Attorney General's Office

Attorney General's Guidelines on Disclosure

For investigators, prosecutors and defence practitioners

December 2013

Contents

Foreword

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

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

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

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Attorney General

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Introduction

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'). The Guidelines emphasise the importance of prosecution-led disclosure and the importance of applying the CPIA regime in a "thinking manner", tailored, where appropriate, to the type of investigation or prosecution in question.

The Guidelines do not contain the detail of the disclosure regime; they outline the high level principles which should be followed when the disclosure regime is applied.

These Guidelines replace the existing Attorney General's Guidelines on Disclosure issued in 2005 and the Supplementary Guidelines on Digital Material issued in 2011, which is an annex to the general guidelines.

The Guidelines are intended to operate alongside the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases. They are not designed to be an unequivocal statement of the law at any one time, nor are they a substitute for a thorough understanding of the relevant legislation, codes of practice, case law and procedure.

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

The Importance of Disclosure

1. The statutory framework for criminal investigations and disclosure is contained in the Criminal Procedure and Investigations Act 1996 (the CPIA) and the CPIA Code of Practice. The CPIA aims to ensure that criminal investigations are conducted in a fair, objective and thorough manner, and requires prosecutors to disclose to the defence material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. The CPIA requires a timely dialogue between the prosecution, defence and the court to enable the prosecution properly to identify such material.

2. Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed by 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 the accused is

an inseparable part of a fair trial. 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. Properly applied, the CPIA should 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. Consideration of disclosure issues should be an integral part of a good investigation and not something that exists separately.

Disclosure: general principles

4. Disclosure refers to providing the defence with copies of, or access to, any prosecution 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 (section 3 CPIA).

5. Prosecutors will only be expected to anticipate what material might undermine their case or strengthen the defence in the light of information available at the time of the disclosure decision, and they may take into account information revealed during questioning.

6. In deciding whether material satisfies the disclosure test, consideration should be given amongst other things to:

    a. the use that might be made of it in cross-examination;

    b. its capacity to support submissions that could lead to:

        (i) the exclusion of evidence;
        (ii) a stay of proceedings, where the material is required to allow a proper application to be made;
        (iii) a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the ECHR;

    c. its capacity to suggest an explanation or partial explanation of the accused's actions;

    d. the capacity of the material to have a bearing on scientific or medical evidence in the case.

7. 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.

8. 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 4 above.

9. 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. The defence statement is important in identifying the issues in the case and why it is suggested that the material meets the test for disclosure.

10. Disclosure should be conducted in a thinking manner and never be reduced to a box-ticking exercise[1]; at all stages of the process, there should be consideration of **why** the CPIA disclosure regime requires a particular course of action and what should be done to achieve that aim.

11. There will always be a number of participants in prosecutions and investigations: senior investigation officers, disclosure officers, investigation officers, reviewing prosecutors, leading counsel, junior counsel, and sometimes disclosure counsel. Communication within the "prosecution team" is vital to ensure that all matters which could have a bearing on disclosure issues are given sufficient attention by the right person. This is especially so given many reviewing lawyers will be unable to sit behind the trial advocate throughout the trial. In practice, this is likely to mean that a full log of disclosure decisions (with reasons) must be kept on the file and made available as appropriate to the prosecution team.

12. The role of the reviewing lawyer will be central to ensuring all members of the prosecution team are aware of, and carry out, their duties and role(s). Where this involves counsel or more than one reviewing lawyer, this should be done by giving clear written instructions and record keeping.

13. The centrality of the reviewing lawyer does not mean that he or she has to do all the work personally; on the contrary, it will often mean effective delegation. Where the conduct of a prosecution is assigned to more than one prosecutor, steps must be taken to ensure that all involved in the case properly record their decisions. Subsequent prosecutors must be able to see and understand previous disclosure decisions before carrying out their continuous review function.

[1] R v Olu, Wilson and Brooks [2010] EWCA Crim 2975 at paragraph 42

14. 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. This is likely to depend on what the defence chooses to reveal at that stage.

Investigators and Disclosure Officers

15. Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. Investigators and disclosure officers should be familiar with the CPIA Code of Practice, in particular their obligations to **retain** and **record** relevant material, to **review** it and to **reveal** it to the prosecutor.

