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|  | <p align="center">RSD Internal Guidance</p> | | <p align="center">RIG-2016-05</p> | |
| <p align="center">Disclosure in legal proceedings</p> | | | | |
| <p>Date of issue/ last review</p> | <p>May 2016</p> | | <p>Date of next review</p> | <p>May 2018</p> |
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| <p align="center">RIG type</p> | | | <p>Policy_____ <input type="checkbox"/></p> | <p>Information_____ <input checked="" type="checkbox"/></p> |
| | | | <p>Procedure_____ <input checked="" type="checkbox"/></p> | |
| <p>Target audience</p> | <p>RSD_____ <input checked="" type="checkbox"/></p> | | <p>Policy_____ <input type="checkbox"/></p> | <p>Inspectors_____ <input checked="" type="checkbox"/></p> |
| | <p>RPP_____ <input checked="" type="checkbox"/></p> | | <p>Admin_____ <input type="checkbox"/></p> | |
| <p><u>Keywords</u></p> | <p>Disclosure; CPIA; prosecution</p> | | | |
| <p><u>Summary</u></p> | <p>This RIG contains guidance to inspectors on the requirements for the disclosure of unused materials during prosecution. It gives an overview of the Criminal Procedure and Investigations Act 1996 (CPIA) disclosure regime, taking into account the Human Rights Act 1998, the Attorney General’s Guidelines on disclosure 2013 the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases 2013 (“ the Criminal Justice Act 2003 (CJA 2003). This guidance does not apply in Scotland.</p> | | | |
| <p><u>Original consultation</u></p> | <p>Legal Services Team</p> | | | |
| <p><u>Subsequent consultation</u> (reviews only)</p> | | | | |

Detail

Introduction

Disclosure refers to a stage during legal proceedings in which we have a duty to provide the defence with copies of, or access to, any material which we have obtained during our investigation into criminal breaches 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, and which has not previously been disclosed (section 3 Criminal Procedures Investigations Act 1996).

Notes:

1. This guidance does not cover pre-trial disclosures, previously known as "primary disclosure". This is now handled as "initial details of the prosecution case" during which the evidence on which we intend to rely is sent to the defendant and the court. See the HSE Enforcement Guide

<http://www.hse.gov.uk/enforce/enforcementguide/pretrial/procedure-advance.htm>

2. This guidance does not apply in Scotland.

The CPIA and associated rules ensure that criminal investigations are conducted in a fair, objective and thorough manner, and requires prosecutors to disclose to the defence material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

The CPIA, as amended by the CJA 2003, provides the statutory framework governing the disclosure of unused material in criminal proceedings. A Code of Practice made under Part II of the CPIA details how relevant material obtained in a criminal investigation is to be recorded, retained and revealed to the prosecutor. There are currently two Codes operating in parallel: one which applies to investigations started before 19 March 2015 and a new code which applies to investigations begun on or after that date. The main change in the new Code is an amendment to the procedure for disclosure in magistrates' court proceedings.

This guidance focuses on the requirements of the code for those investigations which commenced on or after 19 March 2015. ORR's Legal Services Team will advise inspectors on any differences which relate to investigations started before that date.

The CPIA Code of Practice (the Code) governs the regulatory aspects of the CPIA. Although the Code applies only to police officers, other investigators (including HSE and ORR inspectors) are required to "have regard" to any relevant provisions of it. The revised version of the Code, which applies to investigations begun on or after 19 March 2015. It is ORR policy that we will comply with the Code where it is relevant to our enforcement work.

The CPS Disclosure Manual is probably the most user-friendly source of published guidance: http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/.

The HSE Enforcement Guide (England and Wales) is also essential reading: <http://www.hse.gov.uk/enforce/enforcementguide/pretrial/after-intro.htm>

Guidance

This guidance describes how to process and disclose unused material. The CPIA sets standards and procedures for investigators that:

- regulate the investigation process;
- regulate the recording and retention of material that is found or is generated in the course of an investigation.

