



Attorney
General's
Office

Guidance for departments and civil servants on the Provision of Information by Government Departments in Criminal Investigations and Prosecutions:

Criminal Procedure and Investigations Act 1996



Introduction

- 1.** Every accused person has a right to a fair trial. The right is a fundamental part of our legal system and is guaranteed by Article 6 of the European Convention on Human Rights (ECHR). The disclosure process secures the right to a fair trial.
- 2.** Investigators¹ and prosecutors have both common law and statutory disclosure obligations to comply with. The framework for criminal investigations and disclosure is contained within the Criminal Procedure and Investigations Act 1996 (the CPIA), the CPIA Code of Practice (the Code) and the Attorney General's Guidelines (the Guidelines).
- 3.** In order to comply with their disclosure obligations, it may be necessary for investigators and prosecutors to seek access to material held by a Government department or other Crown body.
- 4.** Government departments and other Crown bodies have legal and professional duties to support the administration of justice² which includes a duty to assist investigators and prosecutors in fulfilling their disclosure obligations by co-operating with requests for access to material, and where appropriate, provision of the information and material sought.
- 5.** Departments and Crown servants who have information or material which may be relevant to the investigation or prosecution of a criminal offence also have a professional duty to draw this fact to the attention of the appropriate authorities^{3,4}.
- 6.** The objectives of this guidance are to:
 - a.** set out the principles for identifying and requesting access to relevant material held by government departments;
 - b.** provide a clear, common process for making and responding to requests; and
 - c.** achieve consistent handling of disclosure requests and responses across government.

¹ Includes police officers and any other person charged with the duty of conducting a criminal investigation as defined in section 22 of the CPIA.

² The Civil Service Code provides that civil servants, pursuant to the duty of integrity, must comply with the law and uphold the administration of justice, and pursuant to the duty of honesty, set out the facts and relevant issues truthfully, and correct any errors as soon as possible

³ See the "Rights and Responsibilities" section of the Civil Service Code. Where this situation arises the proper internal processes of your Department should be followed.

⁴ It is acknowledged that there are some limited circumstances where authorities have set out separately how they will approach disclosure relating to criminal offences.



The Principles

Evidence and other relevant material – departments' and other Crown bodies' obligations

7. The Civil Service Code (see footnote 2), includes an obligation to uphold the administration of justice. A criminal investigation or prosecution may identify that a government department or other Crown body holds or potentially holds material that may be evidence in a prosecution as it is probative of guilt. A government department may also hold other material that may be relevant to an investigation or prosecution⁵, including because it could be reasonably considered capable of assisting the defence or undermining the prosecution and may need to be provided to those subject to an investigation or prosecution. Further information about prosecutors' disclosure obligations is set out at **Annex C** below.

8. Government departments and other Crown bodies are considered third parties for the purposes of disclosure. Investigators and prosecutors should only seek third party material if it has been identified by them as relevant to an issue in the investigation and/or prosecution. Further principles and guidance for accessing third party material can be found in the Guidelines.

⁵ See section 3(1) of the CPIA – the test for disclosure



The Process

- 9.** There are clear processes for Government departments or Crown bodies to follow when a request for information is received. These are set out at paragraphs 10 to 29 below.
- 10.** When a request for information is received by a Government department or Crown body from an investigator or prosecutor, it should:
- a. assist the investigator or prosecutor promptly;
 - b. engage with the investigator and prosecutor to enable them to assess and verify what material is held;
 - c. reveal (a wide term, to cover the fact this may be by whatever method best helps all parties to communicate and understand the material held – it is distinct from providing the material itself) to the investigator or prosecutor what is held;
 - d. set out the steps taken to identify the material including what they have searched for and how;
 - e. provide that material to the investigator or prosecutor or, in the case of sensitive material,⁶ explain the reasons why material is deemed to be sensitive and consider whether the material can be provided in a redacted or in another form, without compromising its sensitivity or to permit inspection instead;
 - f. explain to the prosecutor, with reference to the test for sensitivity, any difficulty with the prosecution using the material as evidence or as disclosable material.
- 11.** The investigator or prosecutor will use their best endeavours to provide clear requests, clarify those requests where necessary and seek an understanding of how information is stored in the relevant department to understand whether their request is reasonable. The requests will be in writing. A suggested format to submit a request to a government department can be found at **Annex A**. Investigators and prosecutors may wish to enclose a copy of this guidance with their request.

