

MP8 Chief Officer/Delegate Guidelines

MP8 – Aims and Purpose

The purpose of this document is to direct the Chief Officer (Delegate) in the considerations, and subsequent recording of these considerations, required to address whether it is reasonable to believe that information is relevant and ought to be disclosed. This document aims to give advice around the guiding principles, refer you to relevant case law and provide guidance on how to record your conclusions within Section 4 of the QAF AT3. It should be noted that the Chief Officer is the only individual with a statutory responsibility under Part V.

Relevance to a specific application

The application before you will relate to regulated activity with children, vulnerable adults, both or applications that are eligible for enhanced level checks but will not involve regulated activity with either group.

Guiding Principles

Section 113B(4) of the Police Act 1997 (the “Act”), as amended, states that:

(4) Before issuing an enhanced criminal record certificate the Secretary of State shall request any relevant chief officer to provide any information which —

(a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and

(b) in the chief officer’s opinion, ought to be included in the certificate.

(4a) In exercising functions under subsection (4) a relevant chief officer must have regard to any guidance for the time being published by the Secretary of State.

The Supreme Court identified that, in view of the wide definition of the term ‘relevant information’, it is essential that a careful **and equal** consideration of (b) be made for a disclosure to be lawful.

The Statutory Guidance from the Secretary of State, as well as relevant case law affecting this area, can be found via:

<http://www.homeoffice.gov.uk/publications/agencies-public-bodies/CRB/disclosure-unit-scu/>

Discussion

The Protection Of Freedoms Act states that the relevant Chief Officer, in exercising his functions, must have regard to any guidance published by the Secretary of State. The Secretary of State has published a Statutory Guidance document which should be used in conjunction with the QAF.

The use of QAF as a guide was a contributory factor in the Supreme Court commenting on the ‘*commendable care*’ taken in addressing the necessary considerations that are inherent when considering information for disclosure: *L v Commissioner of Police of the Metropolis 2009, Supreme Court*.

The outcome of this case had the impact of changing the emphasis given by the Lord Chief Justice Woolf in *X v Chief Constable of West Midlands Police 2004*, to a position where there is no presumption in favour of the vulnerable (disclosure) when assessing the competing rights of the parties. QAF guidance, of course, reflects their Lordships judgment but it should be noted that the decision in the case of ‘L’ was described as “*cannot be faulted, cannot be criticised*” due to QAF already addressing the balancing exercise required, with QAF guidance being followed by those concerned.

Chief Officers need to be clear that a rational and correct decision to disclose or not to disclose on information available at the time may, with hindsight, be the subject of criticism and they should ensure that a robust support process is in existence.

MP8 Chief Officer/Delegate Guidelines

Objective of Guidelines

While separate in principle, the two requirements referred to earlier, (a) and (b), may well involve overlapping factors in practice. The guidelines set out a logical process under which both requirements can be considered and the conclusions documented.

The Decision Making Process

Is it reasonable for you to believe that the information before you is relevant to the prescribed purpose set out in the application?

It is for the Chief Officer to determine relevance but the decision must be a reasonable one and may be challenged on those grounds if it does not appear to be so.

Are you of the opinion that the information before you ought to be disclosed?

The Supreme Court endorsed the view that “*This country must, through its legislature, be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable adults*”. (*R (X) v Chief Constable of West Midlands Police*).

Any disclosure will likely cause some disruption to the applicant’s private life and may also affect them professionally. In some cases the material may be so obviously reliable, relevant and grave as to be disclosable however detrimental the consequential effect on the applicant, but in others the balance will be less clear. You must establish whether or not you believe that the impact of disclosure on the private life of those concerned outweighs the potential risk to the vulnerable group from making no disclosure. In every case one must consider whether there is likely to be an interference with a person’s private life and, if so, whether that interference can be justified.

