

## **Attorney General's Guidelines on Disclosure (2005)**

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

### **Foreword by Lord Goldsmith**

Disclosure is one of the most important issues in the criminal justice system and the application of proper and fair disclosure is a vital component of a fair criminal justice system. The "golden rule" is that fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence.

This amounts to no more and no less than a proper application of the Criminal Procedure and Investigations Act 1996 (CPIA) recently amended by the Criminal Justice Act 2003. The amendments in the Criminal Justice Act 2003 abolished the concept of "primary" and "secondary" disclosure, and introduced an amalgamated test for disclosure of material that "might reasonably be considered capable of undermining the prosecution case or assisting the case for accused". It also introduced a new Code of Practice. In the light of these, other new provisions and case law I conducted a review of the Attorney General's Guidelines issued in November 2000.

Concerns had previously been expressed about the operation of the then existing provisions by judges, prosecutors, and defence practitioners. It seems to me that we must all make a concerted effort to comply with the CPIA disclosure regime robustly in a consistent way in order to regain the trust and confidence of all those involved in the criminal justice system. The House of Lords in *R v H & C* made it clear that so long as the current disclosure system was operated with scrupulous attention, in accordance with the law and with proper regard to the interests of the defendant, it was entirely compatible with Article 6 of the European Convention on Human Rights. It is vital that everybody in the criminal justice system operates these procedures properly and fairly to ensure we protect the integrity of the criminal justice system whilst at the same time ensuring that a just and fair disclosure process is not abused so that it becomes unwieldy, bureaucratic and effectively unworkable. This means that all those involved must play their role. Investigators must provide detailed and proper schedules. Prosecutors must not abrogate their duties under the CPIA by making wholesale disclosure in order to avoid carrying out the disclosure exercise themselves. Likewise, defence practitioners should avoid fishing expeditions and where disclosure is not provided using this as an excuse for an abuse of process application. I hope also that the courts will apply the legal regime set out under the CPIA rather than ordering disclosure because either it is easier or it would not "do any harm".

This disclosure regime must be made to work and it can only work if there is trust and confidence in the system and everyone plays their role in it. If this is

achieved applications for a stay of proceedings on the grounds of non disclosure will only be made exceedingly sparingly and never on a speculative basis. Likewise such applications are only likely to succeed in extreme cases and certainly not where the alleged disclosure is in relation to speculative requests for material.

I have therefore revised the Guidelines to take account of developments and to start the process of ensuring that everyone works to achieve consistency of approach to CPIA disclosure. The amalgamated test should introduce a more streamlined process which is more objective and should therefore deal with some of the concerns about inconsistency in the application of the disclosure regime by prosecutors. A draft set of these revised Guidelines went out for consultation, and resulted in many thoughtful and detailed responses from practitioners, including members of the judiciary, who have to work with the scheme on a daily basis. The Group that was established to advise me on the revision of the Guidelines has taken account of the results of the consultation exercise. I give my warm thanks to all who have offered responses on the consultation and assisted in the revision of these Guidelines.

I am publishing today the revised Guidelines that, if properly, applied will contribute to ensuring that the disclosure regime operates effectively, fairly and justly - which is vitally important to the integrity of the criminal justice system and the way in which it is perceived by the general public.

## **Introduction: disclosure of unused material in criminal proceedings**

1. Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed under Article 6 of the European Convention on Human Rights (ECHR). A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial.
2. What must be clear is that a fair trial consists of an examination not just of all the evidence the parties wish to rely on but also all other relevant subject matter. A fair trial should not require consideration of irrelevant material and should not involve spurious applications or arguments which serve to divert the trial process from examining the real issues before the court.
3. The scheme set out in the Criminal Procedure and Investigations Act 1996 (as amended) (the Act) is designed to ensure that there is fair disclosure of material which may be relevant to an investigation and which does not form part of the prosecution case. Disclosure under the Act should assist the accused in the timely preparation and presentation of their case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives risks preventing a fair trial taking place.
4. This means that the disclosure regime set out in the Act must be scrupulously followed. These Guidelines build upon the existing law to help to ensure that the legislation is operated more effectively, consistently and fairly.
5. Disclosure must not be an open ended trawl of unused material. A critical element to fair and proper disclosure is that the defence play their role to ensure that the prosecution are directed to material which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. This process is key to ensuring prosecutors make informed determinations about disclosure of unused material.
6. Fairness does recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm. The scheme of the Act protects those interests. It should also ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources.
7. Whilst it is acknowledged that these Guidelines have been drafted with a focus on Crown Court proceedings the spirit of the Guidelines must be followed where they apply to proceedings in the magistrates' court.

