

Non-Disclosure Applications Guidance

September 2026 (v3.0)

Document History

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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
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1. **Introduction**

- 1.1 This guidance assists Parole Board members when considering and making decisions on non-disclosure applications (NDAs). Applications must be made via the Public Protection Casework Section (PPCS) on behalf of the Secretary of State for Justice (SSJ).¹ Such an application seeks a direction that information or a report should be withheld from the prisoner (and exceptionally, from their representative).
- 1.2 This guidance explains the legal principles and correct procedures for dealing with NDAs and withheld material, and practical issues that may arise during a review.
- 1.3 The two key legal principles are:
 - Material **can lawfully be withheld** from a prisoner, or in very rare cases also their representative, where disclosing it 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 person², BUT
 - We can ONLY do so when non-disclosure is a **necessary and proportionate measure** to prevent the risk manifesting AND doing so is **fair** to the prisoner. In order for the process to be fair, the prisoner MUST know the basic information in enough detail that they can respond to them. As Lord Reed held in *R. (Bourgass) v. The Secretary of State for Justice*³ "A prisoner's right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond."
- 1.4 It is important to stress that NDAs are the exception to the presumption that material that is to be considered by the Parole Board should be disclosed to the prisoner.
- 1.5 There are, in essence, two stages to considering NDAs:
 - **The first stage:** This is a decision by a panel member⁴ whether to grant the application for non-disclosure. The NDA will be considered by an MCA member,⁵ a duty member, or an oral hearing panel chair. Please see section 4.4 for more information.
 - **The second stage:** This is an appeal against that decision.⁶ Under rule 17(11) of the Parole Board Rules 2019 (as amended) ("the Rules"), the person who decides the appeal is the Board Chair who can delegate the powers to appeal members (see below).
- 1.6 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

¹ The Parole Board (Amendment) Rules 2025 removed the ability for a third-party to make an application to withhold material under rule 17. This means that applications to withhold material can only be made by the SSJ.

² Which could create a risk of harm.

³ [2016] AC 384, at [100].

⁴ Under the rules, either a panel chair (including MCA member as defined by 5(6)(b)) or duty member.

⁵ Where there is a multi-member panel, the MCA Panel Chair will be responsible for reviewing the NDA.

⁶ 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.

highlighted.

- 1.7 Rule 17 is set out in full in the consolidated version of the Rules which can be found here. A process map setting out the non-disclosure processes can be found at Annex A.
- 1.8 This guidance does not cover situations where material known to the prisoner is withheld from witnesses or other hearing attendees under rule 6(3)(f). Please see the Oral Hearing Guidance for further information.

Key Terms

- 1.9 **Material** – information or any report which is sought to be withheld from the prisoner.

Open - Material that can be disclosed to the prisoner without giving rise to any of the adverse effects listed in rule 17(1)(a) (see 2.4 below).⁷ Open material is added to the open dossier, seen by both parties, and can be discussed openly at the hearing.⁸ It also includes a summary/gist or redacted document (see below). The majority, if not all, the information seen by a panel will be open material.

Withheld – Material which is withheld from the prisoner and in some cases their representative. It may be classified material or sensitive material which the SSJ (with the permission of any other individual or organisation 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 and in some cases their representative.

Closed – Material that is, exceptionally, withheld from the prisoner and their representative, usually on grounds of national security. It carries 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. Closed material cannot move into open unless it has been declassified.

Gist – A summary⁹ of the material, which is the subject of the application, and is intended to be disclosed to the prisoner and their representative. A "gist" is the essence, in summary terms, omitting the detail of certain information contained in the sensitive material. **Fundamentally, it must convey something both relevant and intelligible to the reader.**¹⁰ The gist must contain sufficient information to enable the prisoner to understand the essence of the material and to challenge it where appropriate. An alternative to a gist is a **redacted** document, namely a copy of the original document with sensitive information obscured. **Rule 17(5)(b) and (c) require a summary or redacted version where the material is withheld from the prisoner.**

⁷ Withholding material under rule 17 can only take place where certain conditions are met. Please see paragraph 2.4 below.

⁸ 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.

⁹ Throughout this guidance, the word gist will be used which also covers summaries.

¹⁰ The term was defined by the Northern Irish Court of Appeal in *The Secretary of State for Northern Ireland v. Northern Ireland Coroner* [2024] NICA 82.

Special Advocate – This 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 the prisoner is not their client, and the Special Advocate cannot share the information with them.

'In camera' – Legal term meaning 'in private'.

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

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 at the same time that it is disclosed to the Board¹¹.** This derives from the common law principle 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 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 it¹².** 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.
- 2.2 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. In such cases, extra steps need to be taken to safeguard the fairness of the proceedings. Rule 17 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.
- 2.3 Under rule 17(1) the SSJ may apply for any material to be withheld from the prisoner or from both the prisoner and their representative. The [HMPPS Handling Sensitive Information Policy Framework](#) states that applications to withhold information must be made "*only where absolutely necessary and proportionate in the circumstances of each case*" and notes that the "*presumption must always be in favour of disclosing all available information to the prisoner*".
- 2.4 A direction for non-disclosure of material may only be made where both limbs of the test in rule 17 are met, namely:
- (1) Disclosure would adversely affect any or all of the following: national security, the prevention of disorder or crime, 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.

¹¹ Parole Board rule 16(2).

¹² [R \(on the application of Bourgass and another\) \(Appellants\) v Secretary of State for Justice \(Respondent\) - UK Supreme Court](#)

Both requirements must be met for non-disclosure to be lawful. Given the impact on a prisoner, reasons should be provided to demonstrate that consideration has been given to both limbs of the test.

