



The Attorney General Falkland Islands

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The Attorney General's Guidance on Witness Anonymity

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The Law and Regulation Directorate
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1. Introduction

1. Sections 472 to 478 of the Criminal Procedure and Evidence Ordinance 2014 provides for Witness Anonymity Orders. This Guidance sets out how Prosecutors must deal with applications for anonymity under the Ordinance, and associated matters.

General principles

2. One of the overarching principles of criminal justice is that the defendant must receive a fair trial and this is enshrined in the Constitution. If citizens cannot rely on the fairness of the trial process then public confidence in the safety of convictions and sentences is irreparably undermined. The prosecution has a vital role to play in delivering fair trials. Where the prosecution can only present its case in a way which denies the defendant's right to a fair trial, it is under a duty to stop the case, no matter how serious the allegation may be.
3. There is a long-established principle that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial is entitled to be confronted by his accuser in court.
4. If the evidence provided by a proposed anonymous witness is truly the sole or decisive evidence against an accused, the application for an anonymity order is likely to fail. Therefore in every case where consideration is to be given to an application the prosecutor must ensure that the police have obtained as much corroborative evidence as possible. On occasion any delay in the seeking of such evidence may compromise the ability to secure it and so immediate action in this respect is important. Where the proposed anonymous evidence will not be the sole or decisive evidence it will nevertheless remain important to continue to seek corroboration and the success of an application may depend on the nature and extent of any support, particularly if it is independent of the witness.
5. An application for a witness anonymity order should only be made when, after full consideration of all the available alternatives, a clear view is taken that conditions A, B and C in section 474 of the Ordinance apply.
6. The Attorney General will ensure that arrangements are in place with the Royal Falkland Islands Police so that the prosecutor has the earliest notification of any case or investigation in which witness anonymity may be sought.
7. It is not possible to set down guidance that will cover every eventuality. Some cases may be at an early stage of investigation; in others, the question of anonymity may first come to the attention of the prosecutor after charge. Prosecutors must apply the following guidance in a way that does not inhibit the effective progress of the case, while ensuring that proper consideration is given to the questions of anonymity at the most appropriate time.

2. Required Information

8. If an anonymity order may be sought, the prosecutor must ensure that the police provide, in writing, the information set out below. The prosecutor must ensure that the police have evidenced each of the conditions A, B and C to ensure that the conditions are satisfied as far as is reasonably practicable (section 474) and all the relevant considerations (section 475) have been taken into account and where necessary examined.
9. The primary responsibility of editing any sensitive information from the otherwise disclosable documentation lies with the police. When the editing and/or copying process falls to be completed by the prosecutor for disclosure or any other purposes, the editing must be completed by the prosecutor personally and again checked by the prosecutor following its copying, prior to the documentation being sent to the defence. If a document with sensitive information is to be disclosed during a trial the responsibility for checking the editing of any sensitive information before it is disclosed to the defence lies with prosecuting counsel. The following documentation is required:
 - (a) Chief of Police request for a witness anonymity application on behalf of a named prosecution witness;
 - (b) Either:
 - (i) a full evidential statement from the witness giving their true identity; **or**
 - (ii) where that person is a police officer or a member of any other agency responsible for the investigation of criminal offences, a report from the Chief of Police setting out why it is appropriate for the Prosecutor to apply to the court to exercise its discretion under section 473 not to be informed of the identity of the witness;
 - (c) A redacted version of the witness' full evidential statement with all elements that could identify the witness removed;
 - (d) A statement from the witness setting out their fear about giving evidence if their identity is made known to the defendant, and, where appropriate, whether the witness will not give evidence without anonymity;
 - (e) For police witnesses only, confirmation that witness anonymity is required to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise);

- (f) A report which includes:
 - (i) a full risk assessment undertaken by the police which should include an assessment of the reasonableness of the witness' fear and explaining why any protection measures are not adequate;
 - (ii) a consideration of special measures and the reasons why a special measure, or a combination of special measures, would not be adequate to deal with the risk identified;
 - (iii) an indication whether any special arrangements have been made with the witness (for example, a house move).