16. Whether a case is a summary only matter or a long and complex trial on indictment, it is important that investigators and disclosure officers should approach their duties in a "thinking manner" and not as a box ticking exercise. Where necessary, the reviewing lawyer should be consulted. It is important that investigators and disclosure officers are deployed on cases which are commensurate with their training, skills and experience. The conduct of an investigation provides the foundation for the entire case, and may even impact the conduct of linked cases. It is vital that there is always consideration of disclosure matters at the outset of an investigation, regardless of its size.

17. A fair investigation involves the pursuit of material following all reasonable lines of enquiry, whether they point towards or away from the suspect. What is 'reasonable' will depend on the context of the case. A fair investigation does not mean an endless investigation: investigators and disclosure officers must give thought to defining, and thereby limiting, the scope of their investigations, seeking the guidance of the prosecutor where appropriate

18. Where there are a number of disclosure officers assigned to a case, there should 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. Where appropriate, regular case conferences and other meetings should be held to ensure prosecutors are apprised of all relevant developments in investigations. Full records should be kept of such meetings.

19. The CPIA Code of Practice encourages investigators and disclosure officers to seek advice from prosecutors about whether any particular item of material may be relevant to the investigation, and if so, how. Investigators and disclosure officers should record key decisions taken

on these matters and be prepared to account for their actions later. An identical approach is not called for in each and every case.

20. Investigators are to approach their task seeking to establish what actually happened. They are to be fair and objective.

21. Disclosure officers (or their deputies) must inspect, view, listen to or search 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. In some cases, a detailed examination of all material seized may be required. In others, however, a detailed examination of every item of material seized would be virtually impossible: see the **Annex**.

22. Prosecutors only have knowledge of matters which are revealed to them by investigators and disclosure officers, and the schedules are the written means by which that revelation takes place. Whatever the approach taken by investigators or disclosure officers to examining the material gathered or generated in the course of an investigation, it is crucial that disclosure officers record their reasons for a particular approach in writing.

23. In meeting the obligations in paragraph 6.9 and 8.1 of the Code, schedules must be completed in a form which not only reveals sufficient information to the prosecutor, but which demonstrates a transparent and thinking approach to the disclosure exercise, to command the confidence of the defence and the court. Descriptions on non-sensitive schedules must be clear and accurate, and must contain sufficient detail to enable the prosecutor to make an informed decision on disclosure. The use of abbreviations and acronyms can be problematic and lead to difficulties in appreciating the significance of the material.

24. Sensitive schedules must contain sufficiently clear descriptions 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.

25. It may become apparent to an investigator that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was inextricably linked to material that was relevant, is, in fact, incapable of impact. It is not necessary to retain such material, although the investigator should err on the side of caution in reaching that conclusion and should be particularly mindful of the fact that some investigations continue over some time and that what is incapable of impact may change over time. The advice of the prosecutor should be sought where appropriate.

26. 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.

27. 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

28. Prosecutors are responsible for making proper disclosure in consultation with the disclosure officer. The duty of disclosure is a continuing one and disclosure should be kept under review. In addition, prosecutors should ensure that advocates in court are properly instructed as to disclosure issues. 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. There should be no aspects of an investigation about which prosecutors are unable to ask probing questions.

29. 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 to resolve the matter satisfactorily.

30. Where prosecutors have reason to believe that the disclosure officer has not discharged the obligation in paragraph 21 to inspect, view, listen to or search relevant material, they must at once raise the matter with the disclosure officer and request that it be done. Where appropriate the matter should be raised with the officer in the case or a senior officer.

31. 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. If the defence statement does point to other reasonable lines of enquiry, 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.

32. It is vital that prosecutors consider defence statements thoroughly. Prosecutors cannot comment upon, or invite inferences to be drawn

from, failures in defence disclosure otherwise than in accordance with section 11 of the CPIA. 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 CPIA 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.

33. Prosecutors should challenge the lack of, or inadequate, defence statements in writing, copying the document to the court and the defence and seeking directions from the court to require the provision of an adequate statement from the defence.

34. 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.

Prosecution advocates

35. Prosecution advocates should ensure that all material which 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.

36. 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 fully instructed regarding disclosure matters. If as a result the advocate considers that further information or action is required, written advice should promptly be provided setting out the aspects that need clarification or action.

37. The prosecution advocate must keep decisions regarding disclosure under review until the conclusion of the trial, whenever possible in consultation with the reviewing prosecutor. 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 CPIA by disclosing material which does not pass the test for disclosure, set out in paragraph 4, above.

38. There remains no basis in practice or law for counsel to counsel disclosure.

Defence

39. Defence engagement must be early and meaningful for the CPIA regime to function as intended. Defence statements are an integral part of this and are intended to help focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify exculpatory unused material. Defence statements should be drafted in accordance with the relevant provisions of the CPIA.