- 2.5 If the NDA is refused by the panel member/appeal member, that does not necessarily mean that one of the 'adverse effects' set out in rule 17(1)(a) will happen. The SSJ 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 SSJ may do that if they consider that the disclosure would have one of the 'adverse effects' specified in the 17(1)(a).
- 2.6 Where the material has been withdrawn, and the application was considered by the panel member appointed to hear the substantive case, they must consider whether they should recuse themselves. Please see section 9 on considerations for recusal.
- 2.7 Rule 17(5)(b) and (c), which allows the panel member to make a direction withholding the material, require a summary (gist) of the material, or a redacted version of it, to be disclosed to the prisoner instead of the full material. **The gist/redacted version is a requirement of rule 17 if information is to be withheld from the prisoner - it is not possible to withhold information in the absence of one or the other.** 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. See paras 5.8 onwards on gists.
- 2.8 Fairness to the prisoner can be met in several ways, by:¹³
 1. Disclosure of the material in full.
 2. Disclosure of a suitable gist or redacted version.
 3. Disclosure of the material to their representative following receipt of an undertaking (thus allowing submissions to be made on the prisoner's behalf).
 4. A combination of 2 and 3.
 5. In **very rare** cases where material is withheld from the prisoner and their representative, the appointment of a Special Advocate (see section 8 below).

3. The Application

- 3.1 **An application for non-disclosure of material can only come from the SSJ.** Even if third parties such as the police or other information owners are involved, the NDA is made by the SSJ. This means that if information is directed to a third party, and they want to use the non-disclosure process, they will need to contact the SSJ's officials. **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 SSJ's responsibility to resolve the matter.

¹³ See para 5.6 for more information.

- 3.2 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 to ask for the application, to be submitted via the correct procedure.¹⁴ **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, see para 13.5 on the panel inadvertently seeing information that is later withdrawn or has not gone through the correct NDA procedure). If this happens at the MCA stage, the member may need to adjourn the case until the position has been clarified.
- 3.3 At the first stage of the process, the prisoner (and their representative, if they have one) are **not** notified about the material and in most cases will be unaware that an application for non-disclosure has been made. This type of application, made by one party in the absence of the other, is sometimes called an 'ex parte' application.
- 3.4 The application must be accompanied by the material in full and the reasons why it is being proposed that the material should be withheld. The NDA must detail why non-disclosure is necessary and proportionate and what the 'adverse effects' would be, should it be disclosed. It must also be accompanied by a proposed gist or a redacted version of the material. If no gist or redacted version has been supplied, a direction (under rule 17(4)) should be made that one is to be provided before a decision is made on the application. If needed, the SSJ can be reminded that rules 17(5)(b) and (c) both require this to be disclosed when material is withheld.
- 3.5 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 within HMPPS. The Policy Framework aims to ensure that there is an effective process in place which:
- Ensures all known relevant risk-related information is shared with the Parole Board;¹⁵
 - Ensures NDAs are submitted in line with the relevant provisions in the Parole Board Rules;
 - Ensures sufficient safeguards protect the source and integrity of the information;
 - Ensures HMPPS staff know how to manage cases where a victim includes previously unknown risk related information in their victim personal statement (VPS);
 - Provides clear procedures for PPCS to apply to withhold the VPS from the prisoner where necessary; and

¹⁴ 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 13.10 onwards for more information.

¹⁵ Under rule 16 (3) Parole Board Rules 2019 (as amended), subject to rule 17, the SSJ 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".

- Allows security and risk information, including prison-held and MAPPA information, to be appropriately shared with the Parole Board.
- 3.6 Where the material that is the subject of the NDA 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.
- 3.7 NDAs 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 higher.
- 3.8 Examples of common circumstances in which an application might be made include (this is not intended to be an exhaustive list):
- A victim does not wish a prisoner to see their VPS due to the adverse effects of 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 enable them to know the case against them. However, in others it may be very difficult, especially when the information to be withheld contains the key details that would be necessary for the prisoner to challenge it.
 - Disclosure could compromise intelligence-gathering methods and enable the prisoner or others to shape their practices to avoid detection.
 - The prisoner themselves is a source (sometimes called a Covert Human Intelligence Source or CHIS).¹⁶ In these circumstances, 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 is unwilling or unable to declassify information so that it can move into open 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 SSJ.

¹⁶ Please see para 13.7 onwards on CHIS.

- There is information 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 (for example, security information and the source). While it is likely that most 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. **The First Stage**

- 4.1 The first thing to check is that the application has been received in time, and if not, to consider whether to accept an extension of time request. Please see section 6 on timeframes for the application.
- 4.2 **The prisoner (and their representative, if they have one) are not notified about the material and will usually be unaware that an application has been made.**
- 4.3 To include them at this stage would reveal the existence of sensitive material and potentially invite inferences about its nature or significance before a decision has been made and the SSJ has been given an opportunity to withdraw it.
- 4.4 NDAs should be determined at the earliest possible stage to minimise the risk of delay. Rule 17(2) states "An application under paragraph (1) may not be made later than 8 weeks before the date allocated for an oral hearing under rule 22."
 - 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 not been 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 ask a duty member to determine the application. Please refer to section 9 for information on recusals.

** The first stage decision on the NDA and the substantive decision (release, not release, open conditions) should not be made together or in close proximity. Parties should have the opportunity to appeal the first stage decision within the relevant timeframe before the substantive decision is made. **A substantive decision must only be made once both stages of the non-disclosure process have***

completed. ¹⁷

- 4.5 Once a decision has been made on an NDA, the only ways in which it can be revisited are:
- (1) by way of the appeal process under Rule 17(11) (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 reconsider the disclosure of any withheld material (see paras 13.21 onwards on further disclosure of withheld material).
- 4.6 Good practice is for panel chairs **not** to involve co-panellists in the consideration of the NDA, and not to share withheld material with them until any appeal is concluded or the appeal window has passed, unless absolutely necessary. This is to reduce the risk of the entire panel having to recuse themselves (please see section 9 on recusal).
- 4.7 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 oral hearing;
 - The full dossier;
 - The **full (unredacted) material** which is the subject of the application;
 - A properly completed NDA 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 of the information;
 - Any supporting material.

