The Attorney General Falkland Islands

AGG7

The Attorney General's Guidance on Disclosure

Published by Authority of the Attorney General

The Law and Regulation Directorate
The Attorney General's Chambers
PO Box 587, Stanley, Falkland Islands, FIQQ 1ZZ

Contents

1. Introduction

1. These Guidelines are issued by the Attorney General for the assistance of investigators, prosecutors and defence practitioners in the application of the disclosure regime set out in the Criminal Procedure and Evidence Ordinance 2014.

2. The Guidelines emphasise the importance of prosecution-led disclosure and the importance of applying the disclosure regime mindful of and tailored to the type of investigation or prosecution in question.

3. The Guidelines are intended to operate alongside Part 14 Criminal Procedure Evidence Ordinance 2014 ('the Ordinance') and Schedule 4 thereto.

4. The statutory framework for criminal investigations and disclosure is contained in Part 14 of the Ordinance. The Ordinance and the Disclosure Code aim to ensure that criminal investigations are conducted in a fair, objective and thorough manner, and require 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 or of assisting the case for the accused. The Ordinance requires a timely dialogue between the prosecution, defence and the court to enable the prosecution properly to identify such material.

5. Every accused person has a right to a fair trial, a right embodied in the law and guaranteed by the Falkland Islands Constitution. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to the accused is an inseparable part of a fair trial. A fair trial should not require consideration of irrelevant material and should not involve spurious applications or arguments which serve to divert the trial process from examining the real issues before the court.

6. Properly applied, the provisions of the Ordinance should ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources. Consideration of disclosure issues should be an integral part of a good investigation and not something that exists separately.

2. General Principles

7. Disclosure refers to providing the defence with copies of, or access to, any prosecution material 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.

8. Prosecutors will only be expected to anticipate what material might undermine their case or strengthen the defence in the light of information available at the time of the disclosure decision, and they may take into account information revealed during questioning. However the disclosure obligation is a continuing one throughout the life of a case and the disclosure decision must be kept under constant review.

9. In deciding whether material satisfies the disclosure test, consideration should be given amongst other things to:

    (a) the use that might be made of it in cross-examination;

    (b) its capacity to support submissions that could lead to:

        (i) the exclusion of evidence;

        (ii) a stay of proceedings, where the material is required to allow a proper application to be made;

        (iii) a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the Constitution;

    (c) its capacity to suggest an explanation or partial explanation of the accused's actions;

    (d) the capacity of the material to have a bearing on scientific or medical evidence in the case.

10. It should also be borne in mind that while items of material viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the accused, several items together can have that effect.

11. Material relating to the accused's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered when in the investigator's custody is likely to fall within the test for disclosure set out above.

12. Disclosure must not be an open-ended trawl of unused material. A critical element to fair and proper disclosure is that the defence play their role to ensure that the prosecution are directed to material which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. This process is key to ensuring prosecutors make informed determinations about disclosure of unused material. The defence statement is important in identifying the issues in the case and why it is suggested that the material meets the test for disclosure. Vague, open-ended and onerous requests for material are not in the spirit of the disclosure regime.

13. Disclosure should be conducted mindfully and never be reduced to a box-ticking exercise; at all stages of the process, there should be consideration of why the disclosure regime requires a particular course of action and what should be done to achieve that aim.

14. There will always be a number of possible participants in prosecutions and investigations: investigation officers and disclosure officers, and crown counsel. Communication within the "prosecution team" is vital to ensure that all matters which could have a bearing on disclosure issues are given sufficient attention by the right person. In practice, this is likely to mean that a full log of disclosure decisions (with reasons) must be kept on the file and be made available as appropriate to the prosecution team.

15. The role of the reviewing lawyer will be central to ensuring all members of the prosecution team are aware of, and carry out, their duties and role(s). This should be done by giving clear written instructions and record keeping. Steps must be taken to ensure that all involved in the case properly record their decisions. Subsequent prosecutors must be able to see and understand previous disclosure decisions before carrying out their continuous review function.

16. Investigators must always be alive to the potential need to reveal and prosecutors to the potential need to disclose material, in the interests of justice and fairness in the particular circumstances of any case, after the commencement of proceedings but before their duty arises under the Ordinance.

17. For instance, disclosure ought to be made of significant information that might affect a bail decision. This is likely to depend on what the defence chooses to reveal at that stage.

3. Investigators and Disclosure Officers

18. Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. Investigators and disclosure officers should be familiar with the Disclosure Code of Practice, in particular their obligations to retain and record relevant material, to review it and to reveal it to the prosecutor.

19. A fair investigation involves the pursuit of material following all reasonable lines of enquiry, whether they point towards or away from the suspect. What is 'reasonable' will depend on the context of the case. A fair investigation does not mean an endless investigation: investigators and disclosure officers must give thought to defining, and thereby limiting, the scope of their investigations, seeking the guidance of the prosecutor where appropriate

20. Where appropriate, regular case conferences and other meetings should be held to ensure prosecutors are apprised of all relevant developments in investigations.

21. The Disclosure Code encourages investigators and disclosure officers to seek advice from prosecutors about whether any particular item of material may be relevant to the investigation, and if so, how. Investigators and disclosure officers should record key decisions taken on these matters and be prepared to account for their actions later. An identical approach is not called for in each and every case.

22. Investigators are to approach their task seeking to establish what actually happened. They are to be fair and objective.

23. Disclosure officers must inspect, view, listen to or search all relevant material that has been retained by the investigator and the disclosure officer must provide a personal declaration to the effect that this task has been undertaken. This process should commence with the investigation and continue as the investigation progresses.

24. Prosecutors only have knowledge of matters which are revealed to them by investigators and disclosure officers, and the schedules are the written means by which that revelation takes place.

25. Whatever the approach taken by investigators or disclosure officers to examining the material gathered or generated in the course of an investigation, it is crucial that disclosure officers record their reasons for a particular approach in writing.

