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Non-Disclosure Applications Guidance

March 2024 (v2.0)

Document History

Document version	Date of Issue	Revision description
1.0	03.10.2019	This guidance was created as part of the Parole Board's project to launch fully revised and updated member guidance.
2.0	13.03.2024	Revised to provide more comprehensive guidance for Parole Board members. The guidance was updated to reflect amendments to the Parole Board Rules 2019. Additional sections added on the following: • Glossary of terms • Fairness to the prisoner • Key principles • Special Advocates • The first and second stage decision • Issues that may arise • Process map

Contents

1. Introduction

1.1 This guidance is to support Parole Board members when considering and making decisions on **non-disclosure applications**. A non-disclosure application must be submitted to the Parole Board via The Public Protection Casework Section (PPCS) (on behalf of the Secretary of State)[1]. Such an application seeks a direction that information or a report should be withheld from the prisoner (and in exceptional cases, from their representative).

1.2 The guidance explains the legal principles and correct procedures for dealing with non-disclosure applications and reads as a step-by-step guide.

1.3 There are, in essence, two stages to considering non-disclosure applications:

- **The first stage** is a decision by the panel member whether to grant the application for non-disclosure. The non-disclosure application will be considered by an MCA member[2], a duty member, or an oral hearing panel chair.
- **The second stage** is an appeal against that decision[3]. Under rule 17 of the Parole Board Rules 2019 (as amended) ("the Rules"), the person who decides the appeal is the Board Chair. In practice, the Board Chair delegates the decision-making to a cohort of appeal members (consisting of a small number of judicial members of the Board).

1.4 The approach to considering non-disclosure applications is generally the same whichever stage the case is at, so the term "panel member" has been used in this guidance to cover all types of members. Where there are differences in process, these have been highlighted.

1.5 Whilst it is best if a non-disclosure application can be dealt with at an early stage, this guidance also contains information on how to respond at later stages, for example on the day of the oral hearing when non-disclosure issues can arise unexpectedly[4].

1.6 Rule 17 is set out in full at Annex A. A process map setting out the non-disclosure processes can be found at Annex B.

1.7 In this guidance the following terms are used:

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[1] Although the Parole Board Rules 2019 (as amended) allows for an authorised third party to make an application for non-disclosure, at the time of writing, no third party has yet been authorised to make a non-disclosure application directly to the Board, therefore this guidance refers throughout to the applicant being the Secretary of State. Please see paragraphs 3.2 and 3.3 of the Handling Sensitive Information Policy Framework for more information.

[2] Where there's a multi-member panel, the MCA Panel Chair will be responsible for reviewing the non-disclosure application.

[3] Where one of the parties has appealed the decision, or where there is an automatic appeal due to the prisoner being unrepresented. See section 11 for more information on the second stage.

[4] Please refer to section 4 for guidance on applications submitted less than eight weeks before the date allocated for an oral hearing. Please refer to paragraphs 12.6 onwards for guidance on how to handle non-disclosure issues which arise on the day of the oral hearing.

Material – as set out in rule 17(1), this refers to information or any report which is sought to be withheld from the prisoner.

Open - Open material is that which can be disclosed to the prisoner without giving rise to any adverse effect on national security, the prevention of disorder or crime and/or the health or welfare of the prisoner or any other person[5]. Open material is added to the dossier, seen by both parties, and can be discussed openly at the hearing[6]. It also includes a gist or redacted document (see below). The majority, if not all, of the information seen by a panel will be open material.

Withheld – This is shorthand for describing material which is withheld from the prisoner and/or their representative – as opposed to 'open', which describes material that is available for all. Withheld material may be classified or otherwise sensitive material which the information owner (in this case the Secretary of State, with the permission of any other party who was the original information owner) wishes to rely on or for the panel to consider in the proceedings but objects to disclosing to the prisoner or their representative on the basis of national security, the prevention of disorder or crime and/or the health or welfare of the prisoner or any other person.

Closed – This is shorthand for describing material that is, exceptionally, withheld from the prisoner and their representatives. This will usually be on grounds of national security. In some cases, it may also be on grounds of the prevention of disorder or crime and/or the health or welfare of the prisoner or any other person. Closed material will carry a security classification of SECRET or higher. It must be kept in secure conditions and can only be considered within those conditions by those with the appropriate level of security clearance.

Gist – This describes a summary of the material, which is the subject of the application, and is intended to be disclosed to the prisoner and their representative. The aim of the gist is to provide the prisoner with sufficient information to enable them to respond to it and to refute it where that is appropriate. An alternative to a gist is a ***redacted*** document, which is a copy of the original document with sensitive information obscured.

Special Advocate – A Special Advocate is a lawyer who has been security cleared to look at Closed material on behalf of a prisoner. They will act in the prisoner's best interests but cannot share the information with them.

'In camera' – Legal term meaning 'in private' (derives from Latin 'in a chamber').

Recusal - to excuse oneself from a case because of a potential conflict of interest or lack of impartiality.

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[5] Witholding material under rule 17 can only take place where certain conditions are met. Please see paragraph 2.3 below.

[6] Where an observer is attending, consideration may need to be given to holding some discussions in closed session without the observer present. Please see the Observer guidance for more information.

2. Legislative Framework

2.1 The overarching principle is that all material to be considered by a Parole Board panel should normally **be disclosed to the prisoner.** This derives from the common law requirement for a fair and impartial review. The general rule is that a party to legal proceedings (in this case, the prisoner) has a right to know what the case against them is so that they can properly respond to it. This in turn means that they normally have the right to see any material which is going to be taken into account by the panel. Where material is withheld from them, they will need to know enough about that material so that they can respond to it. Where material is withheld, this can usually be achieved with a combination of a gist (or redacted version) and allowing representatives to see the material upon receipt of an undertaking, as is set out below.

2.2 This is, however, a qualified right. There are some exceptional circumstances in which material may lawfully be withheld from the prisoner (and in even rarer cases from their representative) but still considered by the panel. Rule 17 of the Rules sets out the procedure for withholding material from the prisoner or from both the prisoner and their representative where the conditions specified by the rule are met (see below).

2.3 Under rule **17(1)** the Secretary of State may apply for any information or report ("the material") to be withheld from the prisoner or from both the prisoner and their representative. Non-disclosure of material to the prisoner is only permissible where the following conditions are met:

(1) Disclosure of the material would adversely affect any or all of the following: national security, the prevention of disorder or crime or the health and welfare of the prisoner or any other person; **and**

(2) Withholding the material is a necessary and proportionate measure in the circumstances of the case.

Both of these requirements have to be met for non-disclosure to be lawful.

2.4 If only the first of the above two conditions is met, it would not be lawful to withhold the material. Withholding it could not be necessary and proportionate if its effect would be to deprive the prisoner of a fair review. However, there are a number of ways in which fairness to the prisoner can be met. Further detail is provided in this guidance and examples are provided at paragraph 2.7 below.

2.5 If, in the above circumstances, the non-disclosure application is refused by the panel member or, on appeal, by an appeal member, that does not necessarily mean that one of the 'adverse effects' set out in rule 17(1) might come about. The Secretary of State has the power under rule 17(15) to respond to the Parole Board's direction for disclosure by withdrawing the material from the Board's consideration. The Secretary of State may do that if they consider that the disclosure would have one of the 'adverse effects' specified in the first limb of rule 17(1).