The Code specifies a number of different roles within the investigation, with different duties attaching to different roles. These roles are:

- Investigator (reporting officer who writes up the INV1);
- Officer in charge of an investigation;
- Disclosure officer;
- Prosecutor

In most cases in ORR, the investigating inspector will carry out all these roles except parts of the prosecutor role where cases are handled by our Legal Advisors Team.

Investigators/disclosure officers should be familiar with the CPIA Code of Practice, in particular their obligations to **retain** and **record** relevant material, to **review** it and to **reveal** it to the prosecutor. It is very important, therefore, that inspectors understand their responsibilities under the Code and how to discharge those duties.

What sorts of material do we need to retain?

The Code lists categories of material falling within the duty to retain. Examples of categories of material that must be retained, where the material may be relevant, are:

- accident reports and notebooks
- records from telephone messages containing descriptions of an alleged offence
- emails and electronic internal documents (memos etc.)
- final versions of witness statements
- draft versions of witness statements
- exhibits mentioned in a witness statement
- interview records (written/audio/video tapes of interviews with actual/potential witnesses or suspects)
- communications between inspectors and experts (including requests to clarify a draft report, remove ambiguities, or to cover additional material)
- reports of work carried out by experts (including draft reports and

working notes)

- schedules of scientific material prepared for the purposes of criminal proceedings
- any material casting doubt on the reliability of a witness, of a confession or on the accuracy of any prosecution evidence generally
- any material which may point to another person or body having involvement in the commission of the offence
- any material which may support a defence or an application to have any prosecution stayed as an abuse of process (for example because of delay)
- any material which may have bearing on the admissibility of any evidence
- any digital material obtained in the course of an investigation and not returned to the owner after copying, including hard drives or imaged material, computerised records, information from data recorders, photographs or videos;
- any other material that may fall within the test for initial disclosure

How do we record it?

Material gathered during an investigation should be logged in the evidence index from the outset, and not left until it is evident that prosecution is likely. It is sufficient for you to believe that you are investigating breaches that may lead to prosecution. The investigation plan will identify if you are looking for breaches. By methodically recording material obtained, it makes it much easier to comply with the requirements of the Code.

Disclosure refers to providing the defence with copies of, or access to, any prosecution material which we have obtained 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, and which has not previously been disclosed (section 3 CPIA).

When do we need to review, reveal and prepare a disclosure schedule?

The disclosure officer/inspector must prepare a schedule if:

- the accused is charged with an offence which is triable only on indictment; or
- the accused is charged with an either way offence which is likely to be tried on indictment or where the accused is likely to plead not guilty at a summary trial; or
- the accused is charged with a summary offence and he is likely to plead not guilty.

However, a schedule may not be needed if:

- the offence is likely to be dealt with in the magistrates' court; and
- it has been admitted; or

- it appears that an accused is likely to plead guilty.

Although disclosure of unused material occurs after all the evidence and exhibits that form the basis of our case have already been disclosed, it is vital that preparations are made to properly log all the materials that are gathered as part of the investigation from the outset, whether or not they eventually form part of the case.

Once the circumstances of the case are clearer, decisions can be made about what material will be used as part of our case and what will remain unused and if necessary, a disclosure schedule of unused material prepared.

The duty is to disclose unused material that satisfies a two-stage test:

1 it is **relevant material** i.e. relates to the investigation into possible breaches; **and**

2 the nature of that material is such that it might **undermine the ORR prosecution case or otherwise assist the defence.**

Therefore, not all material gathered during a prosecution needs to be supplied to the defence. However, we itemise all unused and relevant material we hold in the disclosure schedule of unused material.

We are required to provide copies of, or access to, unused material that meets the second part of the test for disclosure i.e. could undermine or case or assist the defence.

Note: this test does not include an assessment as to whether the material is or could be admissible in a trial.

What sorts of things are relevant?

Relevant material is defined in the Code of Practice as anything that appears to an investigator, or the officer in charge of an investigation or the disclosure officer to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances unless it is incapable of having any impact on the case.