⁶ Sensitive material is “material, the disclosure of which the disclosure officer believes would give rise to a real risk of serious prejudice to an important public interest”: CPIA Code of Practice



Timing

12. Disclosure obligations commence from the outset of an investigation and therefore investigators and prosecutors may be seeking access to material pre-charge⁷ and for the duration of proceedings, including during a trial. It is therefore imperative that requests for information and material are both made and dealt with promptly and in accordance with any agreed timescales.

Requests for Information

13. All requests for information (including documents or interviews) should be addressed to the Permanent Secretary at the relevant department unless another contact point has been provided. These contact points will consider where to route requests for information.

14. If it is not clear which department or Crown body is responsible for the information being sought, full details of the request should be addressed to the Cabinet Office. Where the investigator or prosecutor is aware that the request relates to a matter in which GLD Litigation are already instructed, the request should be directed to the lawyers assigned who will inform their departmental client at the earliest opportunity.

15. Requests should provide enough detail to ensure that the department understands the scope and relevancy⁸ of the request. Investigators should ensure it is precisely drawn. It should include:

- a. a summary of the investigation or case setting out the key facts and issues, in order to provide a sufficient factual basis to explain the request;
- b. how the requested material is relevant to a reasonable line of enquiry within the case, drawn out from the factual summary.
- c. the reasons for considering that the department has the documents or information relevant to the investigation, prosecution or defence; reasonable time limits for responding to the request with an appropriate justification for urgency.
- d. whether or not details contained in the request are sensitive, and, if so, the nature and degree of sensitivity (if known).
- e. specific parameters of any search requested, including the names of all persons, companies, organisations or parts of organisations relevant to the request and details of geographical or other limitations of the request (many departments have different sections to deal with different regions or parts of the world).

⁷ The Full Code Test should be applied: a. when all outstanding reasonable lines of inquiry have been pursued; or b. prior to the investigation being completed, if the prosecutor is satisfied that any further evidence or material

⁸ Material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case": CPIA Code of Practice



16. If necessary, a meeting may be set up with the investigator or prosecutor wherever there is a need for dialogue between the investigator/prosecutor and third party about the nature of the request being made.

17. The assistance of the Attorney General's Office may be sought by the CPS or SFO in appropriate cases to ensure that processes of securing evidence or disclosure of material by a government department run smoothly⁹.

Response: Handling the Request

18. The response to **Annex A** requests should be made in accordance with **Annex B**.

19. The first step is for the Permanent Secretary or other relevant departmental contact to identify the individuals within the department who are best placed to respond. They should be sent a copy of the request together with this guidance to assist them in responding.

20. If the grounds for requesting material appear unclear or unreasonable, this should be clarified with the originator of the request before undertaking departmental searches or providing any material.

21. The department providing the material will need to keep clear records of the search methodology and scope or extent of the search for information, together with the results of the search. This may need to be conveyed to the court or defence to demonstrate a reasonable search has been conducted.

22. Possible means of resolving any difficulties in complying with the request may include:

- a.** The recipient undertaking a more limited search for information than that sought under the terms of the request. The terms of such a search which should be agreed in writing;
- b.** the requester providing search terms, filters or other analytical techniques to assist the department or body;
- c.** allowing the requester to access the files which may contain documents falling within the terms of the request for them to carry out their own search. This will depend on the nature and sensitivity of the roles concerned and the level of security clearance held. A written undertaking to preserve the confidentiality of official documents may be required.
- d.** allowing the requester to inspect material, as a dip sample or representative sample, to inform their view of its relevance and whether it constitutes a reasonable line of enquiry.

⁹ This process is provided for in the framework agreements between the Law Officers and the Director of Public Prosecutions, and the Law Officers and the Director of the Serious Fraud Office



- e. obtaining statements from appropriate subject matter experts in the department. These can detail the strength of their present recollection of those matters and whether they recall any documents, meeting or other facts/information relevant to the particulars of the request. This would be appropriate where: (i) those concerned have a clear recollection of the matters covered by the request and are confident that no documents or other relevant information exists or, (ii) are able to point to strong evidence that such documents or information do not exist (for example the absence of any relevant names in lists, indexes or databases).

Handling Sensitive Information

23. The department may consider whether to make representations that the material be withheld in its entirety. Departments may wish to consider taking advice from their own subject matter experts and departmental lawyers before taking decisions on whether material may need to be withheld. Material may need to be withheld where it is believed that disclosure would give rise to a real risk of serious prejudice to an important public interest. It must be confirmed that it is truly sensitive, assessing the degree of damage and the risk of damage i.e., are all three limbs satisfied: **real** risk; **serious** prejudice; **important** public interest)¹⁰; Such damage may arise directly and immediately from disclosure, for example, where revealing information will:

- a. adversely affect national security or international relations;
- b. threaten the safety or well-being of an individual;
- c. harm the ability of the Government to manage the economy;
- d. assist the commission, or hamper the prevention, of investigation of a crime;
- e. prejudice a fair trial; or
- f. contribute to real damage to the public interest arising indirectly or in the longer term, for example where the information concerns the regulatory process.