40. Defence requests for further disclosure should ordinarily only be answered by the prosecution if the request is relevant to and directed to an issue identified in the defence statement. If it is not, then a further or amended defence statement should be sought by the prosecutor and obtained before considering the request for further disclosure.

41. In some cases that involve extensive unused material that is within the knowledge of a defendant, the defence will be expected to provide the prosecution and the court with assistance in identifying material which is suggested to pass the test for disclosure.

42. The prosecution's continuing duty to keep disclosure under review is crucial, and particular attention must be paid to understanding the significance of developments in the case on the unused material and earlier disclosure decisions. Meaningful defence engagement will help the prosecution to keep disclosure under review. The continuing duty of review for prosecutors is less likely to require the disclosure of further material to the defence if the defence have clarified and articulated their case, as required by the CPIA.

43. In the magistrates' courts, where the provision of a defence statement is not mandatory, early identification of the material issues by the defence, whether through a defence statement, case management form or otherwise, will help the prosecution to focus its preparation of the case and allow any defence disclosure queries to be dealt with promptly and accurately.

Magistrates' Courts (including the Youth Court)

44. The majority of criminal cases are heard in the magistrates' court. The requirement for the prosecution to provide initial disclosure only arises after a not guilty plea has been entered but prosecutors should be alert to the possibility that material may exist which should be disclosed to the defendant prior to the CPIA requirements applying to the case[2].

[2] See for example *R v DPP ex parte Lee [1999] 2 All ER 737*

45. Where a not guilty plea is entered in the magistrates' court, prosecutors should ensure that any issues of dispute which are raised are noted on the file. They should also seek to obtain a copy of any Magistrates' Court Trial Preparation Form. Consideration of the issues raised in court and on the Trial Preparation Form will assist in deciding what material undermines the prosecution case or assists the defendant.

46. Where a matter is set down for trial in the magistrates' court, prosecutors should ensure that the investigator is requested to supply any outstanding disclosure schedules as a matter of urgency. Prosecutors should serve initial disclosure in sufficient time to ensure that the trial date is effective.

47. There is no requirement for a defence statement to be served in the magistrates' court but it should be noted that if none is given the court has no power to hear an application for further prosecution disclosure under section 8 of the CPIA and the Criminal Procedure Rules.

Cases in the Crown Court

48. The exponential increase in the use of technology in society means that many routine Crown Court cases are increasingly likely to have to engage with digital material of some form. It is not only in large and complex cases that there may be large quantities of such material. Where such investigations involve digital material, it will be virtually impossible for investigators (or prosecutors) to examine every item of such material individually and there should be no expectation that such material will be so examined. Having consulted with the prosecution as appropriate, disclosure officers should determine what their approach should be to the examination of the material. Investigators or disclosure officers should decide how best to pursue a reasonable line of enquiry in relation to the relevant digital material, and ensure that the extent and manner of the examination are commensurate with the issues in the case.

49. Consideration should be given to any local or national agreements in relation to disclosure in 'Early Guilty Plea Scheme' cases.

Large and complex cases in the Crown Court

50. The particular challenges presented by large and complex criminal prosecutions require an approach to disclosure which is specifically tailored to the needs of such cases. In these cases more than any other is the need for careful thought to be given to prosecution-led disclosure matters from the very earliest stage. It is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation, which must continue throughout all aspects of the case preparation.

Disclosure Management Documents

51. Accordingly, investigations and prosecutions of large and complex cases should be carefully defined and accompanied by a clear investigation and prosecution strategy. The approach to disclosure in such cases should be outlined in a document which should be served on the defence and the court at an early stage. Such documents, sometimes known as Disclosure Management Documents, will require careful preparation and presentation, tailored to the individual case. They may include:

    a. Where prosecutors and investigators operate in an integrated office, an explanation as to how the disclosure responsibilities have been managed;

    b. A brief summary of the prosecution case and a statement outlining how the prosecutor's general approach will comply with the CPIA regime, these Guidelines and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases;

    c. The prosecutor's understanding of the defence case, including information revealed during interview;

    d. An outline of the prosecution's general approach to disclosure, which may include detail relating to:

        (i) Digital material: explaining the method and extent of examination, in accordance with the **Annex** to these Guidelines;

        (ii) Video footage;

        (iii) Linked investigations: explaining the nexus between investigations, any memoranda of understanding or disclosure agreements between investigators;

        (iv) Third party and foreign material, including steps taken to obtain the material;

        (v) Reasonable lines of enquiry: a summary of the lines pursued, particularly those that point away from the suspect, or which may assist the defence;

        (vi) Credibility of a witness: confirmation that witness checks, including those of professional witnesses have, or will be, carried out.