2.6 The decision whether to direct non-disclosure does not have to be 'all or nothing'. Rule 17(5)(c) allows the panel member to make a direction for a

gist of the material, or a redacted version of it, to be disclosed to the prisoner instead of the full material. The gist or redacted version must give the prisoner sufficient information to allow them to effectively respond to what is being said so that they can still have a fair hearing whilst the 'adverse effects' of a full disclosure are avoided.

2.7 Fairness to the prisoner can be met in a number of ways, by:

1. Disclosure of the material.
2. Disclosure of a gist or redacted version which contains sufficient detail to allow them to respond to the case against them.
3. Disclosure of the material to their representative on undertaking (thus allowing submissions to be made on the prisoner's behalf).
4. A combination of 2 and 3.
5. In **very rare** cases, the appointment of a Special Advocate (see paragraphs 8.1-8.2 below).

2.8 In deciding whether the gist or redacted version contains sufficient detail, the panel member will need to have regard to what is in the open dossier[7] or what is otherwise available to the prisoner (including anything which may reasonably be assumed to be in their knowledge). The panel member will need to bear in mind that a prisoner must know enough about what is in the withheld material so that they can respond to it. Where material is withheld, this can usually be achieved with a combination of a gist and allowing representatives to see the material.

2.9 The panel member may offer a preliminary view about what could be provided in the gist and/or what should be redacted, as part of a direction for an updated gist. Alternatively, they may choose to do so in their decision, which will then need to set out what must be disclosed by way of a gist (see paragraphs 6.8-6.18). The Rules also provide for some or all of material withheld from the prisoner to be disclosed to their representative provided they have given an undertaking not to disclose it to the prisoner or anyone else without the permission of the panel member (see paragraphs 7.1-7.7 below).

3. The Application

3.1 While there are two parties to parole proceedings (the Secretary of State and the prisoner), **an application for non-disclosure of material can only come from the Secretary of State (rule 17(1)).[8]** Even if third parties such as the police or other information owners are involved, the application for non-disclosure is made by the Secretary of State. The police and other information owners do not have the ability to withdraw material, nor can they place conditions on its use. If they are unwilling to co-operate with the process, it is the Secretary of State's responsibility to resolve the matter.

[7] Open dossier refers to the dossier containing open material. The open dossier is always shared with the prisoner and their representative.

[8] Although rule 17 refers to authorised third parties, no third party has been authorised to date. So only the Secretary of State can make an application under rule 17.

3.2 At this stage of the process, the prisoner (and their representative, if they have one) are not notified about the material and will be unaware that an application has been made.

3.3 The application made by the Secretary of State must be accompanied by the material in full and set out the reasons why it is being proposed that the material should be withheld. It must detail why non-disclosure is necessary and proportionate and what the 'adverse effects' would be, should it be disclosed. It may also be accompanied by a proposed gist or a redacted version of the material.

3.4 The HMPPS *Handling of Sensitive Information, Including Information Provided by Victims, For the Purpose of Parole Board Reviews Policy Framework* sets out the arrangements for the handling and sharing of sensitive information, including the making of a non-disclosure application. The procedures laid out within the Policy Framework must be followed by the Probation Service, Youth Offending Teams, the Prison Service and PPCS for all parole-eligible and recalled prisoners. The Policy Framework aims to ensure that there is an effective process in place which:

- ensures all known risk-related information considered relevant by HMPPS is shared with the Parole Board[9];
- ensures applications to withhold information from the prisoner and the prisoner's representative (where applicable) are submitted to the Parole Board in line with the relevant provisions in the Parole Board Rules;
- ensures sufficient safeguards are in place to protect the source and integrity of the information;
- ensures all HMPPS staff are aware of how to deal with cases in which a victim has included risk information, which is unknown to the Probation Service, in their victim personal statement (VPS) to the Parole Board;
- provides clear procedures and processes for PPCS to make applications to the Parole Board to withhold the VPS from the prisoner where it is considered necessary to do so; and
- allows security information, such as that which is held in prisons and risk information from MAPPA meetings, to be appropriately shared with the Parole Board.

3.5 Where the material that is the subject of the application is a statement made (or information otherwise provided) by a victim, there will also be an additional cover form for the victim's statement, which should include the wishes of the victim in relation to disclosure.

3.6 Where an application seems to have come directly to the Parole Board from someone other than PPCS, the Parole Board Case Manager must contact PPCS

[9] Under rule 16 (3) Parole Board Rules 2019 (as amended), subject to rule 17, the Secretary of State must serve on the Board, the prisoner and the prisoner's representative (if they are represented) (a) the information specified in the Schedule to the Parole Board Rules; (b) "Any further information which the Secretary of State considers relevant to the case" and (c) "where a case relates to a request for advice, any information which the Secretary of State considers relevant to the case".

to ask for the application to be submitted via the correct procedure[10]. **Until the correct procedure has been followed, the Board should take no action on the request. Additionally, the panel member should not read the application or the accompanying material as this may result in them having to recuse themselves from the panel** (see section 9 on recusal). If this happens at the MCA stage, the MCA member may need to adjourn the case until the position has been clarified.

3.7 Non-disclosure applications may be made for a variety of reasons, but they most commonly fall into three categories:

- Victim personal statements.
- Prison/police intelligence that is sensitive but not classified as SECRET.
- Closed information classified as SECRET or above.

3.8 Examples of circumstances in which applications may be made include (this is not intended to be an exhaustive list):

- a victim does not wish a prisoner to see their VPS as they will be adversely affected by the very fact of disclosure, over and above the distress already caused by the offence and the forthcoming Parole Board hearing. The VPS form will include contextual information behind a request for non-disclosure.
- disclosure of the material could compromise the safety of its source. In some cases, this will not prevent disclosure of sufficient detail to the prisoner to know the case against them. However, in others it may be very difficult indeed, especially when the information to be withheld contains the key details that would be necessary for the prisoner to challenge it.
- disclosure of the material could compromise intelligence-gathering methods and enable the prisoner or others to shape their practices to avoid detection.
- the prisoner themself is a source (sometimes called a Covert Human Intelligence Source or CHIS[11]). In these circumstances, of course, the prisoner is well aware of what they have told the authorities but understandably do not wish it to become known to others (even, sometimes, their own representative) through having it mentioned in the dossier.
- disclosure of the information might jeopardise ongoing operations, either to gather intelligence or to disrupt criminal activities. In such a case, the panel member will need to remember that the potential wider damage that might occur if the ongoing operations were so disrupted can be a valid reason to withhold material, as long as it can be done so in a way that is necessary and proportionate.
- the owner of the information, who may be a third party such as the police or another information owner, is unwilling to declassify information that they have provided so that it can move into open

[10] In some instances, information may come up in the period shortly prior to an Oral Hearing, or on the day of the Oral Hearing that relates to non-disclosure – please see section 12.6 onwards for more information.

[11] Please see section 12.1-12.3 on CHIS.

evidence. While the panel may be able to explore the potential for disclosure of a more detailed and better gist, the ultimate choice of whether to admit the evidence or withdraw it is for the Secretary of State.

- there is information before a panel that is not itself intended to be withheld, but which may be supported by other, withheld, material. These applications seek to protect the other material which is behind the scenes. While it is likely that the majority of the material can be disclosed in a gist or redacted form, the panel member will need to think carefully about whether and to what extent fairness might require the prisoner to be able to explore the information which sits behind the scenes.

4. Time Frame for making an application

4.1 Under rule 17(2), a non-disclosure application may not be made later than eight weeks before the date allocated for an oral hearing. However, rule 9 gives a panel member[12] a wide discretion to alter the time limit "where it is necessary for the management of the case, in the interests of justice or for such other purposes as the panel chair or duty member considers appropriate."

