

This is the follow up newsletter regarding the contents of the latest CPIA Codes of Practice and Attorney General Guidelines on Disclosure, both of which commenced on 31 December 2020. These documents are intended to be complementary and read alongside each other. This document provides some content, however due to the considerable differences across both documents, they will need to be read by staff involved in enforcement and criminal investigation and prosecution. Please circulate this document to other staff. The Attorney general's Guidelines has been completely re structured so that the process follows a logical chronical sequence of events, therefor you have to read the whole document.

In order to ensure a fair investigation, it is essential that reasonable lines of inquiry are pursued, and that the disclosure test is applied correctly. To encourage and assist with this, the Review proposed introducing a rebuttable presumption in favour of disclosure, for certain items of unused material. This would essentially be a list of material which, where it exists, is highly likely to meet the test for disclosure. The details are contained in 6.6 of the Codes of practice and para 87 AGs Guidelines too.

This presumption is intended to provide assistance to investigators and prosecutors, by 'nudging' them to consider this list of material. It is important to note, however, that this proposal is not intended to encourage 'automatic' disclosure: investigators and prosecutors should always apply the disclosure test, and consider each item of material carefully in the context of the case in question.

Any material subject to the proposed presumption should be reviewed by a prosecutor. Where material subject to the rebuttable presumption is or is not disclosed, the specific reasons why the material does or does not satisfy the test for disclosure should be recorded on the unused schedule.

We will be delivering a half day online refresher and standard CPIA training together with a dedicated prosecutor refresher training, all of which will cover the latest content. For more information please email:  
<mailto:pfowler@phftraining.co.uk>

I have listed some of the contents below to provide a synopsis of the content. You will need to read the guidelines and the latest codes of practice which can be obtained from :

New Criminal Procedures Investigations Act Codes of Practice.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/931173/Criminal-procedure-and-investigations-act-1996.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/931173/Criminal-procedure-and-investigations-act-1996.pdf)

Revised Attorney Generals Guidelines on Disclosure

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/946082/Attorney\\_General\\_s\\_Guidelines\\_2020\\_FINAL\\_Effective\\_31Dec2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946082/Attorney_General_s_Guidelines_2020_FINAL_Effective_31Dec2020.pdf)

Contents

CPIA Codes of Practice

A considerable amount of the content is more or less the same, however there are changes to the preparing of the schedules to the prosecutor. There is also additional guidance on the types of material to be retained and the fact that they are presumed to meet the test for prosecution disclosure.

The disclosure will be determined in the Magistrates Court on whether there is likely to be an anticipated guilty plea. However common law disclosure or certification will be required in all cases irrespective of plea. This is the same as the previous codes.

Must do an appropriate schedule for all cases in crown court.

In summary only and either way offences likely to be heard in the Magistrates Court , schedules are not required unless a not guilty plea is anticipated or entered. (See details below)

6.3 The disclosure officer must ensure that the appropriate schedule of unused material is prepared in the following circumstances:

- \* the accused is charged with an offence which is triable only on indictment;
- \* the accused is charged with an offence which is triable either way, and it is considered that the case is likely to be tried on indictment;

- \* the accused is charged with an either-way offence that is likely to remain in the magistrates' court, and it is considered that they are likely to plead not guilty;
- \* the accused is charged with a summary offence and it is considered that they are likely to plead not guilty.

6.4 Where, however, the accused is charged with a summary offence or an either-way offence, and it is considered that they are likely to plead guilty (e.g. because they have admitted the offence), a schedule is not required unless a not guilty plea is subsequently entered or indicated.

Irrespective of the anticipated plea, the Common Law test under *R v DPP ex parte Lee* [1999] 2 All ER 737 for disclosure requires material to be disclosed if there is material known to the disclosure officer that might assist the defence with the early preparation of their case or at a bail hearing (for example, a key prosecution witness has relevant previous convictions or a witness has withdrawn their statement).

Where there is no material that meets the test for Common Law disclosure, the disclosure officer will certify to this. The old certification for Magistrates disclosure will suffice.

Under the heading preparation of material for Prosecutor there is new information on redaction of sensitive information.

Attorney General Guidelines 31 December 2020 general

In November 2018, the Attorney General's Review of the efficiency and effectiveness of disclosure in the criminal justice system ('the Review') highlighted significant concerns with the culture around disclosure, engagement between prosecutors, investigators and defence practitioners, and the challenge of the exponential increase in digital data. The Review made a series of practical recommendations, crucially recognising that the systemic nature of the problem would demand a system-wide approach to improve disclosure obligations. These recommendations included: earlier engagement between the prosecution and defence, harnessing the use of technology, and culture change.

As a result of the review the new Attorney General's Guidelines on Disclosure came into force on 31 replacing those from 2013. Dec 2020. Most practitioners are aware of the CPIA Codes of Practice but have not read the Attorney General's Guidelines. They are described as "the high level principles which should be followed. They are intended to clarify the processes that are required and the roles each relevant party must play, as well as setting out examples of best practice. They sit alongside the codes and put the flesh on the bones of what is expected.

The new guidelines are there to be followed so that material is not disclosed to the defence that does not require disclosing. However, these codes detail the co-operation between all the parties involved and covers the requirements to manage the CPIA implications from the beginning of the case by having disclosure strategy stating that "Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise". They also introduce new concepts such as pre charge engagement disclosure management document.