52. Thereafter the prosecution should follow the Disclosure Management Document. They are living documents and should be amended in light of developments in the case; they should be kept up to date as the case progresses. Their use will assist the court in its own case management and will enable the defence to engage from an early stage with the prosecution's proposed approach to disclosure.

Material not held by the prosecution

Involvement of other agencies: material held by other Government departments and third parties

53. 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.

54. 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.

55. 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. The final decision on any further steps will be for the prosecutor.

Third party material: other domestic bodies

56. 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, investigators, disclosure officers and prosecutors should take reasonable steps to identify, secure and consider material held by any third party where it appears to the investigator, disclosure officer or prosecutor that (a) such material exists and (b) that it may be relevant to an issue in the case.

57. 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 are satisfied (or any other relevant power), 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.

58. Sometimes, for example through multi-agency working arrangements, investigators, disclosure officers or prosecutors may become aware of the content or nature of material held by a third party. Consultation with the relevant third party must always take place before disclosure is made; there may be public interest reasons to apply to the Court for an order for non-disclosure in the public interest, in accordance with the procedure outlined in paragraph 65 and following.

International matters

59. The obligations under the CPIA Code to pursue all reasonable lines of enquiry apply to material held overseas.

60. Where it appears that there is relevant material, the prosecutor must take reasonable steps to obtain it, either informally or making use of the powers contained in the Crime (International Co-operation) Act 2003 and any EU and international conventions. See CPS Guidance 'Obtaining Evidence and Information from Abroad'.

61. There may be cases where a foreign state or a foreign court refuses to make the material available to the investigator or prosecutor. There may be other cases where the foreign state, though willing to show the material to investigators, will not allow the material to be copied or otherwise made available and the courts of the foreign state will not order its provision.

62. It is for these reasons that there is no absolute duty on the prosecutor to disclose relevant material held overseas by entities not subject to the jurisdiction of the courts in England and Wales. However consideration should be given to whether the type of material believed to be held can be provided to the defence.

63. The obligation on the investigator and prosecutor under the CPIA is to take reasonable steps. Where investigators are allowed to examine files of a foreign state but are not allowed to take copies or notes or list the documents held, there is no breach by the prosecution in its duty of disclosure by reason of its failure to obtain such material, provided reasonable steps have been taken to try and obtain the material. Prosecutors have a margin of consideration as to what steps are appropriate in the particular case but prosecutors must be alive to their duties and there may be some circumstances where these duties cannot be met. Whether the prosecutor has taken reasonable steps is for the court to determine in each case if the matter is raised.

64. In these circumstances it is important that the position is clearly set out in writing so that the court and the defence know what the position is. Investigators and prosecutors must record and explain the situation and set out, insofar as they are permitted by the foreign state, such information as they can and the steps they have taken.

Applications for non-disclosure in the public interest

65. The CPIA allows prosecutors to apply to the court for an order to withhold material which would otherwise fall to be disclosed if disclosure would give rise to a real risk of serious prejudice to an important public interest. Before making such an application, 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 there is no need to bring it to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on whether material in its possession should be disclosed.

66. 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 investigator must be frank with the prosecutor about the full extent of the sensitive material. Prior to or at the hearing, the court must be provided with full and accurate information about the material

67. The prosecutor (or representative) and/or investigator should attend such applications. Section 16 of the CPIA allows a person claiming to have an interest in the sensitive material to apply to the court for the opportunity to be heard at the application.

68. The principles set out at paragraph 36 of *R v H & C* [2004] 2 Cr. App. R. 10 [2004] UKHL 3 should be applied rigorously, firstly by the prosecutor and then by the court considering the material. It is essential that these principles are scrupulously adhered to, to ensure that the procedure for examination of material in the absence of the accused is compliant with Article 6.

69. If prosecutors conclude that a fair trial cannot take place because material which satisfies the test for disclosure cannot be disclosed, and that this cannot be remedied by the above procedure; how the case is presented; or by any other means, they should not continue with the case.

Other disclosure

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

Material relevant to sentence

71. 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

72. Where, after the conclusion of the proceedings, material comes to light, that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material.