4.2 Where a request is received less than eight weeks before the date allocated for the oral hearing, the Secretary of State must apply for permission to submit the application out of time. The application must provide reasons for the late service. If no reasons are provided, the panel member should consider whether to ask for the reasons or whether simply to refuse the application on the basis that it is out of time and no good reason has been given for late service. The decision as to whether it is appropriate to extend the time limit under rule 9 will depend on all the circumstances of the case and in particular:

a) whether there is an acceptable reason for the failure to comply with rule 17(2); and
b) whether extending the time limit or declining to do so would result in any (and if so what) unfairness to either party.

4.3 In regard to fairness:

(a) Extending the time limit will not normally be fair to the prisoner if the application is made so close to the hearing date that it is likely to result in an adjournment of the hearing.

(b) Declining to extend the time limit may be unfair to the Secretary of State (and potentially also to the prisoner and wider public protection) if it is likely to result in relevant material being excluded from the panel's consideration.

(c) Many non-disclosure applications relate to a VPS. Where that is the case, consideration needs to be given to the anxiety and distress which a victim may be feeling when engaging in the process and the challenges that may be faced in meeting deadlines.

[12] *An appeal member acts as a duty member for the purposes of rule 9.*

Where there is actual or potential unfairness to both parties, a balancing exercise is likely to be necessary to determine what is in the best interests of a fair hearing. If the material potentially relates to risk, then there may be no alternative other than to adjourn. This is because the key issue in any Parole Board proceeding is an assessment of risk, and that should always be undertaken on the basis of the best information available.

4.4 The panel member will need to make the decision on whether to grant an extension of time before considering the application for non-disclosure. If an extension is not granted, there is no need for the panel member to go on to make a decision on the non-disclosure application, as it will be regarded as out of time. However, the nature of the material, together with the strength of the application, are likely to be influencing factors on whether to grant an extension, and so the panel member may wish to consider the material before making that decision. Where it is not possible to consider the application for late service without viewing the material in question and recusal is a possibility (see paragraph 9.2), the panel member may wish to consider whether the application should be considered by a duty member instead.

5. The First Stage Application

5.1 At this stage of the process, the prisoner (and their representative, if they have one) are not notified about the material and will be unaware that an application has been made.

5.2 To include them at this stage would compromise the purpose of non-disclosure by making them aware of the existence and content of the material before:

1) a decision has been made about whether to disclose or not; and
2) the Secretary of State has been given an opportunity to withdraw material rather than disclose it.

5.3 Non-disclosure applications should be determined at the earliest possible stage:

- If the case has yet to be allocated to an MCA member, the decision will be taken by a duty member*.
- If the case has been allocated to an MCA member, the MCA member will make the decision.
- If the case has been directed to an oral hearing but a panel chair has yet to be allocated, the application will be considered by a duty member.
- If a panel chair has been allocated to the case, they will determine the application and should do so well in advance of the oral hearing, where possible, in order to avoid delays*.

- If a panel chair has been allocated to the case but they consider there is a real risk that the material may be withdrawn and recusal is a likely possibility, they should consider asking a duty member to determine

the application. Please refer to paragraph 9.2 for information on recusals.

** The first stage decision on the non-disclosure application and the substantive decisions (release, not release, open conditions) should ideally not be made together or in close proximity if it would deny the parties the opportunity of any meaningful appeal.*

5.4 Where an in-time application has been made, or approval has been given to consider an out of time application, a decision must be made on the application before the case is concluded.

5.5 Once a decision has been made on a non-disclosure application, the only ways in which it can be revisited are:

(1) by way of the appeal process (see section 11 on the second stage decision) and

(2) by the panel chair or duty member exercising their power under Rule 17(14D) to consent to the further disclosure of some or all of the withheld material.

5.6 Where there has been a change of circumstances or a new argument that has not already been considered, it might be appropriate to use the power under rule 17(14D). An exercise of the power under this rule normally occurs at the request of the prisoner's representative to whom the material in question has been disclosed. The representative should make their request in writing, which should then be disclosed to PPCS so that they can respond to it. If such a request is received, the member reviewing the request will need to consider the same factors and apply the same tests as they would for a request under rule 17(1). Any exercise of the power under rule 17(14D) is subject to a separate right of appeal under rule 17(11). If disclosure is directed either on appeal or by exercise of the power under rule 17(14D), the Secretary of State may withdraw the material in question. A request is usually made for further disclosure to the prisoner. If it is for disclosure to be made to any other person, please contact the Practice Advisor for bespoke advice on how to proceed.

5.7 It is regarded as good practice for panel chairs not to involve co-panellists in the consideration of the non-disclosure application, unless it is absolutely necessary. This is to try and prevent the entire panel from the risk of having to recuse themselves, should the material which is subject to the non-disclosure application be withdrawn (please see paragraph 9.2 below).

5.8 The panel member determining the outcome of the application should have:

- A request for an extension of the time limit and reasons for the late service if the application is received less than eight weeks before the date allocated for the oral hearing (see paragraphs 4.1-4.4 above);
- The full dossier;
- The full (unredacted) material which is the subject of the application;
- A properly completed non-disclosure application form which sets out the grounds on which the application is being made, why those

grounds apply in this case, and why non-disclosure is both necessary and proportionate;

- Where the application is to withhold information contained within a VPS, the VPS cover sheet in addition to the non-disclosure cover sheet;
- The proposed gist/redacted version if the application is for a gist or redacted version of the material to be provided to the prisoner;
- Any supporting material.

Directions

5.9 If the panel member considers that they require further information to make a decision, they may make directions as necessary under rule 17(4). At this stage, if the panel member considers that they may be assisted by a gist, or a better and more detailed gist (if one has been provided), they can direct this to be produced. It is not the role of the panel member to write the gist as this is done by PPCS, but they may wish to indicate in their directions what material they consider should be included in a gist. There is no provision entitling the prisoner to make representations on the gist.

5.10 At this stage of the process, directions are only issued to PPCS as the prisoner will be unaware of the material and the non-disclosure application.

5.11 Directions in relation to non-disclosure should be issued on a separate MCA directions template, a duty member directions form, or a panel chair directions form. This is to avoid difficulties later by ensuring that issues relating to the non-disclosure determination are not included in the same document as other MCA, duty member, or panel chair directions. This avoids the possibility of directions relating to the non-disclosure being sent to the prisoner by mistake (as explained above, they are not yet aware of the material or application). This is *especially* important if the material is withdrawn as all references to the withdrawn material must be removed from the dossier.

5.12 Case management conferences can be utilised to obtain the necessary information for the panel to make a determination on the rule 17 application. For example, the panel can use a case management conference to ask questions of PPCS/ the source provider (such as the police) to clarify matters. Directing a case management conference can also allow the Secretary of State to make oral arguments in support of their written application. General guidance on case management conferences can be found in the oral hearing guidance. However, as it will be to facilitate a first stage decision (see section 6 below), the prisoner's representative will not and should not be aware of the non-disclosure application and accordingly, notice should only be served on PPCS.

Revelation meetings

5.13 In a few non-disclosure applications, some material will carry a security classification of SECRET or higher which means it is closed material, must be kept in secure conditions, and cannot be shared outside of those conditions. If

there is closed material of this type, PPCS and the Parole Board secretariat[13] will set up a 'revelation meeting'. This is an opportunity for the panel member to attend a meeting in a secure environment where the closed material will be shown to them. PPCS officials and members of the secretariat with appropriate clearance may be present, and it is possible for third parties such as the police to also be there to assist PPCS to present the material. The revelation meeting is not a hearing or an opportunity for the Secretary of State to argue their case: it is so that the panel member can view the closed material and ask any questions that they have about its content in order to make a decision about how to progress the application.