AT3 Section 4

This section of the QAF audit trail document AT3 requires you to record your rationales as to why it is reasonable to believe that the information is relevant and why, in your opinion, it ought to be disclosed. Each rationale must address the conclusions you have reached based on the details of the specific case before you.

Is the information sufficiently credible to justify disclosure?

The weight of evidence required is set at a reasonably low level. Organisations such as Liberty argue that a higher test, one of a balance of probabilities should be used. Case law asks that you consider whether there are untoward circumstances that lead you to consider that it is unlikely that the information is true or that the information is so without substance as to make it unlikely to be true.

A reasonable decision maker would not disclose the existence of allegations without first taking reasonable steps to ascertain whether they might be true. It is not envisaged that a case be re-investigated but, where a case was dismissed by a court, for example, one of the most obvious reasonable steps may be to ascertain why this was so. (*R (S) v West Mercia*.)

MP8 Chief Officer/Delegate Guidelines

Representations

In some, perhaps many, cases the Supreme Court advised that the applicant should be afforded the opportunity of making representations before information is released. Unfortunately, the court itself was unable to be prescriptive on those occasions where this process may be required, however subsequent case law, in particular *R (B) vs Derbyshire Constabulary Sept. 2011*, elaborated further. The types of factors to consider are:

- *If it is unclear whether the position for which the applicant is applying really does require the disclosure of such information*
- *where the information may indicate a state of affairs that is out of date or no longer true*
- *if the applicant has never had a fair opportunity to answer the allegation*
- *If the applicant appears unaware of the information being considered for disclosure*
- *If the facts are not clear and are in dispute*

"...typically, where a chief officer is considering the issue of an ECRC, it is likely to be appropriate for him to afford the applicant an opportunity to make representations, unless, for example the facts are clear and not in dispute..." Munby LJ, *R (B) vs Derbyshire Constabulary Sept. 2011*, Para 60.

"There may (though I suspect only in those probably comparatively infrequent cases where the facts are both clear and known not to be in dispute) be occasions when, as in L, there is no need to give the applicant an opportunity to make representations." Munby LJ, *R (B) vs Derbyshire Constabulary*, Sept. 2011, Para 61.

Further guidance on representations can be found in QAF guidance document GD4.

Reasonable and Proportionate - Age

One needs to consider the length of time that has passed since the incident and the conduct of the applicant in the intervening period. There may be some information that is so obviously reliable, relevant and grave as to remain relevant for a considerable period. If it considered that old information should be included the rationale behind this decision should be included.

Reasonable and Proportionate - Gravity of the material

It may be considered disproportionate to disclose information that might be considered trivial, or simply poor behaviour, or opinions on life styles. Information that may indicate a risk or immediate danger to children or the vulnerable is of the type that is proportionate to disclose.

Third Party Information

Information may be found that relates to someone other than the applicant: to a Third Party. In order to be considered for disclosure, such information must pass the same QAF tests applicable to consideration of an applicant. In addition, however, one would need to consider whether there is a reasonable connection between the Third Party and the applicant that may provide the Third Party with relevant access to children or the vulnerable through the role of the applicant.

In summary, the question is: is there a reasonable risk to a child or vulnerable adult represented by the Third Party themselves and what is the actual, realistic likelihood of contact between the Third Party and the vulnerable, based on the information available?

The courts considered this to be a matter of fact in each case. For example, they held that it was a matter of common sense to consider that the partner of a teacher may have access to children as a result of the applicant's role; similarly a boarding school nurse whose partner is a paedophile may be a risk, whereas a casualty nurse, with the same partner, may not. It is important to consider how the role that the applicant will undertake may give the Third Party access to the vulnerable. The case of *R (SL) v Metropolitan Police* refers to a Third Party disclosure where the applicant's role was that of Teacher: Lord Justice Laws stated that the Chief Officer was right to consider the relationship with a Third Party. It was reasonable to consider that the Third Party could have access to children through his partner. The applicant's private life could not be hermetically sealed from their professional life.