Applicability of these Guidelines

73. These Guidelines shall have immediate effect.

Annex: Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material (2011)

A1. The Guidelines are intended to supplement the Attorney General's Guidelines on Disclosure.

A2. As a result of the number of cases now involving digitally stored material and the scale of the digital material that may be involved, more detailed guidance is considered to be needed. The objective of these Guidelines is to set out how material satisfying the tests for disclosure can best be identified and disclosed to the defence without imposing unrealistic or disproportionate demands on the investigator and prosecutor.

A3. The approach set out in these Guidelines is in line with existing best practice, in that:

a. Investigating and prosecuting agencies, especially in large and complex cases, will apply their respective case management and disclosure strategies and policies and be transparent with the defence and the courts about how the prosecution has approached complying with its disclosure obligations in the context of the individual case; and,

b. The defence will be expected to play their part in defining the real issues in the case. In this context, the defence will be invited to participate in defining the scope of the reasonable searches that may be made of digitally stored material by the investigator to identify material that might reasonably be expected to undermine the prosecution case or assist the defence.

A4. Only if this approach is followed can the courts be in a position to use their case management powers effectively and to determine applications for disclosure fairly.

A5. The Attorney General's Guidelines are not detailed operational guidelines. They are intended to set out a common approach to be adopted in the context of digitally stored material.

Types of digital material

A6. Digital material falls into two categories: the first category is material which is created natively within an electronic environment (e.g. email, office files, system files, digital photographs, audio etc.); the second category is material which has been digitised from an analogue form (e.g. scanned copy of a document, scanned photograph, a faxed document). Irrespective of the way in which technology changes, the categorisation of digital material will remain the same.

A7. Digital material is usually held on one of the three types of media. Optical media (e.g. CD, DVD, Blu-ray) and Solid-State media (e.g. removable

memory cards, solid state music players or mobile devices etc.) cater for usually lower volume storage. Magnetic media (e.g. disk drives and back up tapes) usually cater for high volume storage.

General principles for investigators

A8. The general principles[3] to be followed by investigators in handling and examining digital material are:

a. No action taken by investigators or their agents should change data held on a computer or storage media which may subsequently be relied upon in court;

b. In circumstances where a person finds it necessary to access original data held on computer or storage media, that person must be competent to do so and be able to give evidence explaining the relevance and implications of their actions;

c. An audit trail or other record of all processes applied to computer-based electronic evidence should be created and preserved. An independent third party should be able to examine those processes (see further the sections headed Record keeping and Scheduling below); and,

d. The person in charge of the investigation has overall responsibility for ensuring that the law and these principles are followed.

A9. Where an investigator has reasonable grounds for believing that digital material may contain material subject to legal professional privilege, very strong legal constraints apply. No digital material may be seized which an investigator has reasonable grounds for believing to be subject to legal privilege, other than where the provisions of the Criminal Justice and Police Act 2001 apply. Strict controls need to be applied where privileged material is seized. See the more detailed section on Legal Professional Privilege starting at paragraph A28, below.

Seizure, relevance and retention

A10. The legal obligations are to be found in a combination of the Police and Criminal Evidence Act 1984 (PACE), the Criminal Justice and Police Act 2001 (CJPA 2001) and the Criminal Procedure and Investigations Act 1996 (the CPIA 1996).

A11. These Guidelines also apply to digital material seized or imaged under other statutory provisions. For example, the Serious Fraud Office has distinct powers of seizure under warrant obtained under section 2(4) of the Criminal Justice Act 1987. In cases concerning indecent images of

[3] Based on: Association of Chief Police Officers: Good Practice Guide for Computer Based Electronic Evidence Version 0.1.4

children and obscene material, special provisions apply to the handling, storage and copying of such material. Practitioners should refer to specific guidance on the application of those provisions.

Seizure

A12. Before searching a suspect's premises where digital evidence is likely to be found, consideration must be given to what sort of evidence is likely to be found and in what volume, whether it is likely to be possible to view and copy, if relevant, the material at the location (it is not uncommon with the advent of cloud computing for digital material to be hosted by a third party) and to what should be seized. Business and commercial premises will often have very substantial amounts of digital material stored on computers and other media. Investigators will need to consider the practicalities of seizing computer hard drives and other media, the effect this may have on the business and, where it is not feasible to obtain an image of digital material, the likely timescale for returning seized items.

A13. In deciding whether to seize and retain digital material it is important that the investigator either complies with the procedure under the relevant statutory authority, relying either on statutory powers or a search warrant, or obtains the owner's consent. In particular, investigators need to be aware of the constraints applying to legally privileged material.