6. Key Principles

6.1 Under rule 17(5), the panel member, having considered the non-disclosure application, may make one of the following three directions: that the material should be:

- served on the prisoner and their representative (if applicable) in full;
- withheld from the prisoner or from both the prisoner and their representative; or
- disclosed to the prisoner, or to both the prisoner and the prisoner's representative (if applicable), in the form of a summary or redacted version.

First ground – rule 17(1)(a) criteria

6.2 The starting point for the decision should be whether the Secretary of State has established the first ground for non-disclosure set out in rule 17(1)(a), namely that disclosure of the material would adversely affect one or more of the following criteria:

- national security,
- the prevention of disorder or crime, or
- the health and welfare of the prisoner or any other person.

6.3 In deciding whether any of these grounds are met, the panel member is entitled to draw reasonable inferences from the facts as they appear from the dossier, the material which is the subject of the non-disclosure application, and any other supporting evidence they have been provided with. In the case of a VPS, it may be a reasonable inference from the evidence as a whole that the victim has suffered and continues to suffer psychological harm as a result of the index offence and that knowledge that the prisoner had seen the personal and private details about this described in a statement would be likely to cause further distress and psychological harm.

6.4 If the panel member determines that the initial ground has not been established, then they should refuse the application for non-disclosure and make a direction for the material to be disclosed in full. Below is a suggested form of words for this, although panel members may wish to add further explanation if they think it necessary, however brevity is advised:

[13] *Non-disclosure application with CLOSED material and revelation meetings are managed by the Specialist case team at the Parole Board.*

> **'***An application has been made for certain material to be withheld from (**insert prisoner's name**). The Secretary of State submits that disclosure of this material would adversely affect (***insert the grounds for the application***). On the evidence available to it, the **[MCA member] [duty member] [panel chair] (delete as necessary)** does not find that this is the case.* **[Insert brief reasons why - covering the key points, arguments, and findings.]** *It therefore directs that the material should be disclosed in full to (**insert prisoner's name**) and their representative and added to the dossier.*

Second ground – rule 17(1)(b) criteria

6.5 If the panel member considers that the first ground has been met, then they will need to go on and consider whether the second ground, in rule 17(1)(b), has also been established, namely that withholding the material is a necessary and proportionate measure in the circumstances of the case.

6.6 Withholding material from the prisoner is only likely to be necessary and proportionate if it does not prejudice the prisoner's right to a fair determination of their case. The key point a panel member will wish to bear in mind is that fairness always requires the prisoner to be aware of the case against them so that they can respond to it. The panel member will have to consider separately each item in the material sought to be withheld and decide whether:

- that item comes within the exceptional circumstances set out in rule 17(1)(a); and
- the withholding of that item is a necessary and proportionate measure in the circumstances of the cases, as required by rule 17(1)(b).

6.7 Fairness to the prisoner can be established in a number of ways[14]. The following factors may assist to establish the fairest way forward:

- The gist must be sufficiently detailed to enable the prisoner to understand the case against them.
- There may be open material which can be disclosed to the prisoner, alongside a gist or a redacted version of the material to be withheld, which gives further information or context to enable the withheld material to be understood. The existence of open material that can be disclosed will give the prisoner more of an opportunity to see the case against them and will increase fairness.
- Some of the withheld material may be replicated in open material. If that is the case, it will often be unnecessary to direct that this material is withheld, or it may be removed from the application.
- Some of the material may already be known to the prisoner, such as material recovered from their possession (either from their person or from their cell). In this case, it will not be proportionate to withhold the material from the prisoner, because they are already aware of what it is – unless disclosure of details might endanger a source or intelligence gathering method.

[14] *More information can be found at section 2.8.*

- Prisoners may also be aware that their communications and devices are being monitored[15]. They will know that the prison keeps a contact log of the numbers that they call on their PIN phone, and they will know what information is stored on mobile devices that they have surrendered for inspection. Any information which has been obtained in this manner can usually be used as open material as it will not tell the prisoner or others anything which they no not already know. This obviously does not apply to intercept evidence of which the prisoner is not aware.
- Anything which has a public element is also likely to be used as open evidence. This will include photographs of the prisoner taken in a public place, newspaper reports, any records, and any content that they have uploaded onto social media.

- Information which does not relate to risk, such as information about impact on a victim, may not need to be disclosed (please refer to paragraph 6.15 below).

Gist or redacted version of the material

6.8 If the panel member concludes that there are grounds for withholding the material from the prisoner, or from both the prisoner and their representative, but that withholding all of it would render the proceedings unfair and therefore would not be a necessary and proportionate measure, they can direct disclosure of the material in the form of a gist or a redacted version.

6.9 A gist or redacted version must contain sufficient information to enable the prisoner to understand the nature of what is being said about them, and to respond effectively to it. The Secretary of State may already have provided a gist or redacted version. If the panel member is content that this provides sufficient information, they can decide to direct disclosure of the material in the form of the gist or redacted version provided.

6.10 If the panel member concludes that the gist or redacted version provided by the Secretary of State does not contain sufficient information, they may direct that it be redrafted, or that certain sections be unredacted (adjourning, if necessary, to give the Secretary of State the time to do so). The panel member may suggest within the direction what should be in the gist or redacted version in order to ensure fairness to the prisoner, but it is not for the panel member to draft the gist or redact the material as this is the role of PPCS. Realistic deadlines should be set for the completion of the direction, but the redrafting may have to be done as a matter of urgency if the date for the oral hearing is imminent. The panel member may direct a case management conference if they feel that one would be helpful (see paragraph 5.12).

[15] However, may not be aware that discussions in other languages can be translated into English if necessary.

6.11 Where the information being withheld is a VPS from a victim, a gist or redacted version will only be provided with their express consent, and after they have seen the content of the gist and agreed to the wording. If the victim refuses to give permission, or does not agree with the wording, then the Secretary of State is unable to provide the proposed gist or redacted version of the VPS, and the application will be withdrawn. A revised version may be submitted but again, in line with HMPPS policy, only with the victim's express consent.

6.12 If the prisoner can be provided with a very detailed gist or suitably redacted version which adequately sets out the case against them, then it is more likely to be fair to withhold the full material. In some cases, the Secretary of State may not include a gist in their application or may state that a gist cannot be produced. In this circumstance, if the panel asses that a gist is necessary in order to ensure fairness and accept the application, then a direction for a gist can be made. If there are difficulties in obtaining the gist, the panel member may direct a case management conference if they feel that one would be helpful (see paragraph 5.12). If a gist cannot be produced, then it is unlikely that the rule 17 application can still succeed – if the prisoner cannot be told what the allegation against them is then it will not be proportionate to direct non-disclosure.

6.13 Similarly, if it is possible to disclose sufficient material to a prisoner's representative[16], with a suitable undertaking so that the representative can respond on their behalf, then that may be another way to ensure fairness. This has the advantage that in any hearing held *in camera* where the prisoner is not present, the representative will be able to make informed submissions about the need for further disclosure and they will be able to question witnesses and make submissions about the reliability of the withheld material. However, disclosure to the representative only may not, in itself, enable the prisoner to receive a fair hearing where the prisoner themselves may not receive sufficient detail to be able to give instructions to the representative, which the representative can use to obtain further evidence and question the witnesses.