3. Disclosure

10. If the court has any reservation about the good faith of the application it will be refused. The following principles of disclosure were highlighted by the court:
- (a) The onus is on the prosecution to ensure a fair trial. Where an application for anonymity is being considered, the obligations of the prosecution in respect of disclosure go much further than the ordinary duties of disclosure;
 - (b) The disclosure process is crucially engaged in addressing the section 475 considerations and each consideration should specifically be investigated and addressed;
 - (c) The prosecution must be proactive, and, if relevant, focus closely on the credibility of the witness. This should if possible be objectively verified;
 - (d) A detailed examination of the background of each anonymous witness will almost inevitably be required. This is likely to include a detailed examination into any relationship between the anonymous witness and (i) the victim, (ii) the victim's family and associates, and (iii) other witnesses (including anonymous witnesses). This will include an investigation into the possibility of any improper collusion or cross-contamination between the witness and others involved in the case; and
 - (e) The following information should be included within the police report:
 - (i) the background of the witness, including previous convictions, any other bad character evidence and details of their involvement in any previous case where the police know that their evidence may not have been believed;
 - (ii) whether the police are aware of any relationship between the witness and the defendant and any associates of the defendant;
 - (iii) whether the police have any reason to believe that the witness may not provide truthful evidence to the court.
11. In coming to a decision, the prosecutor must first evaluate the reasonableness of the fear of the witness. The fear may be connected to a specific incident (such as a threat made to the witness), or it may be based on a general climate of fear in the environment in which the witness lives. In either case, it is essential that the prosecutor is satisfied that the police have evidence to support the concerns of the witness.

4. Police Officers and Investigators

12. In any case involving a witness who is a member of the public, the police must provide an unredacted statement providing the true identity of the witness in respect of whom an application is sought.
13. However, in a case involving a witness who is a police officer or a member of any other agency responsible for the investigation of criminal offences, the position may be different. Although the general principle that the prosecutor should be made aware of the true identity of the witness should be followed wherever possible, there may be occasions when the agency considers that it is appropriate for the court to exercise its discretion under Section 473 and not be informed of the identity of the witness.
14. Where the Chief of Police is satisfied that the prosecution should be invited to make such an application to the court, he should make a report to that effect to the prosecutor. In such instances, the police need not supply a full evidential statement from the witness giving their true identity at this stage.
15. The prosecutor must consider such a request together with all the other material supplied in accordance with this Guidance.
16. If the prosecutor is satisfied that it is appropriate to apply for a witness anonymity order and to invite the court not to require the identity of the witness to be supplied to it, the prosecutor should also invite the court to exercise its discretion under Section 473 not to require it to be informed of the true identity of the witness concerned.
17. If the prosecutor is satisfied that it is appropriate to apply for a witness anonymity order but on the basis that the court should be informed of the true identity of the witness concerned, they should discuss this aspect of the application with the Chief of Police. If agreement is reached on that basis, the true identity of the witness should be revealed to the prosecutor in a form that is agreed. The application to the court may then be made in accordance with Section 473 and the identity of the witness should be revealed to the court in the form determined by the court.
18. If agreement with the Chief of Police is not reached about the way forward, the matter should be referred to the Head of Legal Services in accordance with this Guidance.
19. It is a matter for the court to decide whether to grant the order and whether it shall be informed of the identity of the witness.

20. Where the court decides that it must be informed of the identity of the witness, the prosecutor and the relevant agency must decide whether they are willing to comply with that part of the court's order.
21. Where the prosecutor and the agency decide that it would not be in the public interest for the identity of the witness to be given to the court, the application of a witness anonymity order should be withdrawn.
22. Where the prosecutor and the agency decide that it is appropriate to inform the court of the identity of the witness, both the court and the prosecutor should be informed.