A14. A computer hard drive or single item of media, such as a back up tape, is a single storage entity. This means that if any digital material found on the hard drive or other media can lawfully be seized the computer hard drive or single item of media may, if appropriate, be seized or imaged. In some circumstances investigators may wish to image specific folders, files or categories of data where it is feasible to do so without seizing the hard drive or other media, or instead of taking an image of all data on the hard drive or other media. In practice, the configuration of most systems means that data may be contained across a number of hard drives and more than one hard drive or item of media may be required in order to access the information sought.

A15. Digital material must not be seized if an investigator has reasonable grounds for believing it is subject to legal professional privilege, other than where sections 50 or 51 of the CJPA 2001 apply. If such material is seized it must be isolated from other seized material and any other investigation material in the possession of the investigating authority.

The Police and Criminal Evidence Act 1984

A16. PACE 1984 provides powers to seize and retain anything for which the search has been authorised or after arrest, other than items attracting legal professional privilege.[4] In addition, there is a general power to seize

[4] By warrant under section 8 and Schedule 1 and section 18 of PACE

anything which is on the premises if there are reasonable grounds to believe that it has been obtained in the commission of an offence, or that it is evidence and that it is necessary to seize it to prevent it being concealed, lost, altered or destroyed.[5] There is another related power to require information which is stored in any electronic form and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form.[6]

A17. An image (a forensically sound copy) of the digital material may be taken at the location of the search. Where the investigator makes an image of the digital material at the location, the original need not be seized. Alternatively, when originals are taken, investigators must be prepared to copy or image the material for the owners when reasonably practicable in accordance with PACE 1984 Code B 7.17.

A18. Where it is not possible or reasonably practicable to image the computer or hard drive, it will need to be removed from the location or premises for examination elsewhere. This allows the investigator to seize and sift material for the purpose of identifying that which meets the tests for retention in accordance with the 1984 PACE.[7]

The Criminal Justice and Police Act 2001

A19. The additional powers of seizure in sections 50 and 51 of the CJPA 2001 Act only extend the scope of existing powers of search and seizure under the PACE and other specified statutory authorities[8] where the relevant conditions and circumstances apply.

A20. Investigators must be careful only to exercise powers under the CJPA 2001 when it is necessary and not to remove any more material than is justified. The removal of large volumes of material, much of which may not ultimately be retainable, may have serious consequences for the owner of the material, particularly when they are involved in business or other commercial activities.

A21. A written notice must be given to the occupier of the premises where items are seized under sections 50 and 51.[9]

A22. Until material seized under the CJPA 2001 has been examined, it must be kept securely and separately from any material seized under other powers. Any such material must be examined as soon as reasonably practicable to determine which elements may be retained and which should be returned. Regard must be had to the desirability of allowing the

[5] Section 19 of PACE
[6] Section 20 of PACE
[7] Special provision exists for investigations conducted by Her Majesty's Revenue and Customs in the application of their powers under PACE– see section 114(2)(b) – and the CJPA 2001
[8] Schedule 1 of the CJPA 2001
[9] Section 52 of the CJPA 2001

person from whom the property was seized - or a person with an interest in the property - an opportunity of being present or represented at the examination.

Retention

A23. Where material is seized under the powers conferred by PACE the duty to retain it under the Code of Practice issued under the CPIA is subject to the provisions on retention under section 22 of PACE. Material seized under sections 50 and 51 of the CJPA 2001 may be retained or returned in accordance with sections 53-58 of that Act.

A24. Retention is limited to evidence and relevant material (as defined in the Code of Practice issued under the CPIA). Where either evidence or relevant material is inextricably linked to non-relevant material which is not reasonably practicable to separate, that material can also be retained. Inextricably linked material is material that is not reasonably practicable to separate from other linked material without prejudicing the use of that other material in any investigation or proceedings.

A25. However, inextricably linked material must not be examined, imaged, copied or used for any purpose other than for providing the source of or the integrity of the linked material.

A26. There are four categories of material that may be retained:

a. Material that is evidence or potential evidence in the case. Where material is retained for evidential purposes there will be a strong argument that the whole thing (or an authenticated image or copy) should be retained for the purpose of proving provenance and continuity;

b. Where evidential material has been retained, inextricably linked non-relevant material which is not reasonably practicable to separate can also be retained (PACE Code B paragraph 7);

c. An investigator should retain material that is relevant to the investigation and required to be scheduled as unused material. This is broader than but includes the duty to retain material which may satisfy the test for prosecution disclosure. The general duty to retain relevant material is set out in the CPIA Code at paragraph 5; or,

d. Material which is inextricably linked to relevant unused material which of itself may not be relevant material. Such material should be retained (PACE Code B paragraph 7).