26. In meeting the obligations in the Disclosure Code, schedules must be completed in a form which not only reveals sufficient information to the prosecutor, but which demonstrates a transparent and thinking approach to the disclosure exercise, to command the confidence of the defence and the court. Descriptions on non-sensitive schedules must be clear and accurate, and must contain sufficient detail to enable the prosecutor to make an informed decision on disclosure. The use of abbreviations and acronyms can be problematic and lead to difficulties in appreciating the significance of the material, so must not be used.

27. Sensitive schedules must contain sufficiently clear descriptions to enable the prosecutor to make an informed decision as to whether or not the material itself should be viewed but without compromising the confidentiality of the information.

28. It may become apparent to an investigator that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was inextricably linked to material that was relevant, is, in fact, incapable of impact. It is not necessary to retain such material, although the investigator should err on the side of caution in reaching that conclusion and should be particularly mindful of the fact that some investigations continue over some time and that what is incapable of impact may change over time. The advice of the prosecutor should be sought where appropriate and if there is any doubt whatsoever the material should be retained.

29. Disclosure officers must specifically draw material to the attention of the prosecutor for consideration where they have any doubt as to whether it might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.

30. Disclosure officers must seek the advice and assistance of prosecutors when in doubt as to their responsibility as early as possible. They must deal expeditiously with requests by the prosecutor for further information on material, which may lead to disclosure.

4. Prosecutors

31. Prosecutors are responsible for making proper disclosure in consultation with the disclosure officer. The duty of disclosure is a continuing one and disclosure should be kept under review. Prosecutors must also be alert to the need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met.

32. Prosecutors must review schedules prepared by disclosure officers thoroughly and must be alert to the possibility that relevant material may exist which has not been revealed to them or material included which should not have been. If no schedules have been provided, or there are apparent omissions from the schedules, or documents or other items are inadequately described or are unclear, the prosecutor must at once take action to obtain properly completed schedules. Likewise schedules should be returned for amendment if irrelevant items are included.

33. If prosecutors remain dissatisfied with the quality or content of the schedules they must raise the matter with a senior officer to resolve the matter satisfactorily.

34. Where prosecutors have reason to believe that the disclosure officer has not discharged the obligation to inspect, view, listen to or search relevant material, they must at once raise the matter with the disclosure officer and request that it be done. Where appropriate the matter should be raised with the officer in the case or a senior officer.

35. Prosecutors should copy the defence statement to the disclosure officer and investigator as soon as reasonably practicable and prosecutors should advise the investigator if, in their view, reasonable and relevant lines of further enquiry should be pursued. If the defence statement does point to other reasonable lines of enquiry, further investigation is required and evidence obtained as a result of these enquiries may be used as part of the prosecution case or to rebut the defence.

36. It is vital that prosecutors consider defence statements thoroughly. Prosecutors cannot comment upon, or invite inferences to be drawn, from failures in defence disclosure otherwise than in accordance with section 227 of the Ordinance. Prosecutors may cross-examine the accused on differences between the defence case put at trial and that set out in his or her defence statement. Prosecutors should examine the defence statement to see whether it points to other lines of enquiry.

37. Prosecutors should challenge the lack of, or inadequate, defence statements in writing, copying the document to the court and the defence and seeking directions from the court to require the provision of an adequate statement from the defence.

38. If the material does not fulfil the disclosure test there is no requirement to disclose it. For this purpose, the parties' respective cases should not be restrictively analysed but must be carefully analysed to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted.

39. Prosecution advocates should ensure that all material which ought to be disclosed under the Ordinance is disclosed to the defence. However, prosecution advocates cannot be expected to disclose material if they are not aware of its existence. As far as is possible, prosecution advocates must place themselves in a fully informed position to enable them to make decisions on disclosure.

40. Prosecution advocates should consider as a priority all the information provided regarding disclosure of material. Prosecution advocates should consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been fully instructed regarding disclosure matters. If as a result the advocate considers that further information or action is required, written advice should promptly be provided setting out the aspects that need clarification or action.

41. The prosecution advocate must keep decisions regarding disclosure under review until the conclusion of the trial. The prosecution advocate must in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected. Prosecution advocates must not abrogate their responsibility under the Ordinance by disclosing material which does not pass the test for disclosure.

42. There remains no basis in practice or law for counsel to counsel disclosure.

5. Defence

43. Defence engagement must be early and meaningful for the Disclosure regime to function as intended. Defence statements are an integral part of this and are intended to help focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify exculpatory unused material. Defence statements should be drafted in accordance with the relevant provisions of the Ordinance.

44. Defence requests for further disclosure should ordinarily only be answered by the prosecution if the request is relevant to and directed to an issue identified in the defence statement. If it is not, then a further or amended defence statement should be sought by the prosecutor and obtained before considering the request for further disclosure.

45. In some cases which involve extensive unused material that is within the knowledge of a defendant, the defence will be expected to provide the prosecution and the court with assistance in identifying material which is suggested to pass the test for disclosure.

46. The prosecution's continuing duty to keep disclosure under review is crucial, and particular attention must be paid to understanding the impact of developments in the case upon the relevance of the unused material and earlier disclosure decisions. Meaningful defence engagement will help the prosecution to keep disclosure under review. The continuing duty of review for prosecutors is less likely to require the disclosure of further material to the defence if the defence have clarified and articulated their case, as required by the Ordinance.

47. The requirement for the prosecution to provide initial disclosure only arises after a not guilty plea has been entered or the case sent to the Supreme Court but prosecutors should be alert to the possibility that material may exist which should be disclosed to the defendant prior to the Ordinance requirements applying to the case. The common law position is expressly preserved in the Ordinance.

