 of the CPIA if the accused fails to discharge his or her disclosure obligations. Whenever the amended CPIA regime applies, the prosecution may comment on any failure in defence disclosure (except where the failure relates to a point of law) without leave of the court, but counsel should use a measure of judgment as to whether it is wise to embark on cross-examination about such a failure.[5] If the accused is cross-examined about discrepancies between his evidence and his defence statement, or if adverse comment is made, the judge must give appropriate guidance to the jury.[6]

22. In order to secure a fair trial, it is vital that the prosecution is mindful of its continuing duty of disclosure. Once the defence statement has been received, the Crown must review disclosure in the light of the issues identified in the defence statement. In cases of complexity, the following steps are then likely to be necessary:

i. Service by the prosecution of any further material due to the defence following receipt of the defence statement.

ii. Any defence request to the prosecution for service of additional specific items. As discussed below, these requests must be justified by reference to the defence statement and they should be submitted on the section 8 form.

iii. Prosecution response to the defence request.

iv. If the defence considers that disclosable items are still outstanding, a section 8 application should be made using the appropriate form.

23. It follows that all requests by the defence to the prosecution for disclosure should be made on the section 8 application form, even if no hearing is sought in the first instance. Discussion and co-operation between the parties outside of court is encouraged in order to ensure that the court is only asked to issue a ruling when strictly necessary. However, use of the section 8 form will ensure that focussed requests are clearly set out in one place.

5 *R v Essa* [2009] EWCA Crim 43, paragraph 22.
6 *R v Hanyes* [2011] EWCA Crim 3281.

24. The judge should set a date as part of the timetabling exercise by which any application under section 8 is to be made, if this appears to be a likely eventuality.

25. The Court will require the section 8 application to be served on the prosecution well in advance of the hearing – indeed, prior to requesting the hearing – to enable the Crown to identify and serve any items that meet the test for disclosure.

26. Service of a defence statement is an essential precondition for an application under section 8, and applications should not be heard or directions for disclosure issued in the absence of a properly completed statement (see Part 22 of the Criminal Procedure Rules). In particular, blanket orders in this context are inconsistent with the statutory framework for disclosure laid down by the CPIA and the decision of the House of Lords in ***R v H and C*** (supra). It follows that defence requests for disclosure of particular pieces of unused prosecution material which are not referable to any issue in the case identified in the defence statement should be rejected.

27. Judges must ensure that defendants are not prejudiced on account of the failures of their lawyers, and, when necessary, the professions should be reminded that if justice is to be done, and if disclosure is to be dealt with fairly in accordance with the law, a full and careful defence statement and a reasoned approach to section 8 applications are essential. In exploring the adequacy of the defence statement, a judge should always ask what the issues are and upon what matters of fact the defendant intends to rely[7] and on what matters of fact the defendant takes issue.

Listing

28. Sufficient time is necessary for the judge properly to undertake the PCMH, and this is a paramount consideration when listing cases. Unless the court is able to sit early, judges who are part heard on trials are probably not best placed to conduct PCMHs.

29. Cases that raise particularly difficult issues of disclosure should be referred to the Resident Judge for directions (unless a trial judge has been allocated) and, for trials of real complexity, the trial judge should be identified at an early stage, prior to the PCMH if possible. Listing officers, working in consultation with the Resident Judge and, if allocated, the trial judge, should ensure that sufficient time is allowed for judges to prepare and deal with prosecution and defence applications relating to disclosure, particularly in the more complex cases.

Magistrates' Courts (including the Youth Court)

30. The principles relating to disclosure apply equally in the magistrates' courts. It follows that whilst disclosure of unused material in compliance with the statutory test is

7 *R v Rochford* [2010] EWCA Crim 1928; [2011] 1 Cr App R 11

undoubtedly essential in order to achieve justice, it is critical that summary trials are not delayed or made over-complicated by misconceived applications for, or inappropriate disclosure of, prosecution material.

31. Magistrates will rely on their legal advisers for guidance, and the latter should draw the attention of the parties and the court to the statutory provisions and the applicable case law. Cases raising disclosure issues of particular complexity should be referred to a District Judge (Magistrates' Courts), if available.