A27. The balance of any digital material should be returned in accordance with sections 53-55 of the CJPA 2001 if seized under that Act.

Legal professional privilege (LPP)

A28. No digital material may be seized which an investigator has reasonable grounds for believing to be subject to LPP, other than under the additional powers of seizure in the CJPA 2001.

A29. The CJPA 2001 enables an investigator to seize relevant items which contain LPP material where it is not reasonably practicable on the search premises to separate LPP material from non-LPP material.

A30. Where LPP material or material suspected of containing LPP is seized, it must be isolated from the other material which has been seized in the investigation. The mechanics of securing property vary according to the circumstances; "bagging up", i.e. placing materials in sealed bags or containers, and strict subsequent control of access, is the appropriate procedure in many cases.

A31. Where material has been identified as potentially containing LPP it must be reviewed by a lawyer independent of the prosecuting authority. No member of the investigative or prosecution team involved in either the current investigation or, if the LPP material relates to other criminal proceedings, in those proceedings should have sight of or access to the LPP material.

A32. If the material is voluminous, search terms or other filters may have to be used to identify the LPP material. If so this will also have to be done by someone independent and not connected with the investigation.

A33. It is essential that anyone dealing with LPP material maintains proper records showing the way in which the material has been handled and those who have had access to it as well as decisions taken in relation to that material.

A34. LPP material can only be retained in specific circumstances in accordance with section 54 of the CJPA 2001 i.e. where the property which comprises the LPP material has been lawfully seized and it is not reasonably practicable for the item to be separated from the rest of the property without prejudicing the use of the rest of the property. LPP material which cannot be retained must be returned as soon as practicable after the seizure without waiting for the whole examination of the seized material.

Excluded and special procedure material

A35. Similar principles to those that apply to LPP material apply to excluded or special procedure material, as set out in section 55 of the CJPA 2001.[10]

[10] Special provision exists for investigations conducted by Her Majesty's Revenue and Customs in the application of their powers under PACE – see section 114(2)(b) – and the CJPA

Encryption

A36. Part III of the Regulation of Investigatory Powers Act 2000 (RIPA) and the Investigation of Protected Electronic Information Code of Practice govern encryption. See the CPS's Guidance RIPA Part III.

A37. RIPA enables specified law enforcement agencies to compel individuals or companies to provide passwords or encryption keys for the purpose of rendering protected material readable. Failure to comply with RIPA Part III orders is a criminal offence. The Code of Practice provides guidance when exercising powers under RIPA, to require disclosure of protected electronic data in an intelligible form or to acquire the means by which protected electronic data may be accessed or put in an intelligible form.

Sifting/examination

A38. In complying with its duty of disclosure, the prosecution should follow the procedure as outlined below.

A39. Where digital material is examined, the extent and manner of inspecting, viewing or listening will depend on the nature of the material and its form.

A40. It is important for investigators and prosecutors to remember that the duty under the CPIA Code of Practice is to "pursue all reasonable lines of enquiry including those that point away from the suspect". Lines of enquiry, of whatever kind, should be pursued only if they are reasonable in the context of the individual case. It is not the duty of the prosecution to comb through all the material in its possession - e.g. every word or byte of computer material - on the look out for anything which might conceivably or speculatively assist the defence. The duty of the prosecution is to disclose material which might reasonably be considered capable of undermining its case or assisting the case for the accused which they become aware of, or to which their attention is drawn.

A41. In some cases the sift may be conducted by an investigator/disclosure officer manually assessing the content of the computer or other digital material from its directory and determining which files are relevant and should be retained for evidence or unused material.

A42. In other cases such an approach may not be feasible. Where there is an enormous volume of material it is perfectly proper for the investigator/disclosure officer to search it by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers.

A43. In cases involving very large quantities of data, the person in charge of the investigation will develop a strategy setting out how the material should be analysed or searched to identify categories of data. Where search tools are used to examine digital material it will usually be

appropriate to provide the accused and his or her legal representative with a copy of reasonable search terms used, or to be used, and invite them to suggest any further reasonable search terms. If search terms are suggested which the investigator or prosecutor believes will not be productive - for example because of the use of common words that are likely to identify a mass of irrelevant material, the investigator or prosecutor is entitled to open a dialogue with the defence representative with a view to agreeing sensible refinements. The purpose of this dialogue is to ensure that reasonable and proportionate searches can be carried out.