6. Large and Complex Prosecutions

48. The particular challenges presented by large and complex criminal prosecutions require an approach to disclosure which is specifically tailored to the needs of such cases. In these cases more than any other is the need for careful thought to be given to prosecution-led disclosure matters from the very earliest stage. It is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation, which must continue throughout all aspects of the case preparation.

49. Accordingly, investigations and prosecutions of large and complex cases should be carefully defined and accompanied by a clear investigation and prosecution strategy.

50. The approach to disclosure in such cases should be outlined in a Disclosure Management Document which should be served on the defence and the court at an early stage. This document will require careful preparation and presentation, tailored to the individual case and may include issues such as:

    (a) How the disclosure responsibilities have been managed;

    (b) A brief summary of the prosecution case and a statement outlining how the prosecutor's general approach will comply with the Ordinance, these Guidelines and the Code on the Disclosure;

    (c) The prosecutor's understanding of the defence case, including information revealed during interview;

    (d) An outline of the prosecution's general approach to disclosure, which may include detail relating to:

        (i) Digital material: explaining the method and extent of examination;

        (ii) Video footage;

        (iii) Linked investigations: explaining the nexus between investigations, any memoranda of understanding or disclosure agreements between investigators;

        (iv) Third party and foreign material, including steps taken to obtain the material;

        (v) Reasonable lines of enquiry: a summary of the lines pursued, particularly those that point away from the suspect, or which may assist the defence;

(vi) Credibility of a witness: confirmation that witness checks, including those of professional witnesses have, or will be, carried out.

51. Thereafter the prosecution should follow the Disclosure Management Document. It is a living document and should be amended in light of developments in the case; it should be kept up to date as the case progresses.

52. Its use will assist the court in its own case management and will enable the defence to engage from an early stage with the prosecution's proposed approach to disclosure.

7. Material Not Held by the Prosecution

Material held by other Government departments

53. Where it appears to an investigator, disclosure officer or prosecutor that a Falkland Islands Government (FIG) department has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material. Although what is reasonable will vary from case to case, the prosecutor should inform the department or other body of the nature of its case and of relevant issues in the case in respect of which the department or body might possess material, and ask whether it has any such material. The principles set out in the FIG joint disclosure protocol must be applied and the protocol followed.

54. Investigators, disclosure officers and prosecutors cannot be considered to be in constructive possession of material held by FIG departments or Crown bodies simply by virtue of their status.

55. Sometimes, due to the unitary nature of FIG, investigators, disclosure officers or prosecutors may become aware of the content or nature of material held by other departments. Consultation with the relevant department must always take place before disclosure is made; there may be public interest reasons to apply to the Court for an order for non-disclosure in the public interest which must be discussed with the departmental head before any disclosure is made. Again the FIG joint disclosure protocol must be followed.

56. If, after reasonable steps have been taken to secure access to such material, access is denied, the investigator, disclosure officer or prosecutor should consider what if any further steps might be taken to obtain the material or inform the defence. The final decision on any further steps will be for the prosecutor, applying the principles of the Disclosure Code, the guidance set out in the Disclosure Manual and the FIG joint disclosure protocol.

Third party material: other domestic bodies

57. There may be cases where the investigator, disclosure officer or prosecutor believes that a third party has material or information which might be relevant to the prosecution case. In such cases, investigators, disclosure officers and prosecutors should take reasonable steps to identify, secure and consider material held by any third party where it appears to the investigator, disclosure officer or prosecutor that (a) such material exists and (b) that it may be relevant to an issue in the case.

58. If the investigator, disclosure officer or prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information, and the requirements of section 279 of the Ordinance are satisfied, then the prosecutor should apply for a witness summons causing a representative of the third party to produce the material to the court.

International matters

59. The obligations under the Ordinance and Disclosure Code to pursue all reasonable lines of enquiry apply to material held overseas.

60. Where it appears that there is relevant material, the prosecutor must take reasonable steps to obtain it making use of international conventions.

61. There may be cases where a foreign state or a foreign court refuses to make the material available to the investigator or prosecutor. There may be other cases where the foreign state, though willing to show the material to investigators will not allow the material to be copied or otherwise made available and the courts of the foreign state will not order its provision.

62. It is for these reasons that there is no absolute duty on the prosecutor to disclose relevant material held overseas by entities not subject to the jurisdiction of the court in the Falkland Islands. However consideration should be given to whether the type of material believed to be held can be provided to the defence.

63. The obligation on the investigator and prosecutor under the Ordinance is to take reasonable steps. Where investigators are allowed to examine files of a foreign state but are not allowed to take copies or notes or list the documents held, there is no breach by the prosecution in its duty of disclosure by reason of its failure to obtain such material, provided reasonable steps have been taken to try and obtain the material. Prosecutors have a margin of consideration as to what steps are appropriate in the particular case but prosecutors must be alive to their duties and there may be some circumstances where these duties cannot be met. Whether the prosecutor has taken reasonable steps is for the court to determine in each case if the matter is raised.

64. In these circumstances it is important that the position is clearly set out in writing so that the court and the defence know what the position is. Investigators and prosecutors must record and explain the situation and set out, insofar as they are permitted by the foreign state, such information as they can and the steps they have taken.

Applications for non-disclosure in the public interest

65. The Ordinance allows prosecutors to apply to the court for an order to withhold material which would otherwise fall to be disclosed if disclosure would give rise to a real risk of serious prejudice to an important public interest. Before making such an application, prosecutors should aim to disclose as much of the material as they properly can (for example, by giving the defence redacted or edited copies or summaries). Neutral material or material damaging to the defendant need not be disclosed and there is no need to bring it to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on whether material in its possession should be disclosed.

66. Prior to the hearing, the prosecutor must examine all material which is the subject matter of the application and make any necessary enquiries of the investigator. The investigator must be frank with the prosecutor about the full extent of the sensitive material. Prior to or at the hearing, the court must be provided with full and accurate information about the material

67. The prosecutor and/or investigator should attend such applications. Section 239 of the Ordinance allows a person claiming to have an interest in the sensitive material to apply to the court for the opportunity to be heard at the application.