32. Although service of a defence statement is voluntary for summary trials (section 6 CPIA), the defendant cannot make an application for specific disclosure under section 8 CPIA, and the court cannot make any orders in this regard, unless a proper defence statement has been provided. It follows that although providing a defence statement is not mandatory, it remains a critical stage in the disclosure process. If disclosure issues are to be raised by the defence, a defence statement must be served well in advance of the trial date. Any section 8 application must be made in strict compliance with the Rules.

33. The case-management forms used in the magistrates' courts fulfil some of the functions of a defence statement, and the prosecution must take into account the information provided as to the defence case when conducting its on-going review of unused material. As the Court of Appeal noted in ***R v Newell*** (supra), admissions can be made in the Trial Preparation Form and the defence is able to identify the matters that are not in issue. Admissions made in these circumstances may be admissible during the trial. However, other information on the form that does not come within the section relating to admissions should be treated in the same way as the contents of a PCMH form in the Crown Court and it should not generally be introduced as part of the evidence at trial. However, the contents of the Trial Preparation Form do not replace the need to serve a defence statement if the defendant seeks to apply for disclosure under section 8 CPIA.

34. The standard directions require that any defence statement is to be served within 14 days of the date upon which the prosecution has complied with, or purported to comply with, the duty to provide initial disclosure. There may be some instances when there will be a well-founded defence application to extend the 14-day time limit for serving the defence statement. These applications must be made in accordance with the Criminal Procedure Rules, in writing and before the time limit expires.

35. Although CCTV footage frequently causes difficulties, it is to be treated as any other category of unused material and it should only be disclosed if the material meets the appropriate test for disclosure under the CPIA. The defence should either be provided with copies of the sections of the CCTV or afforded an opportunity to view them. If the prosecution refuses to disclose CCTV material that the defence considers to be discloseable, the courts should not make standard or general directions requiring the prosecutor to disclose material of this kind in the absence of an application under section 8. When potentially relevant CCTV footage is not in the possession of the police, the guidance in relation to third party material will apply, although the police remain under a duty to pursue all reasonable lines of inquiry, including those leading away from a suspect, whether or not defence requests are made.

36. The previous convictions of witnesses and any disciplinary findings against officers in the case are frequently discloseable and care should be taken to disclose them as appropriate. Documents such as crime reports or records of emergency calls should not be provided on a routine basis, for instance as part of a bundle of disclosed documents, irrespective of whether the material satisfies the appropriate test for disclosure. Defence advocates should not request this material in standard or routine correspondence, and instead focussed consideration should be given to the circumstances of the particular case. Unjustified requests for disclosure of material of this kind are routinely made, frequently leading to unnecessary delays and adjournments. The prosecution should always consider whether the request is properly made out.

37. The supervisory role of the courts is critical in this context, and magistrates must guard against granting unnecessary adjournments and issuing unjustified directions.

Large and complex cases in the Crown Court

38. Disclosure is a particular problem with the larger and more complex cases, which require a scrupulous approach by the parties and robust case management by the judiciary. If possible, the trial judge should be identified at the outset.

39. The legal representatives need to fulfil their duties in this context with care and efficiency; they should co-operate with the other party (or parties) and the court; and the judge and the other party (or parties) are to be informed of any difficulties, as soon as they arise. The court should be provided with an up-to-date timetable for disclosure whenever there are material changes in this regard. A disclosure-management document, or similar, prepared by the prosecution will be of particular assistance to the court in large and complex cases.

40. Judges should be prepared to give early guidance as to the prosecution's approach to disclosure, thereby ensuring early engagement by the defence.

41. Cases of this nature frequently include large volumes of digitally stored material. The Attorney General's 2011 guidance (now included as an annex to the Attorney General's Guidelines on Disclosure 2013) is of particular relevance and assistance in this context.

42. Applications for witness anonymity orders require particular attention; as the Court of Appeal noted in ***R v Mayers and Others*** [2008] EWCA Crim 2989; [2009] 1 Cr App R 30, in making such an application, the prosecution's obligations of disclosure "go much further than the ordinary duties of disclosure".

43. If the judge considers that there are reasonable grounds to doubt the good faith of the investigation, he or she will be concerned to see that there has been independent and effective appraisal of the documents contained in the disclosure schedule and that its contents are adequate. In appropriate cases where this issue has arisen and there are

grounds which show there is a real issue, consideration should be given to receiving evidence on oath from the senior investigating officer at an early case management hearing.