6.14 If a gist or redacted version is agreed and disclosed to the prisoner, it is usually the case that the prisoner's representative will still see the full material on the basis of their undertaking (see paragraphs 7.1-7.7 below).

6.15 Consideration needs to be given to whether the whole of the material can be withheld without causing any unfairness to the prisoner in the proceedings. If it has no bearing on risk, for example a VPS, then it may not impact upon fairness because it will not affect the panel's decision. If it is relevant to risk and likely to impact on the panel's decision, however minimally, then it is much less likely that it is necessary or proportionate for it to be withheld.

6.16 Below is a suggested form of words for panel members to use when directing disclosure of the material in the form of a gist or redacted version, although panel members may wish to add further explanation if they think it necessary, however brevity is advised:

[16] *Please see paragraph 7.2 that sets out who the material can be served on.*

> ***"****An application has been made that certain material should be withheld from [****insert prisoner's name****]. The Secretary of State submits that disclosure of the material to [****insert prisoner's name****] would adversely affect* ***[the prevention of disorder or crime] [the health or welfare of the prisoner] [the health or welfare of the prisoner or any other person] (delete as necessary)****. On the evidence available to it, the* ***[MCA member] [duty member] [panel chair] (delete as appropriate)*** *finds that that is the case.* ***[Insert reasons]*** *The Secretary of State further submits that withholding the material itself but disclosing a* ***[gist] [redacted version] (delete as necessary)*** *of it in the form proposed by the Secretary of State would be a necessary and proportionate measure in the circumstances of the case and would not affect the fairness of the proceedings. On the evidence available to it, the* ***[MCA member] [duty member] [panel chair] (delete as appropriate)*** *finds that that is also the case.* ***[Insert reasons*** **- covering the key points, arguments, and findings*****]*** *The* ***[MCA member] [duty member] [panel chair] (delete as appropriate****) accordingly directs that the material should be disclosed to [****insert prisoner's name****] but only in the form of the proposed* ***[gist] [redacted version****]".*

6.17 If the panel member considers that all the grounds in rule 17(1) have been met, then they are likely to direct that the material should be withheld from the prisoner and not disclosed. Below is a suggested form of words for this although panel members may wish to add further explanation if they think it necessary, however brevity is advised:

> *`An application has been made that certain material should be withheld from [****insert prisoner's name****]. The Secretary of State submits that disclosure of this material would adversely affect [****insert the grounds for the application****]. On the evidence available to it, the* ***[MCA member] [duty member] [panel chair] (delete as appropriate)*** *accepts that this is the case. [****Insert reasons*** **- covering the key points, arguments, and findings*****]*** *The Secretary of State further submits that withholding the material would not affect the fairness of the proceedings and is a necessary and proportionate measure in this case. On the evidence available to it, the* ***[MCA member] [duty member] [panel chair] (delete as appropriate)*** *accepts that this is the case. [****Insert reasons*** **- covering the key points, arguments, and findings*****]*** *The* ***[MCA member] [duty member] [panel chair] (delete as appropriate)*** *accordingly directs that the material should be withheld from [****insert prisoner's name****].*

6.18 If the disclosure of the material would adversely affect the health or welfare of a person other than the prisoner, that person should not be named in the directions if their name is not going to be disclosed as part of the gist. It is best practice not to name a victim in directions.

7. Disclosure to the Prisoner's Representative

7.1 If the stage one decision is that the material should be withheld from the prisoner, even if a gist or redacted version is provided, the panel member may direct that it should be disclosed to the prisoner's representative,

provided they have given an undertaking[17] that they will not disclose it to the prisoner or to any other person (other than other representatives also responsible for that prisoner's case): see rule 17(7).

7.2 Under rule 17(7), if such a direction is made then the material must be disclosed, subject to a signed undertaking, if the representative is:

- A barrister or a solicitor
- A registered medical practitioner
- A person whom the appointed Parole Board member directs is suitable by virtue of their experience or professional qualification.

7.3 The following suggested form of words can be added to the direction if the material is to be withheld from the prisoner but can be disclosed to their representative:

> *'The material should be served by the Secretary of State on the representative of **[insert prisoner's name**], provided that the representative has first given an undertaking to the Parole Board (in accordance with rule 17(7), Parole Board Rules 2019 (as amended)) that they will not disclose it to the prisoner or any other person'.*

7.4 Although the undertaking is to the Parole Board, PPCS is responsible for obtaining the undertaking from the prisoner's representative. They will be able to confirm whether it has been supplied and whether the material has been disclosed[18].

7.5 The giving of an undertaking is required by rule 17(7) and is intended to ensure that the direction for disclosure to the representative is not frustrated by the representative then passing on the withheld material to their client. This is important to bear in mind when deciding whether a person who is not a barrister, solicitor, CILEX registered paralegal, or registered medical practitioner should be able to view material not seen by the prisoner. If the representative is not part of a regulated profession, they could potentially break any undertaking with impunity as they would face little or no consequence for doing so. It is possible that they could be subject to a common law claim for damages, but this will be difficult to quantify and may not act as a significant deterrent[19].

7.6 It is a matter for each representative to decide whether to give an undertaking or not. If they decide not to, they will not be able to receive any directed material. A representative may decide to refuse to give an undertaking, often on the basis that they have professional duties to their client which the undertaking will conflict with. A potential conflict can be between the duty to act in their client's best interests (to give an undertaking so that they can better respond to the case against their client) and their duty to pass information to their clients (which they will not be able to do if they

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[17] An undertaking is a legally binding promise given by one party to the Court relating to an obligation to the other party in the proceedings. It is essential that they be observed whenever they are given and so should only be given when it is clearly possible for them to be honoured. Breach of an undertaking usually carries severe consequences.

[18] The process for this is set out in the Handling Sensitive Information Policy Framework.

[19] For further information on non-legal representatives, please see the guidance on Representation (sharepoint.com).

have given an undertaking). The question about conflicts of interests is one that each representative must answer for themselves, and a panel member should not question their judgement in relation to their professional responsibilities. If they choose not to see it, they will of course not be able to respond to it on behalf of their client. This of itself will not make the process unfair because they will have had the chance to see it and respond but chose not to do so.

7.7 Where material is being withheld from the prisoner but can be disclosed to their representative, PPCS will make the necessary arrangements. Please contact the practice advisor for advice on disclosure to any other person.

8. Special Advocates

8.1 In cases where the panel member considers it is necessary and proportionate to withhold material from both the prisoner and their representative (for example, if disclosure would be an egregious breach of national security), the panel member will need to consider whether to appoint a Special Advocate under rule 17(8). This is only likely to happen in cases where Closed material is relevant to risk and needs to be withheld in full from both the prisoner and their representative. These cases will be rare.

8.2 A Special Advocate can be appointed to act for a prisoner and make representations about the material on their behalf and in their best interests, without the prisoner having seen the material or given any instructions about it. The Special Advocate will test the case for withholding the material and make submissions about its content. The appointment of a Special Advocate will be a rare occurrence as, in the vast majority of cases, it should be possible to either provide the prisoner with a gist of the material and/or to serve it on the representative in full with an undertaking (see paragraphs 7.1-7.5 above) to ensure fairness. The Parole Board's Legal Adviser should be contacted for bespoke advice if a panel member considers that appointment of a Special Advocate is necessary.