5. Considering the Application

23. Section 474 sets out the conditions (A - C) that must be met before the court will make a witness anonymity order. Accordingly, prosecutors must be sure that they have sufficient evidence or information to satisfy each of these conditions. **An anonymity order should be regarded as an exceptional measure of last practicable resort.** A judge must be satisfied of each of the three Conditions before an order can be made and each application is likely to be fact specific.
24. It may often be helpful to consider condition C first, then A and then B. As the statutory regime makes clear, only those orders that are truly necessary and that are consistent with a fair trial will be made.
25. Prosecutors must also be able to show that any fear expressed by the witness that they, or any other person, would suffer death or injury, or that there would be serious damage to property, if they were identified to the defendant, is reasonable. This could be, for example, a threat to the witness's children ("we'll get your kids") or a fear that their home will be damaged ("we'll fire-bomb your house").
26. Once the prosecutor is satisfied that the fear of the witness is reasonable, they must consider whether any statutory special measures or protective measures available to the police would address the fear of the witness. These include:
 - (a) applying to have the statement of the witness read (section 397 of the Ordinance);
 - (b) applying for one of the measures provided by the Ordinance for intimidated witnesses - screening the witness from the accused; evidence by live link; evidence given in private;
 - (c) applying for reporting restrictions;
 - (d) any safeguards that the police could provide, including any witness protection scheme;
27. Section 475 of the Ordinance sets out some relevant considerations for the court to take into account in deciding whether to make a witness anonymity order. Prosecutors should have particular regard to Sections 475(2)(b), (d) and (e) which deal with the credibility of the witness; whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed; and whether there is reason to believe that the witness has a tendency, or motive, to be dishonest.

28. Prosecutors should carefully consider any defence statement provided. However, a defence statement may only be served after a decision to apply for anonymity has been made and after the initial detailed disclosure exercise in respect of the anonymous witness has been undertaken. The question of disclosure in respect of the anonymous witness should specifically be addressed again immediately upon receipt of the defence statement and further investigations made if necessary.

The distinction between credibility and reliability

29. A key issue for the prosecutor centres on the distinction between the witness' credibility and their reliability.
30. In many instances, the only issue for the defence will be the reliability of the witness and the accuracy of their evidence. Here, it may be less critical to know the identity of the witness.
31. This may be the case where the witness is a police officer acting undercover, or a civilian witness of good character, unconnected with the defendant or other witnesses.
32. In other cases, for example where the witness may be involved in criminal activity or knows the defendant, and particularly where there may be some criminal association between them, the credibility of the witness may be substantially in issue. Prosecutors will have considered any issues surrounding the credibility of the witness when they received the various reports referred to in this Guidance. But at this stage of the process it is essential that the issue is reconsidered in the light of section 475(2) of the Ordinance.
33. Where it is clear that the credibility of the witness may be in issue, the prosecutor must consider the relative importance of the witness' evidence to the prosecution case. Where it remains the sole or decisive evidence, it is unlikely that the defendant will be able effectively to cross-examine an anonymised witness.
34. However, each case must be decided on its own facts. Sometimes, even where credibility may be in issue, the prosecution will be able to provide sufficient material to the defence, short of identifying the witness, to allow an effective cross-examination to take place.
35. Prosecutors must not allow cases to continue where they have genuine grounds for believing that the granting of a witness anonymity order would prevent the defendant from having a fair trial.

Level of authorisation

36. Where a prosecutor is satisfied that it is appropriate to apply to the court for a witness anonymity order, they must inform the Head of Legal Services, to decide whether to authorise an application to the court for a witness anonymity order.

When the Prosecutor decides not to make an application

37. Where a prosecutor decides that it is not appropriate to make an application, they must advise the police promptly. Where the police are not content with the decision, the prosecutor should notify the Head of Legal Services, so that the issue may be considered further.

Scope of the provisions

38. The vast majority of applications are likely to occur in the Supreme Court. However, prosecutors should note that such orders may be made in all courts, although they should bear in mind that the need for an anonymous witness order is a consideration which may be placed before the court as a reason that allocation to the Senior Magistrate's Court is more appropriate.