MP8 Chief Officer/Delegate Guidelines

Accurate, Balanced and Fair Disclosure

Impact on applicant

The purpose of the legislation is the protection of children and the vulnerable. However, the issue of proportionality needs to be considered. One needs to consider why the risk to children or the vulnerable outweighs the impact on the applicant in each case. For example: a seventeen year old male has unlawful sexual intercourse with a fifteen year old female. The incident took place thirty years ago; they are now married with two children. Would the impact of such a disclosure be justified when balanced against the negligible risk to children?

When considering whether to disclose, one must apply one's mind to all of the considerations presented within QAF (including MP8) and balance the applicants' rights under Article 8 (European Convention on Human Rights) with the potential risk to the vulnerable.

There remains the possibility that, in some cases, there will be both disruption to the private life of the applicant and a risk of harm to the vulnerable. In such circumstances, the opinion of the courts is that while Parliament has provided the pressing need through the application of statute, the authorising officer is required to consider whether the intrusion (from disclosure, upon the private life of the individual) is proportionate.

Disclosure Text

"An enhanced disclosure must be meticulous and accurate, and go no further than is justified" (Laws LJ) - the wording of a disclosure must be meticulous, accurate and fair and not exceed its purpose. The information must be balanced. Refer to QAF GD2 for disclosure text guidelines.

A template for the composition of disclosure text, based on the Recommendation 6c of the Criminal Records Review Report "A Common Sense Approach", now forms part of the QAF AT3 document. This template should be followed whenever disclosure is to be made as, in addition to providing the relevant information, it requires that you provide the recipient with the reasons for why you concluded that it is believed to be relevant to the application and why you concluded that it ought to be disclosed.

Disputes/Review

Upon receiving their EDBS the applicant is able to make an application, under Part V of the Police Act, for the accuracy of information to be reviewed, regardless of whether Representations had previously been undertaken. This application, known as a 'dispute', is freely available through the DBS.

In addition to disputes regarding the accuracy of certificates, the Protection of Freedoms Act allows for an EDBS to be challenged if it is believed the information is not relevant or ought not to be disclosed. These challenges will be referred to the Independent Monitor for a decision. The Independent Monitor, on receiving such an application, must ask such chief officer of a police force as he/she considers appropriate, to review whether the information concerned is information which the chief officer reasonably believes to be relevant and ought to be disclosed.

MP8 Chief Officer/Delegate Guidelines

Relevant Conduct (the same provisions apply to vulnerable adults):

A person's conduct endangers a child if he harms a child, causes a child to be harmed, puts a child at risk of harm, attempts to harm a child, or incites another to harm a child. Such conduct need not be of a criminal nature to be considered relevant for disclosure.

- conduct which endangers or is likely to endanger a child
- conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him
- conduct involving sexual material relating to children (including possession of such material)
- conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears that the conduct is inappropriate
- conduct of a sexual nature involving a child, if it appears that the conduct is inappropriate

Disregarded Offences

Certain offences relating to Section 12 of the Sexual Offences Act 1956 (*buggery*), Section 13 of that Act (*gross indecency between men*) and Section 61 of the Offences against the Person Act 1861 or Section 11 of the Criminal Law Amendment Act 1885 (*corresponding earlier offences*) may be disregarded from a person's record upon their application to the Secretary of State.

If this offence has been 'disregarded' it is to be treated as if the person has not:

- (a) *committed the offence,*
- (b) *been charged with, or prosecuted for, the offence,*
- (c) *been convicted of the offence,*
- (d) *been sentenced for the offence, or*
- (e) *been cautioned for the offence.*

The Act goes on to state that where a question is put seeking information in respect of a person's previous convictions, cautions, offences, conduct or circumstances, the question is not to be treated as relating to these disregarded offences and consequently the non-acknowledgement or disclosure of these disregarded offences will not result in any liability or prejudice in law.