A44. It may be necessary to carry out sampling and searches on more than one occasion, especially as there is a duty on the prosecutor to keep duties of disclosure under review. To comply with this duty it may be appropriate (and should be considered) where further evidence or unused material is obtained in the course of the investigation; the defence statement is served on the prosecutor; the defendant makes an application under section 8 of the CPIA for disclosure; or the defendant requests that further sampling or searches be carried out (provided it is a reasonable line of enquiry).

Record keeping

A45. A record or log must be made of all digital material seized or imaged and subsequently retained as relevant to the investigation.

A46. In cases involving very large quantities of data where the person in charge of the investigation has developed a strategy setting out how the material should be analysed or searched to identify categories of data, a record should be made of the strategy and the analytical techniques used to search the data. The record should include details of the person who has carried out the process and the date and time it was carried out. In such cases the strategy should record the reasons why certain categories have been searched for (such as names, companies, dates etc).

A47. In any case it is important that any searching or analytical processing of digital material, as well as the data identified by that process, is properly recorded. So far as practicable, what is required is a record of the terms of the searches or processing that has been carried out. This means that in principle the following details may be recorded:

a. A record of all searches carried out, including the date of each search and the person(s) who conducted it;

b. A record of all search words or terms used on each search. However where it is impracticable to record each word or terms (such as where Boolean searches or search strings or conceptual searches are used) it will usually be sufficient to record each broad category of search;

c. A log of the key judgements made while refining the search strategy in the light of what is found, or deciding not to carry out further searches; and,

d. Where material relating to a "hit" is not examined, the decision not to examine should be explained in the record of examination or in a statement. For instance, a large number of "hits" may be obtained in relation to a particular search word or term, but material relating to the "hits" is not examined because they do not appear to be relevant to the investigation. Any subsequent refinement of the search terms and further hits should also be noted and explained as above.

A48. Just as it is not necessary for the investigator or prosecutor to produce records of every search made of hard copy material, it is not necessary to produce records of what may be many hundreds of searches or analyses that have been carried out on digitally stored material, simply to demonstrate that these have been done. It should be sufficient for the prosecution to explain how the disclosure exercise has been approached and to give the accused or suspect's legal representative an opportunity to participate in defining the reasonable searches to be made, as described in the section on sifting/examination.

Scheduling

A49. The disclosure officer should ensure that scheduling of relevant material is carried out in accordance with the CPIA Code of Practice. This requires each item of unused material to be listed separately on the unused material schedule and numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed (see paragraph A24).

A50. In some enquiries it may not be practicable to list each item of material separately. If so, these may be listed in a block and described by quantity and generic title. Even if the material is listed in a block, the search terms used and any items of material which might satisfy the disclosure test are listed and described separately. In practical terms this will mean, where appropriate, cross referencing the schedules to your disclosure management document.

A51. The remainder of any computer hard drive/media containing material which is not responsive to search terms or other analytical technique or not identified by any "hits", and material identified by "hits" but not examined, is unused material and should be recorded (if appropriate by a generic description) and retained.

A52. Where continuation sheets of the unused material schedule are used, or additional schedules are sent subsequently, the item numbering must be, where possible, sequential to all other items on earlier schedules.

Third party material

A53. Third party material is material held by a person, organisation, or government department other than the investigator and prosecutor within the UK or outside the UK.

Within the UK

A54. The CPIA Code and the AG's Guidelines make clear the obligation on the prosecution to pursue all reasonable lines of enquiry in relation to material held by third parties within the UK.

A55. If as a result of the duty to pursue all reasonable lines of enquiry, the investigator or prosecutor obtains or receives the material from the third party, then it must be dealt with in accordance with the CPIA i.e. the prosecutor must disclose material if it meets the disclosure tests, subject to any public interest immunity claim. The person who has an interest in the material (the third party) may make representations to the court concerning public interest immunity (see section 16 of the CPIA 1996).

A56. Material not in the possession of an investigator or prosecutor falls outside the CPIA. In such cases the Attorney General's Guidelines on Disclosure prescribe the approach to be taken to disclosure of material held by third parties as does the judicial disclosure protocol.

Annexed to the revised Attorney General's Guidelines on Disclosure December 2013