6. Making the Application

39. An application for a prosecution witness anonymity order may only be made by a prosecutor or by counsel instructed on their behalf. Prosecutors must ensure that counsel has the appropriate experience and is fully conversant with this Guidance.
40. Generally, the prosecutor should advise the court and the defence that the prosecution intends to apply for a witness anonymity order no later than the Preliminary Hearing.
41. Sections 473(2) to (4) of the Ordinance sets out how the court should deal with any application. The court must give every party to the proceedings the opportunity to be heard on an application for a witness anonymity order, but it also has the power to hear from the prosecution in the absence of the defendant and his legal representative.
42. In making an application, the prosecutor must ensure that the court is provided with all material relevant to the application. This should include information about the decision-making process leading up to the application. The information should be supplied to the court as a matter of routine. Material will be relevant if the prosecutor relies upon it to support the application, or if it may tend to undermine or qualify the justification for making the order or for making it in the form sought by the prosecutor. The prosecutor must ensure that the court is addressed on each of the three conditions set down in section 474 of the Ordinance and has regard to any relevant considerations (section 475). The court must be informed of the steps taken by the prosecution to try to secure the evidence of the witness short of anonymity.
43. At the inter-partes hearing, the defence will be able to make representations, but will not have sight of any sensitive material disclosed to the judge.
44. If they consider it necessary, judges may invite the Attorney General to appoint a Special Counsel to assist the court.
45. A request from the court for the appointment of a Special Counsel is made to the Attorney General's Chambers. Where the judge decides to seek Special Counsel, the prosecutor must promptly notify the Attorney General and Head of Legal Services.
46. The Attorney General's Guidelines refer in greater detail to the role of the prosecutor when the court is considering whether to invite the Attorney to appoint Special Counsel. The Guidelines set out the duty of the prosecutor in ensuring that the Attorney is provided with all relevant material.

Successful applications

47. Where a witness anonymity order is granted, there is an absolute duty upon the prosecution to provide the defence with as much information as possible - commensurate with the granting of anonymity - to enable the defence effectively to cross-examine the anonymous witness. This particularly relates to material that might undermine the prosecution case or assist the defence.

Discharge or variation of a witness anonymity order

48. Any party may apply for a witness anonymity order to be varied or discharged if there has been a material change in circumstances. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted. The court can also vary or discharge an order of its own initiative. The court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge or before varying or discharging an order on its own initiative.
49. A witness anonymity order may be varied or discharged after proceedings have finished. The court may vary or discharge the order either on an application by a party to the proceedings or on an application by the witness him or herself. This may be appropriate for example, if a considerable period of time has elapsed since the trial and the circumstances of the witness have changed. Before discharging or varying an order the court must provide all parties to the proceedings and the witness the opportunity to be heard unless it is not reasonably practicable to do so.
50. An appellate court can discharge or vary a witness anonymity order made in the proceedings which gave rise to the appeal. There is no provision for an application procedure; it is intended that the power will be exercised by the appeal court of its own motion, how and when it thinks fit.
51. If an order is varied or discharged, the prosecutor must notify the police and the Head of Legal Services immediately. Once an order is made, the prosecution advocate has a duty to ensure that the conditions are kept under review during the trial and that, should there be a material change in circumstances, the judge is informed.

7. Prosecution Duties

52. The effect of a Witness Anonymity Order is to prevent the defendant from knowing the identity of a witness. Without this information the defendant's ability to investigate and challenge the accuracy or credibility of the witness's evidence may be limited.
53. When considering whether to make a Witness Anonymity Order the court will consider to what extent the defendant needs to know the identity of the witness in order to challenge the witness's evidence effectively. This question will often be central to the question of whether, having regard to all the circumstances, the Witness Anonymity Order sought would be consistent with a fair trial.
54. The prosecutor's role is:
- (a) to act with scrupulous fairness
 - (b) to examine with care, and probe where appropriate, the material provided in support of the application and the evidential basis for it. Prosecutors should in particular objectively assess any statement made by the witness or witnesses in question and the grounds on which it is based
 - (c) to be satisfied before making the application that, viewed objectively, it can properly be said that the order is necessary and in the interests of justice and that the defendant can receive a fair trial
 - (d) to put before the court all material that is relevant to the application. Courts will rely to a significant extent upon the prosecutor and the investigator to provide relevant material. Material will be relevant if the prosecutor relies upon it to support the application, or if it may tend to undermine or qualify the justification for making the order at all, or for making it in the form sought by the prosecutor. Material is particularly relevant if credibility is or may be in issue, for example if there is a known link between the witness and the defendant or a co-accused
 - (e) to disclose as much relevant material to the defence as possible without identifying the witness, including material that may tend to cast doubt on the credibility, reliability or accuracy of the witness's evidence
55. The role of the prosecutor as an independent and impartial administer of justice is of paramount importance. Applications should only be authorised by the Head of Legal Services, as case manager for the prosecution service.