9. Withdrawal of the Material

9.1 If the panel member decides that any of the material should be disclosed to the prisoner in full or in the form of a gist or redacted form, rule 17(15) enables the Secretary of State to withdraw the material.

9.2 There is no explicit requirement in the Rules for any member on a panel who has seen withdrawn material to automatically recuse themselves from the panel. From 21st July 2022, it is up to the member to decide whether to recuse themselves. The panel members who have had access to the withdrawn information, will need to be satisfied that they are capable of putting the withdrawn material out of their mind in their consideration of the case. If they do not feel that they can do so they will need to recuse themselves.

10. After the First Stage Decision

10.1 After the first stage decision has been made, the prisoner and their representative (should there be one) are notified, by PPCS, of the fact that an application has been made, of the result, and of their right to appeal. They will be served with any gist or redacted version if that was directed by the panel member. The Rules do not require that the prisoner or their representative receives a copy of the first stage decision. PPCS may choose to send them a copy. If not, they may ask to see it. In some cases, it can be helpful and enable them to decide to appeal. But it is also possible in some cases that providing the decision will inadvertently disclose the withheld material, or the Secretary of State's detailed grounds for non-disclosure, and so undermine any direction to withhold it. If a panel member is asked to disclose their decision, they should seek bespoke advice from the Practice Advisor.

11. The Second Stage

11.1 Either party may appeal against the first stage decision within seven days of being notified of the decision (rule 17(11)). However, it is possible for the panel member to accept a late appeal by using the power under rule 9 to extend the time limit. As above, the panel member will need to decide whether an extension of time is justified, bearing in mind all of the circumstances of the case (including the need for fairness to the prisoner, the reasons for lateness, and the gravity of the issues at stake).

11.2 If the prisoner is not represented, then an appeal will automatically be made for them, under rule 17(13), and the case will move to the second stage. It is the responsibility of the Parole Board[20], not PPCS, to move such cases to the second stage.

11.3 If a prisoner is represented, they will then have to decide whether to appeal. Some of the material may be served on the prisoner or their representative at this stage. If the represented prisoner does appeal, then the case will move to the second stage.

11.4 If the represented prisoner does not appeal, and the panel member has directed that material can be withheld from the prisoner but not their representative, the material must be served on the representative if certain conditions are met (see paragraphs 7.1-7.7 above).

11.5 If the Secretary of State decides to appeal, under rule 17(12) PPCS has the right to withhold the material until after any appeal has been determined. However, in practice, the Secretary of State is usually content to serve material in a gist or covered by an undertaking to enable the prisoner to properly engage with the case, or any appeal unless it involves material that is particularly sensitive or has a high security classification.

11.6 If the case is at the MCA stage, the MCA member may have to adjourn the case for the appeal process to be completed. While there is no explicit requirement for them to do so, if this process results in withdrawal of the

[20] The Case Manager will contact the Parole Board Legal Hub who will process these.

material by the Secretary of State the MCA member will need to consider whether they should recuse themselves (see para 9.2 above).

11.7 If the case is at the oral hearing stage, it may be possible to proceed so long as both parties have confirmed that they do not wish to appeal. However, if one party does wish to appeal, it is likely to be necessary to adjourn the case if it becomes difficult to reach a conclusion on the appeal before the oral hearing date.

11.8 If an adjournment is necessary, a timescale of 10 days is usually appropriate in the first instance. A further review at that stage might result in an additional adjournment if necessary. Dealing with Closed material will require a longer timescale.

11.9 Under rule 17(11), it is the responsibility of the party who makes the appeal to notify the other party that they have lodged an appeal.

11.10 Under rule 17(14), the other party may make representations to the Board within seven days of being notified that the other party has appealed. Timings can be altered under rule 9.

11.11 The panel member can also, at this point, request the appointment of a Special Advocate (see paragraphs 8.1-8.2 above) under rule 17(8). This will only be appropriate in those very rare cases where the material:

(a) has real probative value on a relevant matter going to risk; and

(b) is directed to be withheld from both a prisoner and their representative, and the information cannot be provided in the form of a gist.

11.12 In such a case, the panel member should seek advice from the Parole Board's Legal Adviser. While it is open to either party to request the appointment of a Special Advocate, the decision whether to appoint one rests with the Attorney General. It is unlikely that such a request by the Board will be refused where the Board has made clear its view that without a Special Advocate the prisoner will not be able to have a fair hearing.

11.13 Decisions on appeals are made by appeal members (on behalf of the Board Chair) under rule 17(11) and (13). The Board Chair delegates their authority under rule 17 to a small number of designated judicial members.

11.14 The process which will then be followed will be quite similar to the first stage decision. Most of the same factors will apply, and the key test remains whether the prisoner is able to have a fair review. The appeal member is not bound simply to review the decision at the first stage, they can look at all of the materials and make their own decision. However, during an appeal, the appeal member will also have the benefit of having representations from the prisoner and/or their representative to consider and, if a Special Advocate has, by then, been appointed, representations by them as well. If a Special Advocate has not been appointed and the appeal member considers one to be necessary, the appeal member may request the appointment of one and adjourn the appeal until the Special Advocate has been appointed.

11.15 The appeal member will:

(a) examine the material and representations, for example, to seek clarification as to whether the material can be disclosed to the prisoner's representative under the usual undertakings, if the position has not been addressed.

(b) where necessary, attend a revelation meeting to look at any Closed material.

(c) make directions under rule 17(14A) if they think they are necessary. The appeal member may also wish to explore whether the material could be redacted or whether a more detailed gist might be provided before they come to a final decision.

11.16 In cases where a Special Advocate is appointed, it may be necessary for the appeal member to convene a Closed hearing to consider whether further disclosure of the evidence is justified and to hear submissions on the closed evidence.

11.17 Under rule 17(14B), the appeal member has the option of:

(a) Rejecting the appeal and upholding the first stage decision on what material should be disclosed and what can be withheld;

(b) Rejecting the appeal and directing that less material be disclosed than was directed at the first stage;

(c) Upholding the appeal and directing that more material be disclosed than was directed at the first stage; or

(d) Upholding the appeal and directing that no material be withheld.

11.18 The appeal member will need to write their decision with some care, so as to avoid referring to the detail of material that is to remain withheld. That is because the decision (subject to any necessary redactions) will be disclosed to the representative under rule 17(16)(a) and so, in the usual course of events, may be disclosed onward to the prisoner. However, if it is not possible to do so, the appeal member may make a direction under rule 17(16)(b) requiring an undertaking from any representative in similar terms not to disclose the relevant parts of the decision to their client. Appeal members who need to do so can seek advice from the Board's Legal Adviser.

11.19 Once the appeal member has made their decision, under rule 17(14C) the Secretary of State must, as soon as practicable, notify the prisoner and the prisoner's representative (if they have one) that a decision has been made and its outcome.

11.20 As with the stage one decision, the Secretary of State has the option of withdrawing the material. If the material is withdrawn, the same position on recusal will apply (see paragraph 9.2).

11.21 Any panel making a decision about the suitability of release or a recommendation on suitability for a move to open conditions must have access to all documents relating to the non-disclosure application, including

but not limited to the full material, the application, any gist, the first stage decision and the second stage decision (where an appeal has been made).

11.22 Please see Annex B for a process map showing the non-disclosure process.

12. Issues that may arise

Prisoner as a Covert Human Intelligence Source (CHIS)

12.1 An application is occasionally made by PPCS under Rule 17(1)(a) for non-disclosure of material revealing that the prisoner has provided confidential information to the authorities as a Covert Human Intelligence Source ('CHIS'). A CHIS may provide evidence about the acts of other prisoners, or it may be that they wish the Board to be aware that they are a CHIS so that aspects of the behaviour in custody can be explained in that context. In such a case it will normally not be difficult to find that both limbs of the test for non-disclosure in rule 17(1) are satisfied.