## General principles

8. Disclosure refers to providing the defence with copies of, or access to, any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed.
9. Prosecutors will only be expected to anticipate what material might weaken their case or strengthen the defence in the light of information available at the time of the disclosure decision, and this may include information revealed during questioning.
10. Generally, material which can reasonably be considered capable of undermining the prosecution case against the accused or assisting the defence case will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution. Material can fulfil the disclosure test:
  - (a) by the use to be made of it in cross-examination;
  - (b) by its capacity to support submissions that could lead to:
    - (i) the exclusion of evidence;
    - (ii) a stay of proceedings; or,
    - (iii) a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the ECHR; or,
  - (c) by its capacity to suggest an explanation or partial explanation of the accused's actions.
11. In deciding whether material may fall to be disclosed under paragraph 10, especially (b)(ii), prosecutors must consider whether disclosure is required in order for a proper application to be made. The purpose of this paragraph is not to allow enquiries to support speculative arguments or for the manufacture of defences.
12. Examples of material that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused are:
  - i. Any material casting doubt upon the accuracy of any prosecution evidence;
  - ii. Any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence;

- iii. Any material which may cast doubt upon the reliability of a confession;
  - iv. Any material that might go to the credibility of a prosecution witness;
  - v. Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers; or,
  - vi. Any material which may have a bearing on the admissibility of any prosecution evidence.
13. It should also be borne in mind that while items of material viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the accused, several items together can have that effect.
14. Material relating to the accused's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered when in the investigator's custody is likely to fall within the test for disclosure set out in paragraph 8 above.

### **Defence statements**

15. A defence statement must comply with the requirements of section 6A of the Act. A comprehensive defence statement assists the participants in the trial to ensure that it is fair. The trial process is not well served if the defence make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. The more detail a defence statement contains the more likely it is that the prosecutor will make an informed decision about whether any remaining undisclosed material might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused, or whether to advise the investigator to undertake further enquiries. It also helps in the management of the trial by narrowing down and focussing on the issues in dispute. It may result in the prosecution discontinuing the case. Defence practitioners should be aware of these considerations when advising their clients.
16. Whenever a defence solicitor provides a defence statement on behalf of the accused it will be deemed to be given with the authority of the solicitor's client.

### **Continuing duty of prosecutor to disclose**

17. Section 7A of the Act imposes a continuing duty upon the prosecutor to keep under review at all times the question of whether there is any unused material which might reasonably be considered capable of undermining the prosecution case against the accused or assisting the case for the accused and which has not previously been disclosed.

This duty arises after the prosecutor has complied with the duty of initial disclosure or purported to comply with it and before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case. If such material is identified, then the prosecutor must disclose it to the accused as soon as is reasonably practicable.

18. As part of their continuing duty of disclosure, prosecutors should be open, alert and promptly responsive to requests for disclosure of material supported by a comprehensive defence statement. Conversely, if no defence statement has been served or if the prosecutor considers that the defence statement is lacking specificity or otherwise does not meet the requirements of section 6A of the Act, a letter should be sent to the defence indicating this. If the position is not resolved satisfactorily, the prosecutor should consider raising the issue at a hearing for directions to enable the court to give a warning or appropriate directions.
19. When defence practitioners are dissatisfied with disclosure decisions by the prosecution and consider that they are entitled to further disclosure, applications to the court should be made pursuant to section 8 of the Act and in accordance with the procedures set out in the Criminal Procedure Rules. Applications for further disclosure should not be made as ad hoc applications but dealt with under the proper procedures.