Directions¹⁸

- 4.8 If the panel member considers that further information is needed before making a decision, they may make directions as necessary under rule 17(4) to:
- “(a) resolve any preliminary issues or questions about the application before making a decision on the application, including by directing a case management conference to resolve any such issues, and/or
 - (b) make directions in relation to the service of additional evidence, information or reports regarding the application made under paragraph (3)(b) but only in relation to material required under rule 16”.¹⁹

¹⁷ In some cases, the prisoner may know enough about the nature of the NDA (for example when it relates to a VPS) and decide that whatever the outcome of the NDA, they do not wish to appeal.

¹⁸ Please see section below on adjournments.

¹⁹ That is to say, material relevant to risk.

- 4.9 If the panel member considers that further information, or a better and more detailed gist or redacted version, would assist them, they can direct this to be produced. Where no gist or redacted version has been provided, it should be directed before the application is progressed. The panel member must not write the gist or redacted version as this is done by PPCS but may indicate in their directions what material they consider should be included. There is no provision entitling the prisoner or their representative to make representations on the gist or the redacted version at this stage.
- 4.10 **At this stage, directions are only issued to PPCS as the prisoner will be unaware of the material and in most cases unaware of the NDA.**
- 4.11 Directions in relation to non-disclosure should be issued on a separate MCA directions template (if the case is at the MCA stage), a duty member directions form, or a panel chair directions form. The reason is to avoid the possibility of directions relating to the non-disclosure being sent to the prisoner by mistake. This is **especially** important if the material is withdrawn as all references to the withdrawn material must be removed from the dossier.
- 4.12 Under rule 17(4A) any additional evidence, information or reports directed to be served under rule 17(4)(c) which are served before the panel chair or duty member makes a decision on the application, are to be considered as part of the original NDA and do not require a further application by the SSJ.
- 4.13 Under rule 17(4)(a), case management conferences (CMCs) can be utilised to obtain the necessary information for the panel to determine the NDA. For example, the panel can use a CMC to ask questions of PPCS/ the source provider (such as the police) to clarify matters. Directing a CMC can also allow the SSJ to make oral arguments in support of their written application. General guidance on CMCs can be found in the oral hearing guidance. However, as it will be to facilitate a first stage decision, the prisoner's representative should not be aware of the NDA and accordingly, notice should only be served on PPCS. The NDA decision should include information about the CMC and make clear that no evidence was taken and that as the CMC was to facilitate a first stage decision, the prisoner/their representative were not present.

Revelation meetings

- 4.14 Very rarely, 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. **Only members with appropriate security clearance will be allowed to deal with this material.**
- 4.15 **When SECRET material is involved, members must deal with it in accordance with the special rules around secure conditions and handling materials. It cannot be discussed outside secure conditions unless or until it is declassified. If members do not follow these rules, then there is a real possibility that the Board will no longer be allowed to access such material.**

- 4.16 If there is closed material, PPCS and the Parole Board secretariat²⁰ will set up a 'revelation meeting' in a secure environment where the closed material will be shown to the NDA decision maker. PPCS officials and members of the secretariat with appropriate clearance are present, and possibly third parties such as the police to assist PPCS to present the material.
- 4.17 The revelation meeting is not a hearing or an opportunity for the SSJ to argue their case: it is to enable the panel member to view the closed material and ask any questions that they have about its content before making a decision about how to progress the application.

5. Key Principles for making an NDA decision

First ground – rule 17(1)(a) criteria

- 5.1 The starting point is whether the SSJ has established the first ground for non-disclosure, 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.
- 5.2 In deciding whether any of these grounds are met, the panel member can draw reasonable inferences from the facts in the dossier, the material which is the subject of the NDA, and any other supporting evidence. In the case of a VPS, it may be a reasonable inference from all the evidence that the victim has suffered and continues to suffer psychological harm from the index offence and that were the prisoner to see the VPS, the victim would likely suffer further psychological harm.
- 5.3 If the panel member determines that the first ground has not been established, they should refuse the NDA and direct the material to be disclosed in full. Below is a suggested form of words for this, although panel members can add further explanation if necessary, however brevity is advised:

*'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 because [**Insert 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

²⁰ NDAs with CLOSED material and revelation meetings are managed by the Specialist Case Management team at the Parole Board.

- 5.4 If the panel member considers that the first ground has been met, they must go on to consider whether the second ground has also been established, namely that withholding the material is a necessary and proportionate measure in the circumstances of the case.
- 5.5 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 panel member will have to **separately consider each item** in the material sought to be withheld.
- 5.6 Fairness to the prisoner can be established in several ways. The following factors may assist to establish the fairest way forward:
- **Fairness always requires the prisoner to be sufficiently aware of the case against them so that they can respond to, and where necessary, challenge it** – therefore, the gist/redacted version must be sufficiently detailed.
 - Open material may be disclosed to the prisoner, alongside a gist or a redacted version of the withheld material, to provide context and aid understanding. This helps the prisoner to better understand the case against them and promotes fairness.
 - Where withheld material is duplicated in open material, withholding it may be unnecessary, or it may be removed from the application.
 - Other material already known to the prisoner, such as material recovered from their person or from their cell, will not usually need to be withheld. However, withholding it may be proportionate if disclosure could endanger a source or compromise an intelligence gathering method.
 - Prisoners may also be aware that their communications and devices are being monitored.²¹ 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 disclosed as open material as it will not reveal anything which they do not already know. This does not apply to things such as prison phone monitoring or intercept evidence of which the prisoner is unaware.
 - Material with a public element is also likely to be disclosed as open evidence, including photographs of the prisoner taken in public places, 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 the impact on a victim included in their VPS, may not need to be disclosed (please refer to paragraphs 13.17 onwards).

