



## DISCLOSURE POLICY

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## INTRODUCTION

### 1.0 Policy statement

- 1.1 The Scottish Criminal Cases Review Commission (the Commission) obtains information about the cases that it reviews. Such ‘case-related’ information enables the Commission to carry out its primary statutory function.<sup>1</sup>
- 1.2 The Commission operates within a framework of statutory provisions that limit its disclosure of information, as set out in s194J–L of the Criminal Procedure (S) Act 1995 (CPSA),<sup>2</sup> the General Data Protection Regulation (GDPR)<sup>3</sup> and the Data Protection Act 2018 (DPA). Those provisions are not absolute: there are circumstances in which the Commission may disclose case-related information. The Commission may disclose such information only where it is entitled by law to do so.
- 1.3 The Commission, in deciding whether to disclose such information, will take into account s194 s194J–L of CPSA, GPDR and DPA.

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<sup>1</sup> The Commission may, on the consideration of any conviction of a person in Scotland or the sentence imposed in such a case, refer the case to the High Court of Justiciary for determination where it believes there may have been a miscarriage of justice and it is in the interests of justice to do so (s194B and C of the Criminal Procedure (S) Act 1995).

<sup>2</sup> Section 194J(1) provides that a person who is or has been a member or an employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is excepted from s194J by s194K of CPSA.

<sup>3</sup> ‘GDPR’ means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

1.4 The purpose of this policy is to provide an indication of the circumstances in which the Commission may disclose case-related information and those in which it may not.

## 2.0 Policy authorisation

2.1 On 14 August 2020 the Board of the Commission approved this version of this policy.

## 3.0 Related policies

3.1 This policy must be read in conjunction with the Commission's data protection policy, its publication scheme under the Freedom of Information (S) Act 2002 (FOISA), its case handling procedures and its records management plan.

## 4.0 Disclosure of information in a reference case

4.1 CPSA provides that where the Commission has decided to refer an applicant's case to the High Court, the Commission shall give to the High Court a statement of reasons for its decision, and send a copy of the statement of reasons to every person who appears to the Commission to be likely to be a party to any proceedings on the appeal arising from the reference.<sup>4</sup>

4.2 CPSA provides that the disclosure of information is excepted from the Commission's obligations of non-disclosure of information where the information is disclosed in certain named circumstances, which include in any statement or report required by CPSA or in connection with the exercise of any function under CPSA.<sup>5</sup>

4.3 Part 3 of DPA provides for the processing of personal data by competent authorities for 'the law enforcement purposes'.<sup>6</sup> The Commission processes the information in a reference case for the law enforcement purposes.

4.4 Accordingly, the Commission will send the statement of reasons for its decision to the High Court, the applicant, his solicitor, the Lord Advocate and the Crown Agent. It will, in addition, send to the applicant's solicitor and the Crown copies of the documents on which it relied in taking its decision – subject to points **4.6** and **4.8** below and the relevant consent for the Commission to disclose to the applicant's solicitor the supporting documents that it obtained from the Crown.

4.5 Where the applicant has not instructed a solicitor, the Commission may send copies of the documents on which it relied in taking its decision to the applicant, and it may accede to any request by the applicant for it to disclose a specific supporting document to him – subject to points **4.6** and **4.8** below and the relevant consent for the Commission to disclose to the applicant the supporting documents that it obtained from the Crown. In taking the decision whether to disclose the documents in such circumstances, the Commission will have regard to GDPR, DPA and The Law Society of Scotland's 'Code of Conduct for Criminal Work, Article 11– Documents and Materials'.

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<sup>4</sup> Section 194D(4).

<sup>5</sup> Section 194K(1)(d) and (e).

<sup>6</sup> See Part 3 of DPA and the Commission's data protection policy.

- 4.6 On occasions, the Commission receives information from an organisation on the basis that it will not disclose the information to third parties – it has, for example, received information on that basis from foreign states and the UK security service. The Commission will not disclose that information by narrating it in the statement of reasons, or by disclosing the document containing the information, without the consent of the organisation from whom it received the information.
- 4.7 Where it has retained documents on which it did not rely in taking its decision, the Commission will disclose those documents to the Crown and the applicant’s solicitor (by allowing them, on their request, to view those documents in the Commission’s office) – subject to point 4.8 below and the following conditions:
- The Crown’s consent for the Commission to disclose to the applicant’s solicitor the documents that the Commission obtained from the Crown;
  - The applicant’s consent for the Commission to disclose to the Crown the documents that the Commission obtained from the applicant, his solicitor or his previous solicitor(s);
  - The consent of the applicant’s co-accused for the Commission to disclose to the Crown or the applicant’s solicitor the documents that the Commission obtained from the co-accused, the co-accused’s solicitor or the co-accused’s previous solicitor(s); and
  - The consent of the accused in a case the Commission considers to be connected to the applicant’s case for the Commission to disclose to the Crown or the applicant’s solicitor the documents that the Commission obtained from the accused in the connected case, his solicitor or his previous solicitor(s).