68. The principles set out below should be applied rigorously, firstly by the prosecutor and then by the court considering the material.

(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered.

This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected. In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

(8) It is essential that these principles are scrupulously adhered to, to ensure that the procedure for examination of material in the absence of the accused is compliant with paragraph 6 of the Schedule to the Constitution.

69. If prosecutors conclude that a fair trial cannot take place because material which satisfies the test for disclosure cannot be disclosed, and that this cannot be remedied by the above procedure; how the case is presented; or by any other means, they should not continue with the case.

8. Post-Conviction

70. In all cases the prosecutor must consider disclosing in the interests of justice any material which is relevant to sentence (e.g. information which might mitigate the seriousness of the offence or assist the accused to lay blame in part upon a co-accused or another person).

71. Where, after the conclusion of the proceedings, material comes to light, that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material.

9. Roles and Responsibilities

72. The Disclosure Code requires the police to record and retain material obtained in a criminal investigation which may be relevant to the investigation. In particular:

(a) all police officers have a responsibility to record and retain relevant material obtained or generated by them during the course of the investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original, if the original is perishable, or the retention of a copy rather than the original is reasonable in all the circumstances.

(b) the officer in charge of the investigation has special responsibility to ensure that the duties under the Disclosure Code are carried out by all those involved in the investigation, and for ensuring that all reasonable lines of enquiry are pursued, irrespective of whether the resultant evidence is more likely to assist the prosecution or the accused.

(c) the Code of Practice creates the role of disclosure officer with specific responsibilities for examining material, revealing it to the prosecutor, disclosing it to the accused where appropriate, and certifying to the prosecutor that action has been taken in accordance with the Disclosure.

(d) the disclosure officer is required to create schedules of relevant unused material retained during an investigation and submit them to the prosecutor together with certain categories of material.

(e) non-sensitive material should be described on form MG6C and sensitive material should be described on form MG6D.

73. The Chief of Police is responsible for putting in place arrangements to ensure that in every investigation the identity of the officer in charge of an investigation and that of the disclosure officer is recorded. It is his or her duty to ensure that disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively.

74. An investigator, a disclosure officer and an officer in charge of an investigation perform different functions. The three roles may be performed by different people or by one person.

75. Where the three roles are undertaken by more than one person, close consultation between them will be essential to ensure compliance with the statutory duties imposed by the Ordinance and the Disclosure Code.

76. The officer in charge of the investigation is responsible for directing an investigation. This officer's responsibilities under the Ordinance and the Disclosure Code are to:

(a) account for any general policies followed in the investigation

(b) ensure that all reasonable steps are taken for the purposes of the investigation and, in particular, that all reasonable lines of enquiry are pursued

(c) ensure that proper procedures are in place for recording and retention of material obtained in the course of the investigation

(d) appoint the disclosure officer

(e) ensure that an individual is not appointed as disclosure officer, or allowed to continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged crime which is the subject of the investigation. The advice of a more senior officer must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as disclosure officer. If thereafter the doubt remains, the advice of the prosecutor should be sought

(f) ensure that tasks delegated to civilians employed by the police force or to other persons participating in the investigation under arrangements for joint investigations have been carried out in accordance with the requirements of the Disclosure Code

(g) ensure that material which may be relevant to an investigation is retained and recorded in a durable and retrievable form

(h) ensure that all retained material is either made available to the disclosure officer, or in exceptional circumstances revealed directly to the prosecutor

(i) ensure that all practicable steps are taken to recover any material that was inspected and not retained, if as a result of developments in the case it later becomes relevant.

77. An investigator is any police officer involved in a criminal investigation. All such police officers, including those who may not view themselves as investigators, have a responsibility for carrying out the duties imposed under the Disclosure Code.

78. All officers, in particular must retain material obtained in a criminal investigation which is either created or discovered during the investigation, and which may be relevant to the investigation.

79. The investigator must notify the disclosure officer of the existence and whereabouts of material that has been retained.

80. Officers have a personal responsibility to reveal all relevant misconduct relating to them, using form MG6B.

81. The disclosure officer has a statutory duty to discharge disclosure responsibilities throughout a criminal investigation, namely to:

(a) examine, inspect, view or listen to all relevant material that has been retained by the investigator and that does not form part of the prosecution case

(b) create schedules that fully describe the material

(c) identify all material which satisfies the disclosure test using the MG6E

(d) submit the schedules and copies of disclosable material to the prosecutor

(e) at the same time, supply to the prosecutor copies of all documents required to be routinely revealed and which have not previously been revealed to the prosecutor

(f) consult with and allow the prosecutor to inspect the retained material

(g) review the schedules and the retained material continually, particularly after the defence statement has been received, identify to the prosecutor material that satisfies the disclosure test using the MG6E and supply a copy of any such material not already provided

(h) schedule and reveal to the prosecutor any relevant additional unused material pursuant to the continuing duty of disclosure

(i) certify that all retained material has been revealed to the prosecutor in accordance with the Disclosure Code

(j) where the prosecutor requests the disclosure officer to disclose any material to the accused, give the accused a copy of the material or allow the accused to inspect it.

82. The disclosure officer may be a police officer or a civilian. In order to perform the duties under the Disclosure Code properly, the disclosure officer will need to become fully familiar with the facts and background to the case. The investigator(s) and the officer in charge of the investigation (where these roles are performed by a different individual from the disclosure officer) must provide assistance to the disclosure officer in performing this function.

83. In some cases it will be desirable to appoint a disclosure officer at the outset of the investigation. In making this decision, the officer in charge of the investigation should have regard to the nature and seriousness of the case, the volume of material which may be obtained or created, and the likelihood of a not guilty plea. If not appointed at the start of an investigation, a disclosure officer must be appointed in sufficient time to be able to prepare the unused material schedules for inclusion in the full file.