First stage Decision Outcomes

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

²¹ However, may not be aware that discussions in other languages can be translated into English if necessary.

- served on the prisoner and their representative (if applicable) in full;
- withheld from the prisoner but served on their representative (if applicable) in full, subject to any undertaking required under paragraph (7)(b)²², and disclosed to the prisoner in the form of a summary or redacted version; or
- withheld from the prisoner and the prisoner's representative (if applicable) but disclosed to them in the form of a summary or redacted version.

The rules require that some form of a summary (gist) or redacted version will need to be given to the prisoner if material is to be withheld. This is to ensure procedural fairness.

Gist (summary) or redacted version of the material

- 5.8 If the panel member concludes that there are grounds for withholding the material from the prisoner, they must direct disclosure of the material in the form of a gist or a redacted version. The SSJ should have provided a proposed gist or redacted version as part of the NDA. If one has not been provided, the SSJ should be reminded that the rule 17 application cannot succeed because disclosure under rule 17(5)(a) is the only available option and withholding it will not be proportionate if the prisoner cannot understand and respond to it.
- 5.9 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 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 gist or redacted version must provide sufficient information for the prisoner to understand the nature of what is in the withheld material so that they can respond effectively to it and, if not accepted, challenge it.** This means that they must know enough information to give instructions to their representative about it. Where material is withheld, this can usually be achieved with a combination of a gist/redacted version and allowing representatives to see the material.
- 5.10 If the panel member considers the gist or redacted version is insufficient, they may direct that it be redrafted, or that certain sections be unredacted. The member can adjourn the first stage decision of the NDA, if necessary, to give the SSJ the time to do so. An adjournment may not be necessary if there is sufficient understanding and agreement about the final form/content of the gist or redacted version for the member to be confident it will be produced in that form/content after the decision is made. 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, although urgent action may be required where an oral hearing is imminent.
- 5.11 Where the information being withheld is a VPS, the gist or redacted version will only be provided with their express consent, and after they have agreed to the wording. If the victim refuses to give permission to change the gist, or

²² Whilst the undertaking is to the Board, PPCS are responsible for obtaining the undertaking.

does not agree with the rewording, then the SSJ is unable to provide the proposed gist or redacted version of the VPS, and the application (and material) will need to be withdrawn. A revised version may be submitted but again, in line with HMPPS policy, only with the victim's express consent.

- 5.12 The more detailed the gist or redacted version, the more likely it will be assessed as being fair to withhold the full material. If there are difficulties in obtaining a suitable gist, the panel member may direct a CMC if helpful.
- 5.13 Fairness may also be achieved by disclosing sufficient detail of the material to a prisoner's representative,²³ subject to an undertaking. This enables the representative to make informed submissions about the need for further disclosure, question witnesses, and challenge the reliability of withheld material, including during any *in camera* hearing. However, disclosure to the representative alone may not ensure a fair hearing if the prisoner lacks sufficient information to be able to give instructions to the representative.
- 5.14 Although a gist or redacted version is disclosed to the prisoner, the prisoner's representative will usually still have access to the full material on the basis of their undertaking (see section 7 below).
- 5.15 Consideration needs to be given as to whether the whole material can be withheld without causing any unfairness to the prisoner. Material that has no bearing on risk, for example a VPS that talks about the impact of the crime, may not impact upon fairness because the prisoner has no need to respond to it as it will not affect the panel's decision. In such a case a gist can be very brief. Where material is relevant to risk and likely to impact on the panel's decision, however minimally, it is less likely to be necessary or proportionate to withhold it.
- 5.16 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:

*"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 because **[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,***

²³ Please see paragraph 7.2 that sets out who the material can be served on.

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]. The material should be served by the Secretary of State on [insert prisoner's name]'s representative (if applicable) in full, 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, other than other legal professionals also responsible for working on [insert prisoner's name] case, together with the representative".*

- 5.17 If 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 also best practice not to name a victim in directions.

6. Time Frame for making an application

- 6.1 Under rule 17(2), an NDA may not be made later than eight weeks before the date allocated for an oral hearing. However, rule 9 allows a panel member²⁴ a wide discretion to alter that time limit.
- 6.2 Where a request is received less than eight weeks before the date allocated for the oral hearing, the SSJ must apply for permission to submit the application out of time, using the "extension of time request for a non-disclosure application" form and provide reasons for the delay.
- 6.3 Panel members should consider:
- 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.
- 6.4 Regarding fairness:
- (a) Extending the time limit will not normally be fair to the prisoner if the application is made so close to the hearing that it is likely to result in an adjournment. Panels must be aware that it can take time for a representative to both obtain instructions from, and advance challenges on behalf of, their clients.
 - (b) Declining to extend the time limit may be unfair to the SSJ (and potentially 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 NDAs 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.

²⁴ An appeal member acts as a duty member for the purposes of rule 9.

(d) **Where there is actual or potential unfairness to both parties, a balancing exercise is necessary to determine what is in the best interests of a fair hearing.** If the material potentially relates to risk and is likely to have an impact on questioning at the oral hearing, 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. The Parole Board has a duty to provide a fair procedure to both parties – this is most often achieved by seeking representations as to the need for an adjournment. Whilst it may not always be possible to take representations, if possible, the parties should be given the opportunity to provide them. See section below on adjourning.

- 6.5 The panel member will need to make the decision on whether to grant an extension of time before considering the NDA. If an extension is refused, the NDA will not proceed. 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.
- 6.6 Where determining an extension of time requires consideration of the material that may subsequently be withdrawn, panel members should apply the recusal principles e.g. the panel member may require a duty member to consider the extension request and NDA rather than risk recusal. There is no provision to appeal a decision to accept or reject an extension of time request for an NDA.
- 6.7 Whilst the prisoner/their representative is usually unaware that an in-time application has been made, where the application is made out of time, in most cases, PPCS will notify the prisoner's representative when they are submitting an extension of time request. However, there will be some cases, for example where the material is particularly sensitive and they are seeking to withhold from both the prisoner and the representative, where they would not do so.