Other contents

Now mentions the Prosecution Team and what that consists of.

Investigators and disclosure officers should be deployed on cases which are commensurate with their training, skills and experience.

A fair investigation does not mean an endless investigation. Investigators and disclosure officers must give thought to defining, and articulating the limits of the scope of their investigations.

The conduct of an investigation provides the foundation for the entire case, and may even impact on linked cases. The specific strategy and approach to disclosure that will be taken must always be considered at the start of each investigation.

A full log of disclosure decisions and the reasons for those decisions must be kept on file and made available to the prosecution team. Any prosecutor must be able to see and understand previous disclosure decisions before carrying out their continuous review function (see Disclosure management Doc below and in the guidelines.

Whole new section - The balance between the right to a fair trial (Article 6 of the European Convention of Human Rights) and the right to private and family life (Article 8 of the European Convention of Human Rights)

This section deals with the issues of privacy under the DPA when conducting enquiries. There should be no unjust intrusion of privacy. The proposed amendments set out clearly that investigators and prosecutors should not pursue enquiries that concern personal information as a matter of course.

This section provides guidance on reasonable lines of enquiry where personal or private material is to be obtained.

The rationale for pursuing the reasonable line of inquiry and the scope of the review it necessitates should be open and transparent. It should be capable of articulation by the investigator making the decision. It should provide the basis for:

- (i) consultation with the prosecutor,
- (ii) engagement with the defence and,
- (iii) the provision of information to the witness about how their material is to be handled.

Solicitors must be careful not to disclose personal information unless absolutely justified because it meets the test for Prosecution Disclosure. Outside of this may not be in accordance with the law.

Disclosure management document (DMD)

A disclosure management document (DMD) outlines the strategy and approach taken in relation to disclosure and should be served to the defence and the court at an early stage. DMDs will require careful preparation and presentation which is tailored to the individual case.

The investigator should provide information for use in the DMD and the prosecutor should prepare it. They are a requirement in Crown Court cases and some Magistrates cases. See para 95 of the Attorney Generals guidelines.

The Investigation

Disclosure officers and/or investigators must inspect, view, listen to, or search all relevant material. The disclosure officer must provide a personal declaration that this task has been completed. In some cases, a detailed examination of every item of material seized would be disproportionate. In these cases, the disclosure officer can apply search techniques using the principles contained in Annex A. However, anything likely to meet the disclosure test must be looked at. Whatever the approach taken by disclosure officers in examining material, it is crucial that disclosure officers record their reasons for a particular approach in writing.

There is an Appendix A which provides the guidance for digital material.

#### Pre charge engagement

In some investigations it may be appropriate for the officer in charge of the investigation to seek engagement with the defence at the pre-charge stage. This is likely to be where it is possible that such engagement will lead to the defence volunteering additional information which may assist in identifying new lines of inquiry. Annex B sets out the process for any such pre-charge engagement.

Pre-charge engagement may, among other things, involve:

- a. Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
- b. Ascertaining whether the suspect can identify any other lines of inquiry.
- c. Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
- d. Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
- e. Agreeing any key word searches of digital material that the suspect would like carried out.
- f. Obtaining a suspect's consent to access medical records.
- g. The suspect identifying and providing contact details of any potential witnesses.
- h. Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.

Pre-charge engagement is encouraged by the Code for Crown Prosecutors and may impact decisions as to charge.

## Schedules

The schedules are the means by which that revelation takes place. Therefore, it is crucial that the schedules detail all of the relevant material and that the material is adequately described. This process will also enable defence practitioners to become appraised of relevant material at the appropriate stage of the investigation. More detail on what constitutes relevant material can be found [here](#).

## Case management

108. In order for the statutory disclosure regime to work effectively all parties should ensure compliance with the Criminal Procedure Rules. The rules require the court to actively manage the case by identifying the real issues<sup>20</sup><sup>F21</sup>. Each party is obliged to assist the court with this duty.

Defence statements - There is guidance provided on defence statements.

Public Interest Immunity Application - Provides considerable PII guidance

## The trial

Prosecutors must ensure that advocates in court are provided with sufficient instructions regarding the disclosure strategy and any disclosure decisions taken.

Also provides guidance for advocates and disclosure during a trial.

## Material relevant to sentence

At sentence, the prosecutor should disclose any material which might reasonably be considered capable of ensuring fairness in the sentencing process. This material could include information which might mitigate the seriousness of the offence or the level of the defendant's involvement.

## Post-conviction

Where, at any stage after the conclusion of the proceedings, material comes to light which might reasonably be considered capable of casting doubt upon the safety of the conviction, the prosecutor should disclose such material.

#### Confiscation Proceedings

The disclosure regime in the CPIA ceases to have effect post-conviction and the continuing duty of disclosure does not apply to confiscation proceedings (see section 7A(1)(b) of the CPIA).

If anyone has difficulty obtaining any documents, please email [pfowler@phftraining.co.uk](mailto:pfowler@phftraining.co.uk) (<mailto:pfowler@phftraining.co.uk>)

If you have not received this circulation direct from PHF Training and wish to be entered onto our update list, please email [pfowler@phftraining.co.uk](mailto:pfowler@phftraining.co.uk) (<mailto:pfowler@phftraining.co.uk>) for inclusion. Also please feel free to pass on this circulation.

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