84. Deputy disclosure officers can be appointed to examine parts of the material and reveal it to the prosecutor. For instance, where a police investigation has been intelligence led, there may be a deputy disclosure officer appointed just to deal with intelligence material which, by its very nature, is likely to be sensitive. References in this manual to disclosure officers include deputy disclosure officers.

85. Where the prosecutor consults with the lead disclosure officer, for example, when he provides a copy of the defence statement, the lead disclosure officer should inform any deputy disclosure officer who has provided schedules to the prosecutor.

86. The officer in charge of an investigation may delegate certain tasks to civilians employed by the police. The officer in charge of an investigation must ensure that those tasks have been carried out in accordance with the Disclosure Code.

10. Reasonable Lines of Enquiry

Lines of enquiry

87. Duties of disclosure under the Ordinance are imposed upon two categories of persons only: the investigator and the prosecutor. All other categories of persons are to be treated as third parties, rather than as belonging to the prosecuting or investigating team. Third parties frequently encountered will include:

    (a) the social services department

    (b) the health department

    (c) the education department

    (d) forensic experts

    (e) police surgeons

    (f) owners of CCTV material

88. The unitary nature of the Falklands Islands Government means that although material may be held by separate departments such as social services, health, education or customs, all fall within the unitary authority but for the purposes of disclosure fall to be treated as third parties.

89. There is a duty under the Disclosure Code for an investigator to pursue all reasonable lines of enquiry, whether these point towards or away from a suspect. What is reasonable will depend upon the circumstances of a particular case.

90. Where police and another investigating agency (such as the Customs and Immigration department, or a foreign police force) undertake a joint investigation, material obtained within the remit of that joint investigation should be treated as prosecution material and dealt with in accordance with this manual.

91. Investigators, disclosure officers and prosecutors must have regard to whether relevant material may exist in relation to other linked investigations or prosecutions. Reasonable enquiries must be carried out to establish whether such material exists and, if so, whether it may be relevant to the instant prosecution.

92. Reasonable lines of enquiry may include enquiries as to the existence of relevant material in the possession of a third party. It is not necessary to make speculative enquiries, but frequently the existence of the material will be known or can be deduced from the circumstances. For example, where a child witness is the subject of a care order, the social services department may have relevant material relating to the allegation under investigation.

93. A third party has no obligation under the Ordinance to reveal material to the investigator or to the prosecutor, nor is there any duty on the third party to retain material which may be relevant to the investigation. In some circumstances, the third party may not be aware of the investigation or prosecution.

94. If the officer in charge of the investigation, the investigator, or the disclosure officer believes that a third party holds material that may be relevant to the investigation, that person or body should be told of the investigation. They should be alerted to the need to preserve relevant material. Consideration should be given as to whether it is appropriate to seek access to the material, and if so, steps should be taken to obtain such material. It will be important to do so if the material or information is likely to satisfy the disclosure test. If the third party is a department of the Falkland Islands Government then the Prosecutor will contact the relevant department and both will follow the FIG Joint Disclosure protocol.

95. Otherwise a letter should be sent to the third party together with the explanatory note, specimens of which can be found at Annex A.

96. The disclosure officer should inform the prosecutor of the identity of the third party and the nature of the material the third party is believed to possess by way of the MG6. In some circumstances it may be appropriate for the disclosure officer and the investigator to consider with the prosecutor whether the third party should be approached and further material sought or inspected.

97. If material relevant to the investigation comes to the knowledge of the investigator and is then obtained from a third party, it will become unused material or information within the terms of the Disclosure Code. This applies particularly to relevant information conveyed verbally by the third party. Any such material should be recorded in a durable or retrievable form (for example potentially relevant information revealed in discussions at a child protection conference attended by police officers). It will have to be recorded on the appropriate schedule and revealed to the prosecutor in the usual way.

98. If the disclosure officer alerts the prosecutor to the possibility that a third party has material or information that has a bearing on the case or where it may be deduced from the circumstances of the case, the prosecutor should consider whether it is appropriate to advise the police to seek access to the material as part of their duties to explore all reasonable lines of enquiry.

99. The prosecutor is only under a duty to disclose a third party's material if that material had come into the prosecutor's possession and the prosecutor was of the opinion that such material satisfied the disclosure test. Before taking steps to obtain third party material, the Court emphasised that it must be shown that there was a suspicion that the third party not only had relevant material and that the material was not merely neutral or damaging to the accused but satisfied the disclosure test.

100. The prosecutor has a "margin of consideration" as to what steps to take in any particular case and was not thus under an absolute obligation to obtain material that was suspected to satisfy the disclosure test.

101. In advising the police on whether to approach a third party, the prosecutor should consult with the disclosure officer, the investigator and if necessary with the officer in charge of the investigation.

102. Any material provided by a third party at the request of the investigator and supplied to the investigator will also be subject to the requirements of the Ordinance.

103. If relevant material held by third parties is inspected by the police but not retained, a record of its content must be made. This should then be referred to on the appropriate schedule. An example might be where an investigator examines relevant material held by a third party, but decides not to obtain it. The record of information obtained in this way should then be assessed for sensitivity and disclosure to the defence as for all other unused material.

Obtaining access to third party material

104. Where having received a request from the investigator or prosecutor the third party refuses to co-operate, the prosecutor should consider whether to make an application for a witness summons. Where the prosecutor believes that there is material that satisfies the disclosure test, he or she should nevertheless only make an application where the statutory conditions are satisfied as set down in sections 279 and 300 of the Ordinance.

105. Where access to the material is declined or refused by the third party and the investigator believes that it is reasonable to seek production of the material before a suspect is charged because he or she believes it is likely to be relevant evidence and of substantial value, the investigator may consider making an application under Section 14 and Schedule 1 of the Ordinance, and/or a search warrant. The investigator may seek advice of the prosecutor before such an application is made.