Adjournments

- 6.8 Where an adjournment is considered necessary, it may be appropriate to issue two adjournment notices: one to be sent to all parties, the other to be sent only to PPCS with directions for them to submit an NDA if required. In the first notice, the panel should consider what the prisoner is already aware of which can inform whether the adjournment notice should refer to a potential NDA or not. Wording such as the following may be helpful:

"We have been informed by PPCS that further risk related information may be put to the panel. We have adjourned the case to give them time to decide if they wish to submit the information and if so, to follow the usual procedures."

This explains the delay but does not identify the further information or force PPCS to put anything forward if the NDA is not successful. Unless the prisoner is aware of a potential NDA, the 'reason for adjournment' should not refer to an outstanding NDA and a more suitable reason can be selected (for example

new information directed). Any specific directions relating to ND can be included in the ND adjournment notice.

- 6.9 An adjournment may not always be necessary if the hearing can proceed as planned, and the questioning and evidence at the oral hearing is unlikely to be affected by the ND material, whilst the NDA matter is dealt with separately after the hearing. For example, if the late NDA relates to a VPS which is unlikely to impact the questioning and evidence taken at a hearing, there may be no need to adjourn until after evidence has been taken and submissions have been made. Adjournment directions should be made after the hearing to stop the clock on production of a decision. If the NDA is accepted, or rejected and the material is added to the open dossier, the panel will need to consider if whether fairness to the prisoner requires further evidence in writing or at a further hearing, before concluding the case.

7. Undertakings and Disclosure to the Prisoner's Representative

- 7.1 If the first stage decision is that the material should be withheld from the prisoner, the panel member may direct that it should be disclosed to the prisoner's representative, provided they have given an undertaking²⁵ that they will not disclose it to the prisoner or to any other person (other than other legal professionals also responsible for that prisoner's case²⁶).
- 7.2 Under rule 17(7), if such a direction is made then the material must be disclosed by PPCS, subject to a signed undertaking, providing 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 qualification²⁷.
- 7.3 Although the undertaking is to the Parole Board, PPCS is responsible for obtaining it from the prisoner's representative. They will be able to confirm whether it has been supplied and whether the material has been disclosed.²⁸
- 7.4 The giving of an undertaking 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, CILEX²⁹ 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

²⁵ 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.

²⁶ Rule 17(7A) introduces the requirement for a new undertaking to be given if a prisoner appoints a new legal representative, even where they are from the same firm. This may not be necessary if an undertaking is given in the name of a whole firm.

²⁷ See Parole Board rule 10.

²⁸ The process for this is set out in the Handling Sensitive Information Policy Framework.

²⁹ Chartered Institute of Legal Executives. They could fall within 17(7)(a)(iii) if the member directs it.

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, or an application to bring contempt of court proceedings, but such processes can take a considerable time to bring and may not act as a significant deterrent.³⁰

- 7.5 Due to legal representatives' professional obligation to keep prisoners informed of all material relevant to their case, it is always necessary for the representative to obtain the prisoner's consent before receiving material in such circumstances, and this can take time. It is a matter for each representative following instruction 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, following instruction from the prisoner, 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. 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 it has not been withheld from them as they have been provided with the opportunity to see and respond to the material but chose not to do so. They still have the right to appeal the non-disclosure decision, even in the absence of providing an undertaking.
- 7.6 HMPPS witnesses do not need to provide an undertaking before PPCS shares withheld material with them as they are bound by their organisation's policies and procedures on handling sensitive information. However, prisoner commissioned witnesses, such as psychologists, must provide an undertaking for the information to be shared with them.
- 7.7 Requests may come in for an undertaking to be removed, please see para 13.25 for more information.

8. Special Advocates

- 8.1 Where a panel member considers it is necessary and proportionate to withhold material from both the prisoner and their representative (for example, if disclosure would adversely affect national security), they should consider whether to direct the appointment of 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 from both the prisoner and their representative. These cases will be rare and will always be managed by the National Security Casework team in PPCS. In these rare cases a Special Advocate will almost always be needed.
- 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. Under rule 17(A)(1), the Special Advocate can:

³⁰ For further information on non-legal representatives, please see the guidance on Representation.

- (a) make submissions to the panel in any oral hearings from which the prisoner and the prisoner's representative are excluded;
- (b) adduce evidence and cross-examine witnesses at hearings;
- (c) make applications to or seek directions from the panel or duty member where necessary, and
- (d) make written submissions to the panel, including whether material withheld under rule 17(5) should be disclosed in full or in a summary or redacted version.

- 8.3 Rule 17B sets out what Special Advocates can do in relation to communication about proceedings. In essence, they cannot communicate with the prisoner without permission once they have seen the material. Rule 17C sets out the process for issuing written decisions in cases where material has been withheld from the prisoner and their representative. In essence, the decision must be prepared under secure conditions and will not be disclosed into open until after it has been declassified. The declassification process is not about changing the decision or reasons but ensuring that no withheld information is accidentally disclosed.
- 8.4 The appointment of a Special Advocate will be a rare occurrence as, in the vast majority of cases, it should be possible to serve the material on the representative in full with an undertaking (see section 7) to ensure fairness. The Parole Board's Head of Legal and Policy should be contacted for bespoke advice if a panel member considers that appointment of a Special Advocate is necessary.
- 8.5 Panel members dealing with Closed cases should remember that the Closed material cannot be discussed outside of secure conditions. This means that they cannot take the material away to consider it, and that decisions must be prepared in secure conditions and must be declassified before they can be issued. In some cases, it will be necessary to prepare a Closed Annex to the decision, containing detailed reasoning on the Closed material. Panels may take notes of the open evidence and their reasons into secure conditions, but the decision itself must not be drafted outside secure conditions, not even in part. This is a necessary precondition of being given access to closed material. The secretariat will be able to make all necessary facilities available to members to allow them to do so. The existence of that Annex can be referred to in the decision but the contents of it cannot be declassified and so it must remain in secure conditions after the decision has been declassified and issued. The Annex will be seen by the Special Advocate but not by the prisoner or their representative.