12.2 So far as rule 17(1) is concerned, there would certainly be a serious risk to the prisoner if their role as an informant were to become known to other prisoners (or anyone else for that matter - sometimes the prisoner will wish their role to be concealed even from their own representative to avoid any risk of inadvertent disclosure. This is sometimes asserted by the Secretary of State as a justification for requesting that material should be withheld from the prisoner's representative as well as the prisoner). For obvious reasons it will be important that the prisoner's role should not appear anywhere in the dossier where it would be seen by those (including the representative) who do not need to see it. Rule 17(1)(c) is therefore likely to be satisfied.

12.3 So far as rule 17(2) is concerned, it is likely to be hard to see how non-disclosure could be anything other than a necessary and proportionate measure. It is for the benefit of the prisoner and could not prejudice their case in any way (they will, of course, be fully aware of the facts being withheld).

Considering withheld material at an oral hearing

12.4 Under rule 24(4)(c), a panel chair may exclude the prisoner (or any other person) from the part of an oral hearing where consideration is being given to material which has been directed to be withheld from the prisoner or the prisoner and their representative under rule 17. This enables the panel to explore the withheld material with witnesses *in camera*, or hear *in camera* submissions, in cases where the representative has seen the material, but the prisoner has not.

12.5 Sometimes the witnesses will not have seen the withheld material, and this might arguably detract from the quality of their evidence. This is a difficult position because the Secretary of State is entitled to put their case in the way they see fit and decide what their witnesses can see. If witnesses have not

seen part of the evidence, the panel will need to consider how much weight to give their evidence as a result.

Non-Disclosure Situations at the Oral Hearing

12.6 On rare occasions, a witness may allude or refer to risk related material which the panel has not seen and which the witness states is not to be seen by the prisoner. This can be, for example, prison security information, a police report, information about a protected person, or a summary of domestic abuse call outs. Incidents like this come about usually because the witness is unaware of the correct procedure for submitting such material, or because it is new information which has just come to light. When this happens, the panel should stop the witness to try and prevent the material which may be subject to a non-disclosure application from being divulged (verbally or in writing). This is because it opens up risks such as the panel potentially having to recuse themselves if the material is not relied upon or is withdrawn, or the risks of disclosure to the prisoner etc.

12.7 It may still be possible to complete the hearing on the day by undertaking the following procedure, but consideration will need to be given to the time available to the panel on the day.

For cases where a Secretary of State Representative is in attendance

12.8 The panel chair should direct a short adjournment to provide the Secretary of State Representative with an opportunity to speak privately with the witness to make themselves aware of the new material. The panel chair will then need to move the hearing *in camera*, with only the Secretary of State's representative present, to deal with the issue of non-disclosure (and only that issue). If the issue of new material potentially subject to a non-disclosure application is raised before any evidence is taken, then the *in camera* part of the hearing should be before the panel chair only (as there is the possibility that those hearing the material may have to recuse themselves from the panel). If the issue of new material is raised during a part-heard hearing, then there may be no reason to ask co-panellists to leave the room during the *in camera* part of the hearing as should the panel chair later need to stand down, a completely new panel, who will all hear the same evidence, should hear the case.

For cases where no Secretary of State Representative is present

12.9 If the material is being presented by a Secretary of State witness, such as a Community Offender Manager (COM) or Prison Offender Manager (POM), they should be given time to contact PPCS to discuss this and determine whether a formal application for non-disclosure will need to be made by PPCS. A short break will be needed to allow this to happen. If there is no suitable response from PPCS (on behalf of the Secretary of State) the hearing will have to be adjourned.

12.10 If a formal non-disclosure application is made, or is going to be made, the hearing will need to be adjourned to allow for the application to be considered by the panel chair or by a duty member.

12.11 In some circumstances, PPCS may determine that the material does not need to be subject to non-disclosure. The guidance on new information arising at the oral hearing can be found in the oral hearing guidance.

Application for Non-Disclosure of a Victim Personal Statement (VPS)

12.12 A VPS is the means by which a victim is entitled to make the Parole Board fully aware of the impact the index offence has had, and continues to have on their life, and of their family and friends, and in some cases the wider community. It should not contain anything which is relevant to the prisoner's current level of risk to the victim or to the wider public. These statements are carefully considered by Parole Board panels and may inform decision-making in relation to licence conditions. It goes without saying that all victim-related material/issues should be handled with the utmost sensitivity. That said, these statements do not play a part in the process of risk assessment which is the sole basis of the panel's decision about suitability for release or progression, and do not constitute evidence.

12.13 Victim Liaison Officers (VLOs) should explain to victims that their statements will be disclosed to the prisoner unless there is a successful application for non-disclosure. To direct non-disclosure of a VPS, it must be established, as with any other non-disclosure application, that the two grounds in rule 17(1) are met (see paragraphs 2.3-2.4 above). In these instances, the victim is "another person" whose health or welfare may be adversely affected.

12.14 The application will usually focus on issues that the victim will be adversely affected by the very fact of disclosure, over and above the distress already caused by the offence and the forthcoming Parole Board hearing, and that withholding the material is a necessary and proportionate measure in the circumstances. Panels will need to be careful not to judge how adversely a victim may be affected as this can vary widely from victim to victim and is very personal to the individual.

12.15 If a VPS is properly confined to the impact of the offence upon the victim (or their family and friends, or community), and the author of that statement has asked for it not to be disclosed to the prisoner, the panel member might conclude that it is necessary and proportionate for it to be withheld from the prisoner without impacting on the fairness of proceedings. The prisoner's proceedings may not be unfair if they do not see the full VPS, as the content will not influence decision-making regarding risk. Not seeing it should also not prevent the prisoner from being able to demonstrate their understanding of the impact of their crime on the victim. The presence of a gist will indicate to the prisoner that there is still ongoing impact. There may be rare cases where more detail is necessary to explore this.

12.16 Sometimes, a VPS in respect of which a non-disclosure application is made contains information which goes beyond impact and is relevant to risk. This

makes the decision about non-disclosure more complicated but only insofar as more stages in handling the information need to be followed:

- the panel member can, and normally should, direct that information going beyond the impact of the crime or of the prisoner's release upon the victim, family, or community, should be removed from the VPS;
- once such information has been removed from the VPS, the decision about any non-disclosure application, relating only to the revised VPS, should be simplified and should follow the approach set out above;
- the issues that then remain are that possibly new information on risk exists, and also that this information has now been seen by the panel which may lead to them having to consider whether to recuse themselves from the panel (see paragraph 9.2). It might well be that the information in the VPS which is relevant to risk is already evidenced in another document within the dossier. If so, the panel and the prisoner will have access to it without further steps having to be taken once it is removed from the VPS;
- if the new information in the VPS is relevant to risk and does not appear anywhere else in the dossier, it is likely the Secretary of State would want the panel to rely upon it. The prisoner is entitled to see all material which is to be considered by the panel. As a consequence, in the unusual circumstances where information upon which the Secretary of State wishes to rely is presented only in the VPS, PPCS will seek to substantiate the information by making reasonable attempts to investigate and cross-reference it with other reports in the dossier. Where risk-related information contained within the VPS cannot be corroborated, PPCS will submit the information by way of a covering letter to the panel chair. The letter will clearly set out exactly which parts of the VPS have been investigated and confirm the information is not available anywhere else in the dossier and set out what has been done to try and verify the information. The VLO will make the victim aware of the letter, thereby providing them with an additional opportunity to provide further evidence if they are able to, or to remove the information from their VPS;
- where PPCS has a duty to disclose such information, contrary to the wishes of the victim, then the only option is for it to be presented in a different way. For example, the information could be in the format of a gist, in a way that it becomes disclosable to the prisoner and included in the COM's report (the PAROM or, in recall cases, the Part B/C Report).