106. The statutory requirements in sections 279 and 300 of the Ordinance are more stringent than the disclosure test. Items sought under the summons procedure must be 'likely to be material evidence,' meaning 'immediately admissible per se.' Accordingly, there should be consultation between the investigator and the prosecutor before any application to the court is made to assess whether it can properly proceed. A pragmatic and co-operative stance should be taken by social services and material revealed to the prosecution.

107. Before applying for the witness summons it may be appropriate to make a formal request directly to the third party (see specimen letter at Annex A1). The request should explain:

(a) what material or information it is thought that the third party holds

(b) the reasons why access to the material is sought

(c) the known or suspected issues in the case

(d) what will happen to the material if it is released

(e) that views are invited from the third party on whether the material is considered sensitive

(f) what will happen if the material is not released.

108. A suitable time should be given for a response before making the application for the witness summons.

109. If the prosecutor believes there is relevant material which the third party has declined to reveal, but grounds for a witness summons are not made out, the prosecutor should notify the court and where appropriate the defence (unless in the case of the defence, for example, an intelligence operation could be compromised).

110. Where material is obtained from third parties, the investigator should discuss with them whether any sensitivities attach to the material that might influence whether it is used as evidence, or otherwise disclosed to the defence, or whether there may be public interest reasons that justify withholding disclosure. The third party's view must be passed to the prosecutor using the MG6D.

Public bodies as third parties

111. Where it appears to an investigator, disclosure officer or prosecutor that a FIG department or Crown body has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material, whilst applying the FIG Joint Disclosure Protocol.

112. It should be remembered that investigators, disclosure officers and prosecutors cannot be regarded to be in constructive possession of material held by Government departments or Crown bodies simply by virtue of the status as Government departments or Crown bodies.

11. Relevance, Recording and Retention

113. The Disclosure Code requires that material of any kind, including information and objects, which is obtained in the course of a criminal investigation as defined by the Ordinance and which may be relevant to the investigation must be retained.

114. Material which may be relevant to the investigation is defined in the Disclosure Code 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.

115. This includes not only material coming into the possession of the investigator (such as documents seized in the course of searching premises) but also material generated by the investigator (such as interview records).

116. A criminal investigation is defined in the Ordinance as an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it.

117. The Disclosure Code expands this by stating that a criminal investigation includes:

(a) investigations into crimes that have been committed;

(b) investigations whose purpose is to ascertain whether a crime has been committed, with a view to the possible institution of criminal proceedings; and

(c) investigations which begin in the belief that a crime may be committed. For example, a surveillance operation is part of an investigation even if it is directed to a target without there being a specific offence in mind.

118. This means that information and material arising out of operations conducted purely for intelligence purposes might become disclosable (subject to public interest immunity (PII) considerations). Officers involved in intelligence operations should regularly and actively consider whether the information that they have has a bearing upon any live investigations or prosecutions, and if so, act quickly to ensure it is brought to the attention of the disclosure officer and prosecutor.

119. If material with an evidential value has been destroyed, there is a danger that a court may stay the prosecution for abuse of process.

120. In discharging their obligations under the Ordinance, the Disclosure Code, the Attorney General's Guidelines, the common law and these operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant.

121. Material includes information given orally. Where relevant material is not recorded in any way, it will need to be reduced into a suitable form.

122. It is the responsibility of the officer in charge of the investigation to ensure that the material is recorded in a durable or retrievable form, whether in writing, visually, audibly or electronically.

123. The issue of relevance is especially important where an investigator is considering whether:

(a) to throw something away, or

(b) to return an item to the owner, or

(c) not to record information, or

(d) where not keeping material or recording information would result in the permanent loss or alteration of the material (as with reusable control room discs, tapes, shop videos etc).

124. As a general rule, pure opinion or speculation, for example police officers' theories about who committed the crime, is not unused material. However, if the opinion or speculation is based on some other information or fact, not otherwise notified or apparent to the prosecutor, that information or fact might well be relevant to the investigation and should be notified to the prosecutor.

125. Reports, advices and other communications between the prosecutor and police will usually be of an administrative nature or derivative in that they contain professional opinion based on evidential material or material already subject to revelation. They will usually have no bearing on the case and thus will not be relevant. If the content of any such document is however relevant and not recorded elsewhere then the material should be dealt with in accordance with these instructions and described on the appropriate schedule. The prosecutor must not assume that there is no basis for disclosure.

126. Disclosure officers must inspect, view or listen to all material that is or may be relevant. Generally this will mean that such material must be examined in detail by the disclosure officer but occasionally the extent and manner of inspecting, viewing or listening will depend on the nature of material and its form.

127. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip-sampling. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The extent and manner of its examination must also be described together with justification for such action.

128. Early in an enquiry it may not be possible to make a considered decision on the relevance of an item until later in the case when the facts are clearer. However, at any time the considerations that the investigator should bear in mind will include:

(a) whether the information adds to the total knowledge of how the offence was committed, who may have committed it, and why

(b) whether the information could support an alternative explanation, given the current understanding of events surrounding the offence

(c) what the potential consequences will be if the material is not preserved.

129. Negative information can sometimes be as significant to an investigation as positive information. It is impossible to define precisely when negative information may be significant, as every case is different. However it will include the result of any enquiry that differs from what might have been expected, given the prevailing circumstances. Material or information that points towards a fact or an individual must be retained, as must that which casts doubt on the suspect's guilt, or implicates another person. Examples of negative information include:

(a) where a number of people present at a particular location at the particular time that an offence is alleged to have taken place state they saw nothing unusual

(b) where a finger-mark from a crime scene cannot be identified as belonging to a known suspect

(c) any other failure to match a crime scene sample with one taken from the accused

(d) identification procedures where a witness or witnesses failed to identify the suspect

(e) a CCTV camera that recorded the crime/location/suspect in a manner which is inconsistent with the prosecution case. (The fact that a CCTV camera did not function will not usually be considered relevant negative information.)