#### **Applications for non-disclosure in the public interest**

20. Before making an application to the court to withhold material which would otherwise fall to be disclosed, on the basis that to disclose would give rise to a real risk of serious prejudice to an important public interest, prosecutors should aim to disclose as much of the material as they properly can (for example, by giving the defence redacted or edited copies or summaries). Neutral material or material damaging to the defendant need not be disclosed and must not be brought to the attention of the court. It is only in truly borderline cases that the prosecution should seek a judicial ruling on the disclosability of material in its possession.
21. Prior to or at the hearing, the court must be provided with full and accurate information. Prior to the hearing the prosecutor and the prosecution advocate must examine all material, which is the subject matter of the application and make any necessary enquiries of the investigator. The prosecutor (or representative) and/or investigator should attend such applications.
22. The principles set out at paragraph 36 of *R v H & C* should be rigorously applied firstly by the prosecutor and then by the court considering the material. It is essential that these principles are scrupulously attended to ensure that the procedure for examination of

material in the absence of the accused is compliant with Article 6 of ECHR.

### **Responsibilities: investigators and disclosure officers**

23. Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. A failure to take action leading to inadequate disclosure may result in a wrongful conviction. It may alternatively lead to a successful abuse of process argument, an acquittal against the weight of the evidence or the appellate courts may find that a conviction is unsafe and quash it.
24. Officers appointed as disclosure officers must have the requisite experience, skills, competence and resources to undertake their vital role. In discharging their obligations under the Act, code, common law and any operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant.
25. An individual must not be appointed as disclosure officer, or continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged crime which is the subject of investigation. The advice of a more senior investigator must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as the disclosure officer. If thereafter a doubt remains, the advice of a prosecutor should be sought.
26. There may be a number of disclosure officers, especially in large and complex cases. However, there must be a lead disclosure officer who is the focus for enquiries and whose responsibility it is to ensure that the investigator's disclosure obligations are complied with. Disclosure officers, or their deputies, must inspect, view or listen to all relevant material that has been retained by the investigator, and the disclosure officer must provide a personal declaration to the effect that this task has been undertaken.
27. Generally this will mean that such material must be examined in detail by the disclosure officer or the deputy, but exceptionally the extent and manner of inspecting, viewing or listening will depend on the nature of material and its form. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip sampling. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The extent and manner of its examination must also be described together with justification for such action.
28. Investigators must retain material that may be relevant to the investigation. However, it may become apparent to the investigator that

some material obtained in the course of an investigation because it was considered potentially relevant, is in fact incapable of impact. It need not then be retained or dealt with in accordance with these Guidelines, although the investigator should err on the side of caution in coming to this conclusion and seek the advice of the prosecutor as appropriate.

29. In meeting the obligations in paragraph 6.9 and 8.1 of the Code, it is crucial that descriptions by disclosure officers in non-sensitive schedules are detailed, clear and accurate. The descriptions may require a summary of the contents of the retained material to assist the prosecutor to make an informed decision on disclosure. Sensitive schedules must contain sufficient information to enable the prosecutor to make an informed decision as to whether or not the material itself should be viewed, to the extent possible without compromising the confidentiality of the information.
30. Disclosure officers must specifically draw material to the attention of the prosecutor for consideration where they have any doubt as to whether it might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.
31. Disclosure officers must seek the advice and assistance of prosecutors when in doubt as to their responsibility as early as possible. They must deal expeditiously with requests by the prosecutor for further information on material, which may lead to disclosure.