9. Withdrawal of the Material and Recusal Considerations

- 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 version, rule 17(15) enables the SSJ to withdraw the material. The overriding consideration must be the protection of the public. In this instance, the SSJ has decided that the risk in disclosing the material is greater than the risk of any harm that might result if the panel does not see it.

- 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. It is up to the member to decide whether to recuse themselves however, the overriding consideration of fairness must be applied. 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 (if applicable) are notified, by PPCS, of the fact that an NDA was made, the outcome of that application, and their right to appeal that outcome. If the outcome is that material should be withheld, they will be served with the gist or redacted version as soon as practicable. In most cases this is uploaded to the dossier once the first stage decision is made, unless the material is sensitive and there is a high probability that it will be withdrawn if an appeal is accepted and they withdraw the information.
- 10.2 The Rules do not require that the prisoner or their representative receives a copy of the application or the first stage decision. Requests to see the application should be directed to PPCS. If a panel member is asked to disclose their decision and PPCS have concerns, the panel member is advised to seek bespoke advice from the Legal & Policy hub.

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)). They must notify the other party that they have submitted an appeal and under rule 17(14), representations may be made to the Board within seven days of being notified.³¹ Time limits may be reduced in accordance with rule 9 and the guidance above (section 4) if both parties have confirmed that they do not wish to appeal³².
- 11.2 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 members.
- 11.3 **If the prisoner is not represented,** it is the responsibility of the Parole Board,³³ to **automatically initiate an appeal under rule 17(13).**
- 11.4 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.

³¹ The secretariat staff will seek representations.

³² Panels should bear in mind the difficulties that prisoner's representatives may have in obtaining instructions from the prisoner within the prescribed time limits.

³³ The Case Manager will contact the Parole Board Litigation Team who will process these.

- 11.5 If there is no appeal, and the material has been directed to be withheld from the prisoner, the material must be served on the representative if certain conditions are met (see section 7 above).
- 11.6 If the SSJ appeals, under rule 17(12) PPCS has the right to withhold the material until the appeal has been determined. However, usually, the SSJ is content to serve material in a gist or covered by an undertaking, to enable the prisoner to properly engage with the case, unless it involves material that is particularly sensitive or has a high security classification.
- 11.7 If either party appeals at the MCA stage, the panel member may have to adjourn to enable the appeal process to conclude. While there is no explicit requirement to do so, if this process results in withdrawal of the material by the SSJ, the panel member will need to consider whether to recuse themselves (see section 9 above).
- 11.8 If the case is at the oral hearing stage, and each party has confirmed that they do not wish to appeal, it may be possible to proceed with the hearing. 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. Representations should be sought where possible.
- 11.9 If an adjournment is necessary, a timescale of 10 days is usually appropriate in the first instance. A further review might result in an additional adjournment if necessary. Dealing with Closed material will require a longer timescale.
- 11.10 The panel member can also request the appointment of a Special Advocate (see section 8 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.
- 11.11 The expectation is that a Special Advocate will have already been directed in these cases. If not, the panel member should seek advice from the Litigation Team and formally adjourn until appointed. 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.
- 11.12 The same rule 17 test, fairness principles and disclosure requirements apply on appeal. The appeal member can look at all the materials and make their own decision. However, they 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.
- 11.13 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.

- 11.14 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.
- 11.15 Under rule 17(14B), the appeal member may determine an appeal by:
- (a) upholding the decision made by the panel chair or duty member under paragraph (5)³⁴; or
 - (b) substituting their own decision, which may contain any direction that the panel chair or duty member could have made under paragraph (5).
- 11.16 The appeal member will need to write their decision with caution, so as to avoid referring to the detail of withheld material. That is because the decision (subject to any redactions the Board considers necessary) 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 Litigation Team. Finally, appeal members should recall that when dealing with Closed material, their decisions will have to be prepared in secure conditions and not released until they have been declassified.
- 11.17 Once an appeal decision is made, under rule 17(14C) the SSJ 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.
- 11.18 As with the stage one decision, the SSJ has the option of withdrawing the material. If the material is withdrawn, the same position on recusal will apply.
- 11.19 Rule 17(4B) states that once a decision has been made on an NDA, and the appeal process has been completed, if the panel chair or duty member directs that any additional evidence, information or reports are to be served, a new application by the SSJ is required if the SSJ considers that the material should be withheld. Similarly, a new application will also be required if the SSJ decides to voluntarily disclose further information that has not been directed.

³⁴ Rule 17(5).

12. Parole Board Decisions

- 12.1 All written decisions about release or open conditions must follow the Decision-Writing Guidance and should cover all the relevant risk related evidence that the panel considered and placed weight on.
- 12.2 **Any panel making a decision about release or a recommendation on open conditions must have access to all documents relating to an approved NDA, including (but not limited to) the full material, the application, any gist, the first stage decision and the second stage decision (if any).**
- 12.3 When drafting a decision, panel members should consider whether reference to the open material alone is sufficient or whether further reference to withheld material is necessary to explain the panel's reasoning.
- 12.4 Where the panel's reasoning can be adequately explained by reference only to the open material (including the gist or redacted version), a single decision can be issued.
- 12.5 Where reference to withheld material is necessary to clearly set out how they critically analysed the material and the weight they have applied to it, two versions of the written decision should be issued:
 - A full version containing withheld material which can be shared with PPCS and the prisoner's representative (as long as they have given an undertaking) or a Special Advocate where appropriate.
 - A disclosable version that can be shared with the prisoner with the relevant material removed or redacted. The panel can include wording such as "Rule 17 withheld material removed".