For more information on VPS, please refer to the Parole Board Guidance on Victims.

Licence Conditions

12.17 Whilst rule 17 does not reference licence conditions, there are some occasions where the reasons for a proposed licence condition need to be withheld from the prisoner. In such circumstances, rule 17 can be applied by analogy.

12.18 For example, one of the conditions often proposed is an exclusion zone to avoid any contact (whether deliberate or inadvertent) between the prisoner and the victim or the victim's family. Another example could be a proposed change in release address if the current address is assessed as no longer

suitable for reasons that cannot be disclosed to the prisoner – such as a rival gang member residing at the same Approved Premises, or a family member no longer wanting the individual to move in with them.

12.19 The extent of the licence condition will need to be made clear to the prisoner, but usually the detailed reasons for it (which might reveal personal details about the life and movements of those sought to be protected) can be withheld from them if the rule 17 criteria are met. A non-disclosure application in relation to those reasons will often be appropriate.

12.20 If rule 17(1)(a) is satisfied, non-disclosure of the detailed reasons is likely to be a necessary and proportionate measure satisfying rule 17(1)(b). The prisoner will normally have no legitimate reason to be made aware of the details and withholding them cannot realistically cause them any prejudice in the Board's consideration of his case.

ANNEX A (Rule 17)

PAROLE BOARD RULES 2019 (as amended)

Withholding information or reports

17.—(1) The Secretary of State and any third party authorised by the Secretary of State ("authorised third party") may apply to the Board for information or any report ("the material") to be withheld from the prisoner, or from both the prisoner and their representative, where the Secretary of State or the authorised third party considers—

(a) that its disclosure would adversely affect—

(i) national security;

(ii) the prevention of disorder or crime, or

(iii) the health or welfare of the prisoner or any other person, and

(b) that withholding the material is a necessary and proportionate measure in the circumstances of the case.

(2) An application under paragraph (1) may not be made later than 8 weeks before the date allocated for an oral hearing under rule 22.

(3) Where the Secretary of State or the authorised third party makes an application for the material to be withheld under paragraph (1), the Secretary of State or authorised third party must serve on the Board—

(a) the material, or a separate document containing the material, and

(b) a written application for non-disclosure, explaining why it is proposed to be withheld.

(4) On receipt of an application under paragraph (3)(b), either a panel chair or duty member appointed for that purpose, must consider the application and may make directions as necessary to enable determination of the application.

(5) Where the panel chair or duty member is satisfied that all relevant information has been served on the Board, they must consider the application and direct that the material should be—

(a) served on the prisoner and their representative (if applicable) in full;

(b) withheld from the prisoner or from both the prisoner and their representative, or

(c) disclosed to the prisoner, or to both the prisoner and the prisoner's representative
(if applicable) in the form of a summary or redacted version.

(6) If—

(a) a direction is given under paragraph (5)(a) and the Secretary of State or authorised third party intends to appeal against it in accordance with paragraph (11), or

(b) a direction is given under paragraph (5)(b) or (c),

the Secretary of State, or the Board (where an authorised third party made the application under paragraph (3)), must, as soon as practicable, notify the prisoner and the prisoner's representative (if applicable) that an application has been made under paragraph (3)(b) and the direction that has been made under paragraph (5).

(7) If the panel chair or duty member appointed under paragraph (4) gives a direction under paragraph (5)(b) or (c) that relates only to the prisoner, and that prisoner has a representative, the Secretary of State or authorised third party must, subject to paragraph (11), serve the material as soon as practicable (unless the panel chair or duty member directs otherwise) on the prisoner's representative, provided that—

(a) the representative is—

(i) a barrister or solicitor;

(ii) a registered medical practitioner; or

(iii) a person whom the panel chair or duty member appointed under paragraph (4) directs is suitable by virtue of their experience or professional qualifications, and,

(b) the representative has first given an undertaking to the Board that they will not disclose it to the prisoner or to any other person, other than other representatives also responsible for that prisoner's case.

(8) The panel chair or duty member making the determination in regards to the non-disclosure application, or the panel chair or duty member at a later date, may direct the appointment of a special advocate appointed by the Attorney General to represent the prisoner's interests where the panel chair or duty member appointed under paragraph (4)—

(a) makes a direction under (5)(a) and the Secretary of State or the authorised third party appeals the direction under paragraph (11), or

(b) makes a direction under (5)(b) or (c) that relates to a prisoner and their representative, or the prisoner does not have a representative.

(9) If a direction to appoint a special advocate is made under paragraph (8), the Secretary of State or authorised third party must serve the material as soon as practicable (unless the panel chair or duty member directs otherwise) on the special advocate.

(10) ...

(11) Within 7 days of notification by the Secretary of State or Board in accordance with paragraph (6), either party or the authorised third party may appeal against that direction to the Board chair and notify the other party of the application to appeal.

(12) If the Secretary of State or authorised third party appeals the direction in accordance with paragraph (11), the Secretary of State or authorised third party

need not serve the material under paragraphs (5) or (7) until the appeal is determined.

(13) Where a direction is made under paragraph (5)(b) or (c) to withhold material from a prisoner who does not have a representative, the decision will automatically be considered in an appeal to the Board chair.

(14) Within 7 days of being notified that a party has appealed under paragraph (11), the other party may make representations in respect of the appeal to the Board chair.

(14A) In determining an appeal under paragraph (11) or (13), the Board chair must consider the application and may make directions as necessary to enable determination of the application, including a direction under paragraph (8).

(14B) The Board chair may determine an appeal by—

(a) upholding the decision made by the panel chair or duty member under paragraph (5); or

(b) substituting their own decision, which may contain any direction that the panel chair or duty member could have made under paragraph (5).

(14C) When the Board chair has made a decision under paragraph (14B) the Secretary of State, or the Board (where an authorised third party made the application to appeal under paragraph (11)), must, as soon as practicable, notify the prisoner and the prisoner's representative (if applicable) that a decision has been made and its outcome.

(14D) The panel chair or duty member may consent to the disclosure of any material withheld under this rule at a later date provided that direction is subject to a separate right of appeal under paragraph (11).

(15) If—

(a) a panel chair or duty member appointed under paragraph (4) to determine an application under paragraph (1),

(b) the Board chair determining an appeal under paragraph (11) or (13), or

(c) a panel chair or duty member making a direction under paragraph (14D),

decides that any material which is subject to the application by the Secretary of State or authorised third party under paragraph (1) should be disclosed to the prisoner or the prisoner's representative (in full or in the form of a summary or redacted version), the Secretary of State or authorised third party may withdraw the material ….

(16) If the Secretary of State does not withdraw any material in accordance with paragraph (15), they must serve on the prisoner or the prisoner's representative or both (as directed by the Board chair)—

(a) the decision, subject to any redactions the Board considers necessary so as not to undermine the decision;

(b) any material directed to be disclosed, subject to receipt of an undertaking if so directed.

ANNEX B (Non-Disclosure Process Map)