130. It is important to record promptly any information from any source, which might be considered relevant to the investigation. A record should be made at the time the information is obtained or as soon as practicable after that time.

131. Sometimes it is not practicable to retain the initial record because it forms part of a larger record which is to be destroyed, for example, control room audio discs, custody suite video discs, traffic car videos of speeding offences, or other similar recordings. Where this is the situation, the officer in charge of the investigation should identify information that should be retained, and ensure that it is transferred accurately to a durable and retrievable form before the larger record is destroyed.

132. Investigators should be alert to the potential relevance and evidential value of information contained in messages that might not normally be retained; for example, running commentaries and details of a pursuit. Investigators should make a record of conversations with experts and other investigators, where the information discussed is likely to be relevant to the case and is not recorded elsewhere.

133. Whether in original or copy form, details of preserved messages should be listed on the schedule(s) in the normal way.

Information recorded on computer

134. It is difficult to give clear-cut guidance on the approach to be adopted when dealing with information recorded on computer, owing to the wide range of investigative computer systems. But many computer systems generate material in the form of a hard copy. This should be treated in the same way as relevant material from any other source.

135. The investigator or disclosure officer will need to inform the prosecutor of the use of such systems, and the disclosure officer should describe any hard copies produced on the schedules. Where material is to be disclosed to the defence under the Ordinance material may be supplied on a disc where this is acceptable to the accused and the disclosure officer.

136. Information contained in emails may be relevant unused material, particularly if the information is not recorded elsewhere. It should be recorded, retained and revealed in the same way as other relevant material.

Retention

137. Where material was obtained in the course of an investigation because the investigator originally considered it potentially relevant, but it has in fact no bearing on the offence, the offender or the surrounding circumstances, it need not be retained further. If it is retained, it should not be handled in accordance with the disclosure provisions of the Ordinance.

138. However the investigator should err on the side of caution in coming to this conclusion and seek the advice of the prosecutor as appropriate.

139. If during the lifetime of a case, the officer in charge of an investigation or the prosecutor becomes aware that material previously examined but not retained may have become relevant as a result of new developments. The officer should take steps to recover the material wherever practicable, or ensure that it is preserved by the person in possession of it. Examples of specific items which must be retained are listed in Annex B but this list is not exhaustive.

140. Whatever the source, if the material is relevant, it must be retained. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, if the original is perishable; the original was supplied to the investigator rather than generated by him and is to be returned to its owner; or the retention of a copy rather than the original is reasonable in all the circumstances.

12. Scheduling

Preparation of schedules generally

141. The disclosure officer is responsible for preparing the schedules and submitting them to the prosecutor. The schedules, signed and dated by the disclosure officer, should be submitted to the prosecutor with a full file.

142. Where the disclosure officer is unsure whether an item is relevant to the investigation and should therefore be described on a schedule, the prosecutor should be consulted as soon as practicable.

143. In most cases there will be advantages in starting the schedule(s) at an early stage. The officer in charge of the investigation will need to consider at what stage the schedules should be prepared, and when to appoint a disclosure officer. It is not necessary to maintain schedule(s) of unused material from the start of simple, straightforward investigations.

144. During the course of the investigation it may not be possible to decide whether particular material will eventually form part of the prosecution case, or will remain unused.

145. Where working schedules or draft lists have been created as the investigation progressed, the disclosure officer must check the contents and consolidate the items into two schedules for the prosecutor describing:

(a) any non-sensitive unused material (MG6C)

(b) any sensitive unused material (MG6D)

146. Draft schedules or lists used to prepare the final schedule need not be retained or described on the MG6C.

147. Any comments, observations or explanations regarding the contents of the schedules should be made on the MG6, which should accompany the submission of the MG6C and MG6D.

148. The disclosure officer must also indicate on the MG6 the date on which the investigation started. This will tell the prosecutor which provisions to apply in disclosing material to the accused. It will also inform the prosecutor of what obligations will apply to the accused.

149. All items of material relevant to the investigation must be described on one of the above schedules for the prosecutor.

Trials in the Summary, Magistrate's and Youth courts

150. The time available for the investigator and the prosecutor to carry out their respective functions under the Ordinance will be limited in these courts, particularly where the accused is in custody.

151. To make best use of available time, it is therefore essential that:

(a) anticipated not guilty pleas are identified at an early stage so that the preparation of full files can start as soon as possible. The prosecutor should request a full file if appropriate on the form MG3

(b) full files should be submitted on time, complete with the schedules and copies of any items that must be supplied to the prosecutor.

152. There is no legal requirement to provide schedules unless and until a not guilty plea is formally entered by the accused. That is the minimum standard, however, and police officers, in simple cases, should be submitting completed MG6 schedules as a matter of normal practice at the time the case is submitted for a charging decision.

153. However, if this is not the case as soon as the police receive a clear indication of a not guilty plea, all appropriate disclosure schedules should be prepared and submitted to the prosecutor as swiftly as possible. This applies to all offences carrying a penalty of imprisonment including traffic offences. However where no plea is entered in a motoring matter and it is listed to be proved in absence, there is no requirement for disclosure schedules.

13. The Non-Sensitive Material Schedule

154. Non-sensitive unused material should be described on the MG6C. This form will be disclosed to the defence.

155. In the description column of every schedule, each item should be individually described and consecutively numbered. Where continuation sheets are used or additional schedules sent in later submissions, item numbering must be consecutive to all items on earlier schedules.

156. Every description in non-sensitive schedules should be detailed, clear and accurate. Each should include a summary of the item's contents to allow the prosecutor to make an informed decision on whether it could satisfy the disclosure test. For example, it is not sufficient merely to refer to a document by way of a form number or function which may be meaningless outside the Police Service.

