

QAF GD 4 - Representations Guidance

Representations

Representations – a process by which applicants are given opportunity to refute or correct information that police are minded to disclose (or which may change a subscriber's Update Service status) for an Enhanced Disclosure and Barring Service Check, or to provide their reasons as to why it ought not to be included in the disclosure or ought not change their Update Service status.

This supplement to QAF is intended to assist colleagues in determining when the use of this process is appropriate.

A logical presumption is to consider that information should at least be of a quality to have reached Section 3 of the AT3 (Proposed Disclosure Review) before considering whether representation may be appropriate, however difficulty in answering MP7a Boxes 3, 4, 5 or 6 may also be an early indicator. Forces should not offer representation for information that they do not consider to be relevant for disclosure.

Using the Supreme Court judgement, October 29 2009, and B v Derbyshire September 16 2011 as a guide, **any** of the following factors indicate a need to consider whether representations are appropriate (see Appendix).

- *If it is unclear whether the position [*employment] for which the applicant is applying really does require the disclosure of such information [*our addition]*
- *where the information may indicate a state of affairs that is out of date or no longer true*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*

There **may** be Instances where representations **may** not be needed, such as Impending Prosecutions and disclosure of information that is background to a PNC conviction (MO) – a case-by-case assessment will be necessary in every instance.

The Process

ACPO and DBS agreed a standard process for representations that would be observed by all forces. Full details are available separately but in summary consist of the following:

- Use of the standard communication pack (explanatory guidance, letters)
- Provision of the proposed disclosure text to the applicant *and/or*
- Seeking of clarification for information which may have a bearing on the decision
- Adherence to the agreed time-scales for completion of the process

The communication pack explains the process to the applicant and outlines what is required of them and how they are to respond. Forces may offer representation in writing or in person (offering in representations person is, however, at the discretion of the force and the force will be liable for any associated costs).

If an applicant accepts the offer to make representation, they must make every effort to do so within the time-scales stated within the communication pack.

Consideration of applicant responses should be timely and dependent upon the merit of the response; forces will reach their conclusion, complete the case and return it as usual. All representation documentation is to be stored with the QAF AT3 for the related application.

QAF GD 4 - Representations Guidance

Where does representation fit into the Quality Assurance Framework (QAF)?

Depending on the size and structure of a particular Disclosure Unit, representation considerations may be best made at either Section 3 or Section 4 of the QAF process. Each force should determine the most appropriate stage for themselves; considering the roles, responsibilities and skill-sets of each individual undertaking each stage.

In any case, forces should record their considerations and provide a rationale for why they conclude that representations are needed; equally, forces should record their rationale when arriving at a conclusion that representations are not necessary, particularly if this has been recommended/suggested at an earlier stage in the QAF process.

Representations – a form of disclosure

Forces should regard representations as a form of disclosure and ensure that the same degree of care and risk assessment is applied in order to consider the potential impact that revealing certain information can have.

It is strongly advised that the related QAF MP7b considerations are applied (potential to prejudice a police operation/cause a crime to be committed) and that a rationale addressing these considerations is recorded in the audit trail.

Third Party representations

Other than existing (applicant-related) case law there exists no stated case that can specifically help us with Third Party (TP) representations under Part V disclosure.

You may determine whether or not your force will consider disclosure of TP intelligence (non-conviction information) or limit yourself to TP convictions only – if TP intelligence *is* to be considered for disclosure, it will most likely (perhaps always) result in offering the TP representations on the information concerned. A case-by-case assessment would be applicable for any proposed TP disclosure.

In many cases, the contact details of a TP may not be known to police, making the offering of reps to TPs difficult even when desired. Offering the applicant representations to determine their relationship with a TP, without providing any information at all, may be the most appropriate/safe/reasonable first step.

What should you do with information received via representation?

Any information received via representation should not only be referenced within (and archived with) the QAF audit trail, but should also be considered for adding to the related intelligence record(s) for future reference - particularly if it has direct impact (updates or corrects/changes) the information originally held. Whatever the outcome, it is advisable that you record a rationale that captures your assessment of the representations and the impact that it had on your risk assessment and decision-making.

QAF GD 4 - Representations Guidance

The 'cooling-off' period (the Treacy case judgment)

In certain circumstances, police should offer a reasonable 'cooling-off' period of 7-14 days when still minded to disclose following a receipt of representations.

We have guidance from Home Office Legal Team arising from a JR for an Access Northern Ireland application (processed by PSNI), Neutral Citation No: TRE8602, that concerns withdrawal of an application following representations

The Treacy judgment hinged on the fact that, after offering representations to the applicant, the applicant's solicitor had "...sought confirmation that no information would be disclosed at that stage"; the police, however, disclosed without providing the applicant time to consider matters and, possibly, to conclude that they should withdraw their application.

The Home Office Legal view, as circulated to all forces in November (and again in December) 2012, was that:

"In my view this judgment is only applicable where the clear inference from the applicant when making representations is to the effect that if information is still going to be disclosed as a result of considering (and rejecting) the representations the applicant wishes to consider his next steps (i.e. go ahead or withdraw the application) then this should be accommodated.

It does not go wider than this and does not say that in all cases where there are reps, there should be this extra step built in."

It was the view of Home Office Legal that the applicant (or their representative) must state, within their representations, that they require time to consider how to proceed with their application in the event that police reject their representations. It was clear from reading the JR that inferring such wishes would be sufficient – the applicant does not need this to be 'expressly put' in their representations, only 'tolerably clear'.

QAF GD 4 - Representations Guidance

Appendix

**The Supreme Court, 13 and 14 July 2009,
R (on the application of L) (FC) v Commissioner of Police of the Metropolis,
Judgement given 29 October 2009 stated:**

“46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released. In R (X) v Chief Constable of the West Midlands Police Lord Woolf CJ rejected Wall J’s suggestion that this should be done on the ground that this would impose too heavy an obligation on the Chief Constable [2005] 1 WLR 65, para 37. Here too I think, with respect, that he got the balance wrong. But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable.” Lord Hope

“63. ... the chief officer in any borderline case, before issuing the certificate, [should] give the prospective employee an opportunity to state why the information which the officer proposes disclosing ought not in fact to be disclosed.” Lord Brown

As the Supreme Court itself was unable to be prescriptive, it fell to police to determine, on a case-by-case basis, when representation would be appropriate. LJ Munby shed more light on the matter of when representations may be required, drawing upon cases heard since the Supreme Court in L, 2009.

**The High Court of Justice (Nottingham), 27 and 28 June 2011,
R (on the application of B v Chief Constable of Derbyshire Constabulary,
Judgement given 16 September 2011 stated:**

*“60. ...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, ...”
LJ Munby*

“61. 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