56. The interests of justice include the interests of the victim or victims, the interests of the witness or witnesses, the interests of the defendant and any co-defendants and the wider public interest.
57. Prosecutors should take all necessary and reasonable steps consistent with a fair trial and the interests of justice to ensure the safety of a witness or the avoidance of real harm to the public interest or the protection of property.

Applications by defendants

58. The Ordinance permits a defendant (as well as a prosecutor) to apply for a Witness Anonymity Order. Prosecutors should respond to such applications independently and objectively. Prosecutors should examine critically, but fairly, the basis for any application and any material put forward in support of any application.
59. The prosecutor should provide the court with all material within the prosecutor's possession or control that is relevant to the defendant's application.

Appointment and role of Special Counsel

60. The Ordinance makes no statutory provision for the appointment of Special Counsel.
61. A criminal court may invite the Attorney General to appoint Special Counsel. In accordance with the case law such an appointment:
 - (a) should be regarded as '... exceptional, never automatic, a course of last and never first resort.'
 - (b) the court will take account of the seriousness of the issue that the court has to determine in the particular case. Whether credibility is at issue is likely to be an important consideration. The court will also need to consider the extent to which Special Counsel could further the defendant's case
 - (c) the court itself can be expected to perform a role of testing and probing the case which is presented on the application. When coupled with the prosecutor's duty to put all relevant material before the court, this may often be sufficient to enable a fair and informed decision to be reached without the need to appoint Special Counsel
62. Where appointed, the role of Special Counsel is to make representations on behalf of the accused in any closed proceedings.

63. The Attorney General will consider each invitation to appoint Special Counsel on its merits, having regard to the all the relevant circumstances of the case. In particular, in this context, to the basis of the application, whether it is opposed, the basis upon which it is opposed and the particular considerations that the court wishes Special Counsel to address.
64. A prosecutor making an application for a Witness Anonymity Order should always be prepared to assist the court to consider whether the circumstances are such that exceptionally the appointment of Special Counsel may be called for. When appropriate a prosecutor should draw to the attention of the court any aspect of an application for a Witness Anonymity Order or any aspect of the case that may, viewed objectively, call for the appointment of Special Counsel.
65. When a court decides to invite the Attorney General to appoint Special Counsel the prosecutor should (regardless of any steps taken by the court or any defendant) ensure that the Attorney General is promptly notified; and assist in ensuring that the Attorney General receives all the information needed to take a decision.
66. Where Special Counsel is appointed, he or she will initially be provided by the prosecutor with any open material made available to the accused regarding the application (and any other open material requested by Special Counsel). Special Counsel may then seek instructions from the defendant and his legal representatives. Only then will Special Counsel be provided by the prosecutor with the closed or un-redacted material provided to the court.

8. Records

67. The Attorney General will maintain a register of all cases in which an application for a witness anonymity order is made. That register must contain:
- (a) details of the case;
 - (b) the nature of the witness in respect of whom a witness anonymity order was sought (civilian, undercover police officer; test purchase officer; other (to be specified));
 - (c) on what grounds the order was sought;
 - (d) details of any requested order that was not sought;
 - (e) whether Special Counsel was sought by the court;
 - (f) the outcome of the application and any reasons given by the court; and
 - (g) the outcome of the case, and whether the case was stopped because an order was not granted.

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