This is to ensure that the written decision accurately reflects the panel's determination whilst ensuring that relevant analysis of withheld material is not inadvertently disclosed to the prisoner and/or missed out from the panel's written decision. To ensure fairness, the disclosable version should include as much information as possible to enable the prisoner to understand the panel's analysis of the withheld information and enable them to challenge the decision should they choose to do so.

- 12.6 Where Closed material has been considered, the decision must be prepared in accordance with the provisions set out in section 8.

13. Issues that may arise

Unauthorised redactions or other material

- 13.1 Information may only be withheld from the Prisoner under rule 17 where an NDA has been accepted. However, not all redacted information in the dossier will necessarily be subject to an NDA. Where a dossier contains redacted material (for example information in a police report with sensitive details obscured) or other indication that material has been withheld, but the

relevant NDA or decision is not available, Panels should contact the Case Manager to seek clarification from PPCS regarding the reasons for the redactions. Where the redacted material is a result of an approved NDA, the Panel making a decision about release or open conditions **must** have access to all documents related to the approved NDA before making the decision.

- 13.2 If no NDA has been submitted during that review, and the dossier contains unexplained redactions, a direction should be made for PPCS to clarify the reasons why. Where the information should properly be withheld under rule 17, PPCS should either submit an NDA for consideration or withdraw the material. NDAs and non-disclosure decisions made in relation to a previous review do not automatically carry forward to a subsequent review and must be considered afresh.

Information received outside the Rule 17 process

- 13.3 All information that a panel has sight of must be seen by both parties, unless it is subject to an NDA which has been granted.
- 13.4 Where the panel receive information outside the correct ND process, for example information from a witness has been emailed to the panel and is not in the dossier, they should establish the following:
- Are PPCS aware of the information? If not, the Case Manager should ask the witness to share the information with PPCS to decide how to proceed.
 - If PPCS are aware of the information, can it be uploaded to the dossier? If not, are PPCS intending to submit an NDA? The Case Manager can ask PPCS to confirm.
 - If PPCS do not formally submit the information and are not intending to submit an NDA, do the panel consider that an ND direction relating to the information needs to be made for the information to be uploaded to the dossier? Panels should be mindful that this may result in either a withdrawal of the information or an NDA.
 - If PPCS withdraw the material and do not wish to rely on it, the panel will need to consider whether they need to recuse themselves. See section 9 above for further advice.

- 13.5 Where the panel has had sight of material that has not been seen by the prisoner or their representative, and the SSJ has withdrawn it without seeking non-disclosure, the panel should issue PCDs and make it clear to both parties that the panel inadvertently had sight of material (without referring to the nature of the information) that the SSJ is not relying on and provide assurances that the panel can put the information out of their mind. Representations should be sought on how to proceed.

Prisoner as a Covert Human Intelligence Source (CHIS)

- 13.6 In some cases, the prisoner has provided confidential information to the authorities as a Covert Human Intelligence Source ('CHIS'). A CHIS may want the Board to be aware that they are a CHIS so that aspects of their behaviour in custody can be explained in that context.

- 13.7 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 from their own representative to avoid any risk of inadvertent disclosure. This is sometimes asserted by the SSJ 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 who do not need to see it. Rule 17(1)(b) is therefore likely to be satisfied. Any gist provided can be extremely minimal. This is because the prisoner already knows the information to be withheld.
- 13.8 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 when assessing witness' written and oral evidence

- 13.9 Sometimes 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 SSJ is entitled to put their case in the way they see fit and decide what their witnesses can see. **Members should assume that the only witnesses aware of the withheld material are those stated in the Annex A i.e. usually the witness who has provided PPCS with the material.** Members should assume that all other witnesses will have had sight of the gist or redacted version only. If other witnesses have been provided with the withheld material, PPCS will inform the Board. If there is any uncertainty and the NDA is not clear on this point, the panel can make an ND direction to clarify who has seen the material.
- 13.10 Where a panel considers that another witness should have sight of withheld material, it may make a direction seeking PPCS's position on whether the information can be disclosed to the other witness where the panel considers that their evidence may be impacted by the withheld information.
- 13.11 Where PPCS have concerns about disclosing the information to other witnesses, the panel should consider whether further directions might assist. For example, the panel may wish to reassure PPCS that any discussion of the withheld material at an oral hearing would take place in closed session or direct a case management conference to discuss the issues and any additional safeguards that may be appropriate.
- 13.12 Panels are reminded that where agreement cannot be reached on a witness' access to withheld material, PPCS may decide to withdraw the material. Panels requiring further advice should contact the Legal & Policy hub.
- 13.13 Where withheld material has not been shared with other witnesses, the panel will need to bear in mind that, as that witness will not see part of the

evidence, the weight given to their evidence may be impacted as a result.

- 13.14 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. This enables the panel to explore the withheld material with witnesses (who have had sight of the withheld material) *in camera*, or hear *in camera* submissions, in cases where the representative has seen the material, but the prisoner has not.

Non-Disclosure Situations arise unexpectedly at the Oral Hearing

- 13.15 Where potentially sensitive information emerges unexpectedly during a hearing e.g. a witness alludes to prison security information, a police report, a summary of domestic abuse call outs (usually because the witness is unaware of the proper procedure for submitting such material or because the information is new):

- The panel should stop the witness from divulging any further information which may need to be subject to an NDA (lest the panel might have to recuse itself or there are risks of disclosure to the prisoner);
- The panel should direct a short adjournment to allow the Secretary of State Representative (if present), witness and PPCS to consider whether an NDA is required;
- Where necessary, the hearing should proceed *in camera*³⁵ solely for the purpose of addressing the ND issue;
- If an NDA is to be made, the hearing may need to be adjourned to allow the application to be determined;
- Where appropriate, the panel may continue with other aspects of the hearing while the ND issue is being resolved;
- If no NDA is to be made, the hearing should proceed in accordance with the guidance on new information arising during an oral hearing which can be found in the oral hearing guidance.