Therefore, relevant material could include witness statements that we have taken but are not going to use as part of our case; documents that we have copied or taken into possession during our investigation that helped us form a view about compliance issues; possibly notes of telephone conversations or face-to-face meetings that we have had with a dutyholder in respect of establishing the cause of an incident and therefore compliance; any notebook entries, sketches, measurements, that relate to the investigation and particularly where we have recorded a conversation where information has been passed to us that we have not captured in a witness statement because we are not intending to use it.

How can I tell if it might weaken the prosecution or assist the defence?

Examples of material having the potential to weaken the prosecution case or to be inconsistent with it, are:

- any material casting doubt upon the accuracy of any prosecution evidence;
- any material which may point to another person, whether charged or not (including the co-accused) having involvement in the commission of the offence;
- any material which may cast doubt upon the reliability of a confession;
- any material that might go to the credibility of a prosecution witness;
- any material that might support a defence that is either raised by the defence or apparent from the prosecution papers. If the material satisfies the disclosure test, it should be disclosed even though it suggests a defence inconsistent with or alternative to one already advanced by the accused;
- any material which may have a bearing on the admissibility of any prosecution evidence;
- any material that might assist the accused to cross-examine prosecution witnesses:
- any material that might enable the accused to call evidence or advance a line of enquiry or argument: or
- any material that might explain or mitigate the accused's actions.

Previous convictions and/or cautions recorded against a prosecution witness should be disclosed where such convictions/cautions satisfy the test for disclosure, by being reasonably capable of undermining the prosecution case against the accused, or assisting the case for the accused.

How do I record unused relevant material on the schedule?

Stage 1: We prepare a schedule that lists each item with a description that must be sufficiently clear for the defendant to understand the nature of that document.

Stage 2: We are required to apply a public interest test to each item. In a very small number of instances, we may decide that the information we hold is **sensitive**.

Sensitive material is any material that the disclosure officer believes is not in the public interest to disclose, and therefore attracts public interest immunity from disclosure.

- material relating to national security, for example in connection with Crown contractors;
- material given in confidence;
- material the disclosure of which might facilitate the commission of other offences or hinder the prevention, investigation and detection of crime;
- material generated by a corporate or financial regulator.

If we have obtained material seems to fit the sensitivity test, inspectors should seek advice from the legal team to confirm the decision. This is identified as CPIA schedule 2 material and is exempt from disclosure, but must be included on the disclosure schedule.

Stage 3: Each entry on the disclosure schedule should then be considered against the second stage of the disclosure test i.e. material that may assist the defence or in some way weaken the prosecution case. This must be brought to the attention of the defence.

Stage 4: Each item should then be allocated an action:

- a) For relevant, unused and non-sensitive material that does NOT undermine our case or assist the defence, we do not disclose and call it **CND Clearly Not Disclosable**;
- b) For relevant unused, non sensitive and material that might undermine or case or assist the defence we must describe it as either **C (Copy)** it to the defence (for documents) or make it available for them to see described as **I (Inspection)**. This would apply to hardware items such as a section of rail, or very large documents where copying would be impractical; or
- c) Relevant unused sensitive material is identified as CPIA schedule 2 material.

The completed schedule should then be passed to the legal services team who will arrange for the disclosure to the defence and the court.

Any further material that is obtained after the disclosure schedule has been served must also be subject to the same process and disclosed this it meets the test. **Therefore, the role of disclosure is a continuing role from early in the investigation through to completion of proceedings.**

Defence Disclosure

In contested matters, the defence will be required to provide to the court and the prosecutor a Defence Statement which outlines their defence and any legal issues that they intend to raise during the course of a trial. In that document they may also make requests disclosure of any material that they believe ORR might hold that might undermine the prosecution case or assist the defence case. The Defence Statement will be sent to the inspector/disclosure officer and the prosecutor will draw the disclosure officer's attention to the key issues raised. It may also be appropriate for the prosecutor to provide further advice to the disclosure officer as to the sort of material to look for. Any material that falls to be disclosed as a result of this procedure must also be copied or made available for inspection and the results communicated to the defence.