## **Prosecutors**

32. Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice and in accordance with the law. Prosecutors must also be alert to the need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met.
33. Prosecutors must review schedules prepared by disclosure officers thoroughly and must be alert to the possibility that relevant material may exist which has not been revealed to them or material included which should not have been. If no schedules have been provided, or there are apparent omissions from the schedules, or documents or other items are inadequately described or are unclear, the prosecutor must at once take action to obtain properly completed schedules. Likewise schedules should be returned for amendment if irrelevant items are included. If prosecutors remain dissatisfied with the quality or content of the schedules they must raise the matter with a senior investigator, and if necessary, persist, with a view to resolving the matter satisfactorily.
34. Where prosecutors have reason to believe that the disclosure officer has not discharged the obligation in paragraph 26 to inspect, view or



listen to relevant material, they must at once raise the matter with the disclosure officer and, if it is believed that the officer has not inspected, viewed or listened to the material, request that it be done.

35. When prosecutors or disclosure officers believe that material might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused, prosecutors must always inspect, view or listen to the material and satisfy themselves that the prosecution can properly be continued having regard to the disclosability of the material reviewed. Their judgement as to what other material to inspect, view or listen to will depend on the circumstances of each case.
36. Prosecutors should copy the defence statement to the disclosure officer and investigator as soon as reasonably practicable and prosecutors should advise the investigator if, in their view, reasonable and relevant lines of further enquiry should be pursued.
37. Prosecutors cannot comment upon, or invite inferences to be drawn from, failures in defence disclosure otherwise than in accordance with section 11 of the Act. Prosecutors may cross-examine the accused on differences between the defence case put at trial and that set out in his or her defence statement. In doing so, it may be appropriate to apply to the judge under section 6E of the Act for copies of the statement to be given to a jury, edited if necessary to remove inadmissible material. Prosecutors should examine the defence statement to see whether it points to other lines of enquiry. If the defence statement does point to other reasonable lines of inquiry further investigation is required and evidence obtained as a result of these enquiries may be used as part of the prosecution case or to rebut the defence.
38. Once initial disclosure is completed and a defence statement has been served requests for disclosure should ordinarily only be answered if the request is in accordance with and relevant to the defence statement. If it is not, then a further or amended defence statement should be sought and obtained before considering the request for further disclosure.
39. Prosecutors must ensure that they record in writing all actions and decisions they make in discharging their disclosure responsibilities, and this information is to be made available to the prosecution advocate if requested or if relevant to an issue.
40. If the material does not fulfil the disclosure test there is no requirement to disclose it. For this purpose, the parties' respective cases should not be restrictively analysed but must be carefully analysed to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. Neutral material or material damaging to the defendant need not be disclosed and must not be brought to the attention of the court. Only in truly borderline cases

should the prosecution seek a judicial ruling on the disclosability of material in its hands.

41. If prosecutors are satisfied that a fair trial cannot take place where material which satisfies the disclosure test cannot be disclosed, and that this cannot or will not be remedied including by, for example, making formal admissions, amending the charges or presenting the case in a different way so as to ensure fairness or in other ways, they must not continue with the case.

### **Prosecution advocates**

42. Prosecution advocates should ensure that all material that ought to be disclosed under the Act is disclosed to the defence. However, prosecution advocates cannot be expected to disclose material if they are not aware of its existence. As far as is possible, prosecution advocates must place themselves in a fully informed position to enable them to make decisions on disclosure.
43. Upon receipt of instructions, prosecution advocates should consider as a priority all the information provided regarding disclosure of material. Prosecution advocates should consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been instructed fully regarding disclosure matters. Decisions already made regarding disclosure should be reviewed. If as a result, the advocate considers that further information or action is required, written advice should be promptly provided setting out the aspects that need clarification or action. Prosecution advocates must advise on disclosure in accordance with the Act. If necessary and where appropriate a conference should be held to determine what is required.
44. The prosecution advocate must keep decisions regarding disclosure under review until the conclusion of the trial. The prosecution advocate must in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected. Prosecution advocates must not abrogate their responsibility under the Act by disclosing material which could not be considered capable of undermining the prosecution case or of assisting the case for the accused.
45. Prior to the commencement of a trial, the prosecuting advocate should always make decisions on disclosure in consultation with those instructing him or her and the disclosure officer. After a trial has started, it is recognised that in practice consultation on disclosure issues may not be practicable; it continues to be desirable, however, whenever this can be achieved without affecting unduly the conduct of the trial.