Material held by Third Parties

44. Where material is held by a third party such as a local authority, a social services department, hospital or business, the investigators and the prosecution may need to make enquiries of the third party, with a view to inspecting the material and assessing whether the relevant test for disclosure is met and determining whether any or all of the material should be retained, recorded and, in due course, disclosed to the accused. If access by the prosecution is granted, the investigators and the prosecution will need to establish whether the custodian of the material intends to raise PII issues, as a result of which the material may have to be placed before the court for a decision. This does not obviate the need for the defence to conduct its own enquiries as appropriate. Speculative enquiries without any proper basis in relation to third party material – whether by the prosecution or the defence – are to be discouraged, and, in appropriate cases, the court will consider making an order for costs where an application is clearly unmeritorious and misconceived.

45. The 2013 Protocol and Good Practice Model on Disclosure of Information in Cases of Alleged Child Abuse and Linked Criminal and Care Directions Hearings has recently been published. It provides a framework and timetable for the police and CPS to obtain discloseable material from local authorities, and for applications to be made to the Family Court. It is applicable to all cases of alleged child abuse where the child is aged 17 years or under. It is not binding on local authorities, but it does represent best practice and therefore should be consulted in all such cases. Delays in obtaining this type of material have led to unacceptable delays to trials involving particularly vulnerable witnesses and every effort must be made to ensure that all discloseable material is identified at an early stage so that any necessary applications can be made and the defence receive material to which they are entitled in good time.

46. There is no specific procedure for disclosure of material held by third parties in criminal proceedings, although the procedure established under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Courts Act 1980 is often used for this purpose. Where the third party in question declines to allow inspection of the material, or requires the prosecution to obtain an order before providing copies, the prosecutor will need to consider whether it is appropriate to obtain a witness summons under either section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Court Act 1980. Part 28 of the Criminal Procedure Rules and paragraphs 3.5 and 3.6 of the Code of Practice under the CPIA 1996 should be followed.

47. Applications for third party disclosure must identify the documents that are sought and provide full details of why they are discloseable. This is particularly relevant when access is sought to the medical records of those who allege they are victims of crime. It should be appreciated that a duty to assert confidentiality may arise when a third party

receives a request for disclosure, or the right to privacy may be claimed under article 8 of the ECHR (see in particular Crim PR Part 28.6). Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by making a complaint against the accused. The court, as a public authority, must ensure that any interference with the right to privacy under article 8 is in accordance with the law, and is necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused. Confidentiality rests with the subject of the material, not with the authority holding it. The subject is entitled to service of the application and has the right to make representations: Criminal Procedure Rule 22.3 and *R (on the application of B) v Stafford Combined Court* [2006] EWHC 1645 (Admin); [2006] 2 Cr App R 34. The 2013 Protocol and Good Practice Model at paragraph 13 should be followed. It is likely that the judge will need to issue directions when issues of this kind are raised (e.g. whether enquiries with the third party are likely to be appropriate; who is to make the request; what material is to be sought, and from whom; and a timetable should be set).

48. The judge should consider whether to take any steps if a third party fails, or refuses, to comply with a request for disclosure, including suggesting that either of the parties pursue the request and, if necessary, make an application for a witness summons. In these circumstances, the court will need to set an appropriate timetable for compliance with Part 28 of the Rules. Any failure to comply with the timetable must immediately be referred back to the court for further directions, although a hearing will not always be necessary. Generally, it may be appropriate for the defence to pursue requests of this kind when the prosecution, for good reason, decline to do so and the court will need to ensure that this procedure does not delay the trial.

49. There are very limited circumstances in which information relating to Family Court proceedings (e.g. where there have been care proceedings in relation to a child who has complained to the police of mistreatment) may be communicated without a court order: see the Family Procedure Rules 12.73. Reference should be made to the 2013 Protocol and Good Practice Model. In most circumstances, a court order will be required and paragraph 11 of the Protocol which sets out how an application should be made should be followed.

Other Government Departments

50. Material held by other government departments or other Crown agencies will not be prosecution material for the purposes of section 3(2) or section 8(4) of the CPIA if it has not been inspected, recorded and retained during the course of the relevant criminal investigation. The CPIA Code of Practice and the Attorney General's Guidelines on Disclosure, however, impose a duty upon the investigators and the prosecution to pursue all reasonable lines of inquiry and that may involve seeking disclosure from the relevant body.