24. The **first question to ask** is whether the sensitivity of the information is so great that it cannot be safely inspected by investigators and/or the prosecuting authority:

- a. if this is the case (and it is one which is likely to be very rare) the advice of the Law Officers should be sought on whether the sensitivity of the material reaches this threshold;
- b. otherwise, the information itself should be revealed for inspection (as distinct from provided) to the investigators/prosecutor as soon as possible.

¹⁰ It is acknowledged that there may be limited circumstances where even describing that nature of the damages would itself cause damage.



- 25.** The second question is whether the material is going to be relied upon as evidence by the prosecution or is otherwise disclosable to the defence. Departments should assist the investigator/prosecutor in making this a
- 26.** Only where it is required to prove the case or disclosable does the question of the information being withheld arise. The department nonetheless has a professional obligation to continue to retain it and permit access thereafter.
- 27.** A significant proportion of official information is held in confidence for one reason or another, but this alone is not sufficient reason for the information to be withheld in criminal proceedings. The public interest in justice being done may outweigh the public interest in withholding the material. Again departments may wish to take legal advice on such issues before concluding that information should be withheld.
- 28.** It is a ministerial decision as to whether it is in the public interest to withhold sensitive material and they should be clearly briefed with all the necessary information to allow them to reach a decision. If you wish to consider options around seeking a public interest immunity certificate, or feel that there may need to be special measures in place in relation to any court proceedings (e.g. closed material proceedings or hearings in camera, you should contact your legal advisors immediately).



Failure to Cooperate

29. Government departments should always cooperate with requests for information wherever possible. Where a government department or other Crown body fails to cooperate, allow inspection of the material, or requires the prosecution to obtain an order before handing over copies, the prosecutor may consider whether it is appropriate to:

- a. to obtain a witness summons¹¹;
- b. serve a notice compelling production of the material (where available)¹²;
- c. communicate the department's/body's decision to the court/defence and stop the case.

Data Protection

30. Requests for material containing personal data will fall within the provisions of the Data Protection Act 2018 and other data protection legislation. An assessment of whether material contains personal data and whether that prevents its onward disclosure to the prosecutor or investigator is necessarily case specific. As stated in paragraph 15 requests for information should be precisely drawn. This will assist in consideration of data protection issues such as the proportionality of the request. Advice should be obtained from departmental Data Protection Officers and, if necessary, departmental lawyers about the relevant considerations.

¹¹ Under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Court Act 1980

¹² E.g. a disclosure notice pursuant to part 2, Chapter 1 of the Serious Organised Crime and Police Act 2005, or a notice pursuant to section 2 of the Criminal Justice Act 1987.



Annex A – Request for information

From:

To:

A response is requested by *(if urgent, please state why):*

Sensitivity *(if the fact of this request is sensitive, please provide details and/or any request for special handling):*

1. Broad Overview of Case *(briefly summarise the investigation/proceedings: key proceedings to date, the case and the likely issues within it):*

2. Lines of Enquiry *(following on from the broad overview, what is/are the lines of enquiry arising from the case relevant to this request):*

3. Reason for Belief *(why does the investigator/prosecutor believe that the recipient department may hold relevant material?):*



Annex B – Response to Request for information

From:

To:

Returned On – *If there was a delay, please explain why.*

1. Information Available – *Please outline in short whether it was possible to comply with the request: this should set out any problem with doing so e.g. the search involved was agreed not to be a reasonable line of enquiry, or material has been destroyed in accordance with Departmental policies.*

2. Methodology Used – *Please summarise the manner in which the search was conducted.*

3. Non-sensitive material identified *(This should be provided to the investigator/prosecutor if deemed by them to be relevant. If deemed of evidential use, it will be served as evidence. If relevant, it will be described on a schedule which will be provided to the defence) (the prosecutor will indicate if any material is deemed evidential or disclosable and will revert to the Department before disclosure takes place)*



Annex B – Response to Request for information

4. Sensitive material identified *(please identify if provided or not)*

5. Rationale for sensitivity *(please set out why it is said the material is sensitive)*

6. Handling *(where sensitive material is involved, how should this document be handled, whether sensitive material can be separated and how can the prosecutor access the material)*

NB neither Annex A nor B are intended to be prescriptive. They can and should be adapted in order for the investigator and prosecutors to assist the department in dealing with a request as best they can, and/or for the department to engage with that request fully. They are intended however to ensure investigators and prosecutors provide sufficient information, about timing and expectations (Annex A) and for departments to explain how they have engaged with any request and to articulate concerns about sensitivity (Annex B).