46. There is no basis in law or practice for disclosure on a “counsel to counsel” basis.

### **Involvement of other agencies**

#### **Material held by Government departments or other Crown bodies**

47. Where it appears to an investigator, disclosure officer or prosecutor that a Government department or other Crown body has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material. Although what is reasonable will vary from case to case, the prosecution should inform the department or other body of the nature of its case and of relevant issues in the case in respect of which the department or body might possess material, and ask whether it has any such material.
48. It should be remembered that investigators, disclosure officers and prosecutors cannot be regarded to be in constructive possession of material held by Government departments or Crown bodies simply by virtue of their status as Government departments or Crown bodies.
49. Departments in England and Wales should have identified personnel as established Enquiry Points to deal with issues concerning the disclosure of information in criminal proceedings.
50. Where, after reasonable steps have been taken to secure access to such material, access is denied the investigator, disclosure officer or prosecutor should consider what if any further steps might be taken to obtain the material or inform the defence.

#### **Material held by other agencies**

51. There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused prosecutors should take what steps they regard as appropriate in the particular case to obtain it.
52. If the investigator, disclosure officer or prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information, and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act

1965 or as appropriate section 97 of the Magistrates Courts Act 1980<sup>1</sup> are satisfied, then the prosecutor or investigator should apply for a witness summons causing a representative of the third party to produce the material to the Court.

53. Relevant information which comes to the knowledge of investigators or prosecutors as a result of liaison with third parties should be recorded by the investigator or prosecutor in a durable or retrievable form (for example potentially relevant information revealed in discussions at a child protection conference attended by police officers).

54. Where information comes into the possession of the prosecution in the circumstances set out in paragraphs 51-53 above, consultation with the other agency should take place before disclosure is made: there may be public interest reasons which justify withholding disclosure and which would require the issue of disclosure of the information to be placed before the court.

### **Other disclosure**

#### **Disclosure prior to initial disclosure**

55. Investigators must always be alive to the potential need to reveal and prosecutors to the potential need to disclose material, in the interests of justice and fairness in the particular circumstances of any case, after the commencement of proceedings but before their duty arises under the Act. For instance, disclosure ought to be made of significant information that might affect a bail decision or that might enable the defence to contest the committal proceedings.

56. Where the need for such disclosure is not apparent to the prosecutor, any disclosure will depend on what the accused chooses to reveal about the defence. Clearly, such disclosure will not exceed that which is obtainable after the statutory duties of disclosure arise.

### **Summary trial**

57. The prosecutor should, in addition to complying with the obligations under the Act, provide to the defence all evidence upon which the Crown proposes to rely in a summary trial. Such provision should allow the accused and their legal advisers sufficient time properly to consider the evidence before it is called.

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<sup>1</sup> The equivalent legislation in Northern Ireland is section 51A of the Judicature (Northern Ireland) Act 1978 and Article 118 of the Magistrates' Courts (Northern Ireland) Order 1981.

### **Material relevant to sentence**

58. In all cases the prosecutor must consider disclosing in the interests of justice any material, which is relevant to sentence (e.g. information which might mitigate the seriousness of the offence or assist the accused to lay blame in part upon a co-accused or another person).

### **Post-conviction**

59. The interests of justice will also mean that where material comes to light after the conclusion of the proceedings, which might cast doubt upon the safety of the conviction, there is a duty to consider disclosure. Any such material should be brought immediately to the attention of line management.

60. Disclosure of any material that is made outside the ambit of Act will attract confidentiality by virtue of **Taylor v SFO** [1999] 2 AC 177.

### **Applicability of these Guidelines**

61. Although the relevant obligations in relation to unused material and disclosure imposed on the prosecutor and the accused are determined by the date on which the investigation began, these Guidelines should be adopted with immediate effect in relation to all cases submitted to the prosecuting authorities in receipt of these Guidelines save where they specifically refer to the statutory or Code provisions of the Criminal Justice Act 2003 that do not yet apply to the particular case.

**Issued in April 2005**

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