Where the applicant’s solicitor or the Crown asks it for a specific document on which it did not rely in taking its decision, the Commission will disclose that document to the solicitor or the Crown – subject to the above conditions and point 4.8 below.

- 4.8 The Commission will not disclose any documents where it has concerns that such disclosure might compromise the safety of a witness or potential witness in the case or any other person.
- 4.9 The Commission will not disclose any internal documents (draft statements of reasons, emails etc) without a court order.
- 5.0 Disclosure of information in a non-reference case (or before the Commission issues its decision in a case)**
- 5.1 CPSA provides that in every case in which the Commission has decided not to make a reference to the High Court, the Commission shall give a statement of reasons for its decision to the applicant.<sup>7</sup> The Commission processes the information in a non-reference case for the law enforcement purposes under Part 3 of DPA.
- 5.2 Accordingly, the Commission will send the statement of reasons for its decision to the applicant and his solicitor.

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<sup>7</sup> Section 194D(5).

- 5.3 Where the applicant or his solicitor asks it for a report that it has instructed, or a document that it has obtained from the Crown, the police or other organisation, the Commission may disclose the report or document to the applicant or his solicitor – subject to the Crown’s consent for the Commission to disclose to the applicant or his solicitor the documents it obtained from the Crown. In taking the decision whether to disclose the report or document in such circumstances, the Commission will have regard to the s194K exceptions, DPA, GDPR and, where the applicant has not instructed a solicitor, The Law Society’s Code of Conduct for Criminal Work, Article 11–Documents and Materials.
- 5.4 The Commission will not disclose any information where it has concerns that such disclosure might compromise the safety of a witness or potential witness in the case or any other person.
- 5.5 Where it has concerns that the applicant’s receipt of the statement of reasons might cause the applicant to self-harm or commit suicide, the Commission will, where the applicant is in custody, send the statement of reasons, in a sealed envelope, to the Governor or the Director of the relevant prison, with a covering letter in which it asks him to pass the sealed envelope to the applicant and in which it explains that the content of the letter may cause the applicant distress. Where it has such concerns, and the applicant is at liberty, the Commission will ask his solicitor to request that the applicant attends his office to collect the statement of reasons.
- 5.6 The Commission will not disclose any internal documents (draft statements of reasons, emails etc) without a court order.
- 6.0 Disclosure of information to a person who would not be a party to any proceedings on any appeal arising from a Commission reference**
- 6.1 Where a person who would not be a party to any proceedings on any appeal arising from a Commission reference (‘the third party’) asks it whether a named individual has applied to it, the Commission will tell the third party whether it has received an application from the named individual and, where it has received the application, whether it has accepted the application for a Stage 2 review or whether it has still to decide whether to accept the application for a Stage 2 review – subject to the exceptions listed at point **6.9** below.
- 6.2 Where it has decided to refer an applicant’s case to the High Court, the Commission will write, one week before the statement of reasons is sent to the High Court, to the Crown Agent to tell him or her about the Commission’s decision. The purpose of the letter is to allow the Crown Agent to attempt to tell the complainer or the victim’s next of kin about the reference. The information is given at that stage to the Crown Agent solely for the purpose of telling the complainer or the victim’s next of kin, and it is given on the strict understanding that any such notification is not to be made until he is in possession of the statement of reasons.
- 6.3 Where it has decided to refer an applicant’s case to the High Court, the Commission will issue a news release stating that it has done so. It will put the news release on its website. It will anonymise the name of the applicant in certain circumstances – for example, where the applicant or the victim of the crime is mentally *incapax* or is under 18 years of age (see also point **6.9** below).
- 6.4 Where it has decided to refer the case to the High Court, and where a request for information from a third party is one which concerns whether it has referred the applicant’s case to the High Court, the Commission will tell the third party of that fact only after it has issued the

news release announcing the reference, but it will not tell him about that fact where it has anonymised the name of the applicant in the news release (see also point **6.9** below).