International matters

51. The obligations of the Crown in relation to relevant third-party material held overseas are as set out in *R v Flook* [2009] EWCA Crim 682; [2010] 1 Cr App R 30: the Crown must pursue reasonable lines of enquiry and if it appears there is relevant material, all reasonable steps must be taken to obtain it, whether formally or otherwise. To a great extent, the success of these enquiries will depend on the laws of the country where the material is held and the facts of the individual case. It needs to be recognised that when the material is held in a country outside of the European Union, the power of the Crown and the courts of England and Wales to obtain third-party material may well be limited. If informal requests are unsuccessful, the avenues are limited to the Crime (International Co-operation) Act 2003 and any applicable international conventions. It cannot, in any sense, be guaranteed that a request to a foreign government, court or body will produce the material sought. Additionally, some foreign authorities may be prepared to show the material in question to the investigating officers, whilst refusing to allow the material to be copied or otherwise made available.

52. As the Court of Appeal observed in *R v Khyam* [2008] EWCA Crim 1612; [2009] 1 Cr App R (S) 77:

> *"The prosecuting authorities in this jurisdiction simply cannot compel authorities in a foreign country to acknowledge, let alone comply with, our disclosure principles." ([2008] EWCA Crim 1612, at paragraph 37)*

The obligation is therefore to take reasonable steps. Whether the Crown has complied with that obligation is for the courts to judge in each case.

53. It is, therefore, important that the prosecution sets out the position clearly in writing, including any inability to inspect or retrieve any material that potentially ought to be disclosed, along with the steps that have been taken.

Applications for Non-Disclosure in the Public Interest

54. Applications in this context, whenever possible, should be considered by the trial judge. The House of Lords in *R v H and C* (supra) has provided useful guidance as to the proper approach to be applied (paragraph 36):

> *"When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:*
>
> *(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.*
>
> *(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.*

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see para 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review." ([2004] 2 AC 134, at 155-156)

55. In this context, the following matters are to be emphasised:

a. The procedure for making applications to the court is set out in the Criminal Procedure Rules, Part 22;

b. When the PII application is a Type 1 or Type 2 application, proper notice to the defence is necessary to enable the accused to make focused submissions to the court and the notice should be as specific as the nature of the material allows. It

is appreciated that in some cases only the generic nature of the material can be identified. In some wholly exceptional cases (Type 3 cases) it may be justified to give no notice at all. The judge should always ask the prosecution to justify the form of notice (or the decision to give no notice at all).

c. The prosecution should be alert to the possibility of disclosing a statement in a redacted form by, for example, simply removing personal details. This may obviate the need for a PII application, unless the redacted material satisfies the test for disclosure.

d. Except when the material is very short (for instance only a few sheets), or for reasons of sensitivity, the prosecution should supply securely sealed copies to the judge in advance, together with a short statement explaining the relevance of each document, how it satisfies the disclosure test and why it is suggested that disclosure would result in a real risk of serious prejudice to an important public interest; in undertaking this task, the use of merely formulaic expressions is to be discouraged. In any case of complexity a schedule of the material should be provided, identifying the particular objection to disclosure in relation to each item, and leaving a space for the judge's decision.

e. The application, even if held in private or in secret, should be recorded. The judge should give some short statement of reasons; this is often best done document by document as the hearing proceeds.

f. The recording, copies of the judge's orders (and any copies of the material retained by the court) should be clearly identified, securely sealed and kept in the court building in a safe or locked cabinet consistent with its security classification, and there should be a proper register of the contents. Arrangements should be made for the return of the material to the prosecution once the case is concluded and the time for an appeal has elapsed.

Conclusion

56. Historically, disclosure was viewed essentially as being a matter to be resolved between the parties, and the court only became engaged if a particular issue or complaint was raised. That perception is now wholly out of date. The regime established under the Criminal Justice Act 2003 and the Criminal Procedure Rules gives judges the power – indeed, it imposes a duty on the judiciary – actively to manage disclosure in every case. The efficient, effective and timely resolution of these issues is a critical element in meeting the overriding objective of the Criminal Procedure Rules of dealing with cases justly.