Annex C – The CPIA and Disclosure Obligations

- 1.** The law governing material held by third parties is contained in the Criminal Procedure and Investigations Act 1996 as amended (the CPIA), supplemented by the CPIA Code of Practice and the Attorney General's Guidelines on Disclosure 2020.
- 2.** Every accused person has the right to a fair trial. The accused's right to disclosure is integral to it.
- 3.** Investigators are under a duty to pursue all reasonable lines of enquiry, whether these point towards or away from the accused. What is reasonable in each case will depend on the particular circumstances.
- 4.** The disclosure regime provided for by the CPIA:
 - a.** relates to material which is not prosecution evidence: 'unused material';
 - b.** where that material is relevant to an investigation¹³ and non-sensitive (material not meeting the test of 'sensitive', see below) it is scheduled and that schedule provided to the defence. If material meets the disclosure¹⁴ test it is provided to the defence;
 - c.** sensitive material¹⁵ is revealed to the prosecutor only. If, but only if, it meets the disclosure test (see above) the prosecutor must either disclose it (by providing a copy to the defence or finding another form in which to provide the disclosable information to the defence), seek a public interest immunity ruling to withhold it from disclosure or stop the prosecution.
- 5.** In dealing with sensitive material:
 - a.** the test for sensitive material must be applied rigorously. Only material, the disclosure of which would give rise to a real risk of serious prejudice to an important public interest is sensitive;
 - b.** the test for disclosure must also be applied rigorously;
 - c.** the prosecutor must consider, if disclosure is required, whether it can be made in a way which does not give rise to this risk (redaction, extracts, disclosure notes etc);

¹³ "material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case": CPIA Code of Practice

¹⁴ "any prosecution 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": section 3, CPIA (initial duty of prosecutor to disclose). See also section 7A (continuing duty of prosecutor to disclose)

¹⁵ "material, the disclosure of which the disclosure officer believes would give rise to a real risk of serious prejudice to an important public interest": CPIA Code of Practice



- d. if disclosure will give rise to this risk and a public interest immunity application is necessary, 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);
 - e. if a court, on hearing an application for public interest immunity, determines that the material in question should be disclosed to the defence, the interests of justice may require the prosecution to terminate the proceedings rather than make such disclosure or the court may grant public interest immunity and the trial can proceed with the material being withheld.
- 6.** Duties of disclosure are imposed upon two categories of persons only: (i) the investigator and (ii) the prosecutor. All other categories of persons or organisations, including government departments, are third parties, and are not fixed with legal duties to disclose by the CPIA.
- 7.** Third party material is therefore material held by a person, organisation, or government department other than the investigator and prosecutor, either within or outside the UK.
- 8.** Third parties are not directly involved in the case but may hold information relevant to it. Investigators and prosecutors are not in constructive possession of material that third parties hold.
- 9.** The CPIA places an obligation on the investigator, in consultation with the prosecutor, to pursue all reasonable lines of enquiry in relation to material held by third parties within the UK. What is reasonable will depend on the circumstances of each case.
- 10.** The line of enquiry must not be speculative. The investigator must have a reason to believe that a third party may have relevant material. That reason may come from information provided by the accused, or from other enquiries made or from some other source, but it must be a reasonable line of enquiry in the circumstances of the case.
- 11.** A third party has no legal obligation to reveal material to the investigator or to the prosecutor, nor is there any legal duty on the third party to retain material which may be relevant to the investigation¹⁶. However, Government Departments and Crown Servants have a professional duty to support the administration of justice.

¹⁶ This is subject to the wording of section 2(16) of the Criminal Justice Act 1987



- 12.** If, as a result of the duty to pursue all reasonable lines of enquiry, the investigator or prosecutor obtains or receives material from a third party, then it must be dealt with in accordance with the CPIA, as set out at paragraph 9b and c above (provision of a schedule of non-sensitive material to the defence and provision of any material meeting the disclosure test; assessment of sensitive material against the disclosure test).
- 13.** In criminal proceedings, material served by the prosecution in support of its case prior to a trial is subject to an implied undertaking that the material will be used solely for the purposes of those criminal proceedings. Material provided to the defence for the purposes of disclosure is confidential and must not be used without leave of the court for other purposes. To do so is a contempt of court.
- 14.** If material relevant to the investigation is obtained from a third party, it will become evidence, unused material or information within the terms of the CPIA Code of Practice and must be handled accordingly.