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.