- 6.5 Where it has decided not to refer the case to the High Court, and where a request for information from a third party is one which concerns whether it has referred the applicant's case to the High Court, the Commission will tell the third party only of the fact that it has concluded its review of the applicant's case, and it will tell him about that fact only after it has sent the final decision to the applicant – subject to the exceptions listed at point **6.9** below.
- 6.6 Where it has decided not to refer an applicant's case to the High Court, and where it has spoken to the complainer or the victim's next of kin during its review of the applicant's case, or where it is reasonable to infer that they are aware that it has reviewed the case, the Commission will write to the complainer or the victim's next of kin to tell them its decision not to refer the case, and it will write to them to tell them its final decision in the case.
- 6.7 Where an applicant has alleged that a witness has lied or has otherwise acted improperly, and where the Commission has sought the views of the witness about the allegation made against him, or where it is reasonable to infer that the witness is aware of the allegation, the Commission will write to the witness to tell him its decision in the case, and it will write to them to tell them its final decision in the case.
- 6.8 Where an applicant has made an allegation of defective representation against his solicitor or counsel, and where the Commission has sought the views of the solicitor or counsel about the allegation made against him, or where it is reasonable to infer that the solicitor or counsel is aware of the allegation, the Commission will write to the solicitor and counsel to tell them its decision in the case, and it will write to them to tell them its final decision in the case.
- 6.9 The Commission will not disclose the information in points **6.1**, **6.3**, **6.4** and **6.5** in the following circumstances:
- Where the applicant or the victim of the crime is under 18 years of age and the disclosure of the information may reveal his identity to a third party;
  - Where the applicant or the victim of the crime is mentally *incapax* and the disclosure of the information may reveal his identity to a third party;
  - Where the disclosure of the information may reveal the identity of a victim of a sexual offence;
  - Where the Commission has concerns that the disclosure of information might compromise the safety of a witness or potential witness in the case or any other person;
  - Where the Commission has concerns that the disclosure of information might compromise the physical or mental health of the applicant or any other person.
- 6.10 The Commission may disclose case-related information where the information is requested for the purposes of any criminal, disciplinary or civil proceedings,<sup>8</sup> or where it concerns the

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<sup>8</sup> Section 194K(1)(a) of CPSA.

prevention or detection of crime or it is requested for the purposes of the investigation of an offence or deciding whether to prosecute a person for an offence.<sup>9</sup>

- 6.11 In taking the decision whether to disclose case-related information in such circumstances, the Commission will have regard to the law enforcement processing and, where relevant, Part 2 of DPA ('general processing'), and in particular ss10 and 11 of DPA ('special categories of personal data'), s15 of DPA ('restrictions on data subject's rights') and the Schedules to DPA relating to those particular provisions.

## 7.0 Subject Access Requests

- 7.1 As indicated, much of the information that the Commission obtains in the exercise of its statutory functions is personal data, which the Commission 'processes' – ie, obtains, records and discloses – for the law enforcement purposes.
- 7.2 An individual, the 'data subject', has a right of access to his personal data that the Commission, as the 'data controller', holds. The right is known as 'subject access'. It is, however, subject to certain exemptions under DPA and GDPR. The Commission will consider and respond to each subject access request made to it. It will take the decision whether to disclose the personal data on a case-by-case basis and in accordance with the relevant provisions of DPA and GDPR.

## 8.0 Freedom of Information Requests

- 8.1 An individual has the right of access to recorded information that the Commission holds, and the Commission may withhold the information only where FOISA expressly permits it to do so.<sup>10</sup>
- 8.2 The Commission is required to maintain a publication scheme which sets out the types of information that it routinely makes available and how an individual can access the information.<sup>11</sup> To that end, it has adopted the Model Publication Scheme (MPS) that the Scottish Information Commissioner (SIC) has produced.<sup>12</sup> The SIC approved the MPS on 1 November 2018.
- 8.3 The Commission does not disclose case-related information under its publication scheme. Where it receives a freedom of information (FOI) request for such information, the Commission will refuse the request. The Commission's disclosure of such information would constitute a breach of s194J of CPSA. Section 26(a) of FOISA exempts the disclosure of information under FOISA where the disclosure of information is information which is prohibited by or under any enactment. The s26(a) exemption is an absolute exemption in that it is not subject to the public interest test set out in FOISA. Accordingly, case-related information is exempt from disclosure under FOISA. The SIC has upheld the Commission's approach in that regard.<sup>13</sup>

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<sup>9</sup> Section 194K(3)(a) and (b) of CPSA.

<sup>10</sup> Sections 1–3 of FOISA and Schedule 3 to the Act.

<sup>11</sup> Section 23.

<sup>12</sup> Section 24.

<sup>13</sup> See, for example, decision 075/2010 of the SIC, *Lucy Adams of The Herald and the SCCRC*.

## 9.0 Procedures

- 9.1 All subject access and FOI requests are dealt with in the first instance by the designated legal officer. Where the designated legal officer decides not to disclose the information requested, the requestor may ask the Commission to review that decision, whereupon the matter is passed to the Director of Corporate Services (DOCS).
- 9.2 Where the DOCS upholds the original decision, the requestor may appeal to the appropriate statutory regulator, namely: the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF, at [www.ico.org.uk](http://www.ico.org.uk) (subject access appeals and other data protection matters); and the SIC, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS, at [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info) (FOI appeals).
- 9.3 The Head of Casework or the Board of the Commission deal with all other requests for information. Where he has any concerns about whether the information ought to be disclosed, the Head of Casework will refer the matter to the Board of the Commission.

## 10.0 Review

- 10.1 The Head of Casework will review this policy annually.

Date first approved	19 December 2014
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Date of next review	13 August 2021