Non-Disclosure Situations after the Oral Hearing

- 13.16 Where a non-disclosure issue arises after a hearing, the same principles as set out in this guidance should be followed. Panel members should consider the impact on the evidence (e.g. which witnesses had seen the material before giving their evidence), professional opinions, the fairness of the proceedings and whether further evidence or submissions are required before the case is concluded.

- 13.17 An ND direction can be made to clarify who has seen the material and for those who have seen it, a direction to confirm whether the new information impacts their evidence or professional opinion. Adjournment directions to stop the clock for a decision may be necessary.

³³ If evidence hasn't been taken, then the *in camera* part of the hearing should be before the panel chair only. If it is raised during a part-heard hearing, then the whole panel can be present.

13.18 Where witnesses have not seen the material, the panel will need to bear this in mind when considering how much weight to give their evidence as a result.

Victim Personal Statement (VPS)

13.19 Victim Personal Statements (VPS) may be subject to an NDA and should be handled with particular care and sensitivity. A VPS should not contain anything which is relevant to the prisoner's current level of risk to the victim or to the wider public – they do not play a part in the process of risk assessment.

13.20 Victim Liaison Officers (VLOs) should explain to victims that their statements will be disclosed to the prisoner unless there is a successful NDA.

13.21 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.

13.22 Sometimes, a VPS in respect of which an NDA is made contains information which goes beyond impact and is relevant to risk³⁶. This makes the decision about non-disclosure more complicated but only insofar as more stages in handling the information need to be followed:

- Panel members should normally direct that risk-related information be removed from the VPS and dealt with separately^{37, 38};
- If the risk-related information is removed from the VPS, any NDA should proceed in the usual way;
- PPCS should determine (in consultation with the victim) whether the information should be disclosed, withdrawn, revised, or subject to an NDA.
- Where the information is relevant to risk, not removed, and does not appear anywhere else in the dossier, PPCS should be directed to corroborate the information by making reasonable attempts to investigate and cross-reference it with other reports in the dossier. If PPCS:
 - a) can corroborate the information, it will be communicated to the COM who will assess it, as with any other risk related information, and address its relevance in an addendum report; or
 - b) cannot corroborate the information, they will provide a covering letter to the panel. The letter will clearly set out which parts of the VPS have been investigated, confirm the information is not available anywhere else in the dossier and set out what has been done to try and verify the information.

³⁶ HMPPS guidance requires VLOs to advise victims that the VPS should be purely about the impact of the offence and the impact that release would have upon them and that any information on the risk presented by a prisoner should not be included. However, in some cases, the VPS goes beyond impact. Please see the Victims guidance for more information.

³⁷ If concerns are raised about the direction, it can be revoked.

³⁸ New information about risk may exist and the panel member will need to determine if it is already evidenced in another document within the dossier. If it is, the panel and the prisoner will have access to it without further steps having to be taken once it is removed from the VPS.

- The VLO will inform the victim of the action taken, thereby providing them with an opportunity to provide further evidence where appropriate. Any additional information may be subject to a further NDA.
- The information should then be considered by a panel in the usual way, taking account of its relevance, reliability and evidential weight;
- If the information is removed completely and not relied on at all, the panel may need to consider recusal;
- If the victim does not consent to the removal of risk-related material from their VPS, the panel will need to consider whether to:
 - Accept the VPS on the basis that the information is addressed elsewhere in the dossier;
 - Accept the VPS but disregard the additional information; or
 - Reject the VPS completely (not recommended).

Further guidance on VPS and withholding the victim's name from the prisoner is available in the Parole Board Guidance on Victims.

Further disclosure of withheld material

- 13.23 Where the withheld material has been disclosed in another forum, 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) to reconsider the disclosure of any withheld material under paragraph (5) – namely disclosure to the prisoner and/or their representative.³⁹
- 13.24 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.
- 13.25 However, if the panel decides to use the power of its own initiative, they should give both parties a chance to respond to the proposal before a decision is made.
- 13.26 The panel member making a decision under rule 17(14D) 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)(5)(a) 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 SSJ may withdraw the material in question.
- 13.27 Applications may come in, after a final decision⁴⁰ has been made on a case, from a representative asking for the undertaking to be removed. Rule 17(14E) sets out the requirements for an undertaking to be removed. The undertaking can only be removed where:

³⁹ This power does not relate to disclosure to other witness', please see section 13.9 onwards for further guidance.

⁴⁰ Final decision about release or a recommendation for open conditions.

- (a) the SSJ consents, or
- (b) the Board finds that the reasons for which it previously determined that the material could not be disclosed to the prisoner no longer exist.

The panel member will need to be satisfied that the test in rule 17(1) is no longer met before ordering further disclosure under rule 17(14E). Any decision made under 17(14E)(b) is subject to a separate right of appeal, and the general principles on appeals apply.

Licence Conditions

- 13.28 Although rule 17 does not reference licence conditions or licence variations, the same principles may apply where the reasons supporting a proposed licence condition cannot be safely disclosed to the prisoner.
- 13.29 For example, exclusion zones to avoid 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.
- 13.30 The licence condition itself will need to be clear to the prisoner, but the detailed reasons for it (which might reveal personal details about the life and movements of those sought to be protected) can be withheld if the rule 17 criteria are met.
- 13.31 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. Where the NDA is approved, sufficient time must be given for the prisoner or their representative to appeal the decision, before making a final decision on the licence condition.

ANNEX A (Non-Disclosure Process Map)