157. In cases where there are many items of a similar or repetitive nature (messages for example) it is permissible to describe them by quantity and generic title. However, inappropriate use of generic listing is likely to lead to requests from the prosecutor and the defence to see the items. This may result in wasted resources and unnecessary delay. The preparation of properly detailed schedules at this stage will save time and resources throughout the disclosure process, and will promote confidence in its integrity.

158. When items are described by generic titles or quantities, the disclosure officer must ensure that items which might meet the disclosure test are also described individually.

159. The disclosure officer should keep a copy of the schedules that are sent to the prosecutor, in case there are any queries that need to be resolved. A copy will also assist the disclosure officer to keep track of the items listed, should the schedules need to be updated.

160. Sometimes documents that fall to be disclosed under the Ordinance may contain a mixture of sensitive and non-sensitive material. For example, a prosecution witness's address or personal telephone number may appear on an item that is otherwise entirely non-sensitive.

161. In these cases there may be no objection to the sensitive part being permanently blocked out on the copy document which is to be sent to the prosecutor. The original should not be marked in any way. The document should be described on the MG6C. (The unedited version should not be described on the MG6D, but made available to the prosecutor for inspection if required.) The prosecutor should be informed of the nature of the edited material, if not obvious, on the MG6. The disclosure officer should edit out issues of sensitivity whenever material is routinely revealed.

162. The responsibility to edit rests with the police but the prosecutor should be consulted where editing or separating is other than straightforward. The prosecutor is entitled to see unedited versions to ensure that the duties to disclose are met.

14. The Sensitive Material Schedule

Assessment of sensitivity and schedule preparation

163. This schedule should be used to reveal to the prosecutor the existence of unused material which the disclosure officer believes should be withheld from the defence because it is not in the public interest to disclose it. However, such material must be revealed to the prosecutor.

164. The disclosure officer must describe on the MG6D any material the disclosure of which he or she believes would give rise to **a real risk of serious prejudice to an important public interest** and the reason for that belief. This form will not be disclosed to the defence.

165. In those cases where there is no sensitive unused material, the disclosure officer must endorse and sign an MG6D to this effect and should submit this together with the MG6C and MG6E.

166. To assist the officer in considering the examples given in the Disclosure Code, reference should be made to the following associated public interests:

(a) the ability of the security and intelligence agencies to protect the safety of the Falkland Islands and the UK

(b) the willingness of foreign sources to continue to cooperate with FI and UK security and intelligence agencies, and law enforcement agencies

(c) the willingness of citizens, agencies, commercial institutions, communications service providers etc to give information to the authorities in circumstances where there may be some legitimate expectation of confidentiality

(d) the public confidence that proper measures will be taken to protect witnesses from intimidation, harassment and being suborned

(e) the safety of those who comply with their statutory obligation to report suspicious financial activity (whilst they are under a statutory obligation and therefore do not give suspicious activity reports in confidence, their safety is a consideration to be taken into account in disclosure decisions)

(f) national (not individual or company) economic interests

(g) the ability of the law enforcement agencies to fight crime by the use of covert human intelligence sources, undercover operations, covert surveillance etc

(h) the protection of secret methods of detecting and fighting crime

(i) the freedom of investigators and prosecutors to exchange views frankly about casework.

167. These lists are not check-lists. Other items not listed may be sensitive and not in the public interest to disclose, but equally, items listed may not cause any harm to the public interest if disclosed. The examples are not 'classes' of material. Each item must be considered independently before it is included in the sensitive schedule and before any claim for public interest immunity from disclosure is made.

168. Some items by their very nature will reveal why disclosure should be withheld. Others require more explanation. Careful attention to this element of the schedule will avoid further enquiries and consequent delay. Both the *'Description of item'* and the *'Reasons for sensitivity'* sections must contain sufficient information to enable the prosecutor to make an informed decision as to whether or not the material itself should be viewed. Schedules containing insufficient information will be returned by the prosecutor. If there is any doubt about the sensitivity of the material, the prosecutor should be consulted.

169. In order to make a proper assessment of the material which is said to be sensitive, the prosecutor will need to be fully informed of its contents or see the material or part of it. In cases where it is not possible to describe the nature of the material in sufficient detail to enable the prosecutor to determine whether or not it should be viewed, it will be for the disclosure officer to make arrangements with the prosecutor to view the material with an appropriate level of physical and personal security.

170. The police and the Prosecutor must always take care to protect intelligence information and information given to the police in confidence. That will be so whether or not it is thought likely that the court will order its disclosure. If the investigator is unsure whether information was given in confidence, the position should be clarified with the person who provided the information.

171. When the schedule and any material are sent to the prosecutor, a protective marking should be applied to it consistent with the level of sensitivity of its contents. This will determine the manner in which the material is conveyed to, and stored by the Prosecutor. Reference should be made to the current policy as to the detailed categorisation of different types of sensitive material as **Restricted, Confidential, Secret** or **Top Secret**.

172. In deciding sensitivity it is important to bear in mind that the sensitivity of the schedule and the sensitivity of the information may differ. The security marking will depend on what is being submitted to the prosecutor; if the material itself is to accompany the schedule the content of the material will determine the marking. If the schedule alone is submitted the content of the schedule will determine its security marking.

173. Sensitive unused material and schedules relating to informants, observation posts or undercover operations will normally be treated as **Confidential**.

Dealing with sensitive material that satisfies the disclosure test

174. The prosecutor has a duty under the Ordinance to consider whether sensitive material satisfies the disclosure test.

175. To assist the prosecutor to decide how to deal with disclosable sensitive material, the investigator and disclosure officer should provide detailed information dealing with the following issues:

(a) the reasons why the material is said to be sensitive

(b) the degree of sensitivity said to attach to the material, in other words, why it is considered that disclosure will create a real risk of serious prejudice to an important public interest

(c) the consequences of revealing to the defence;

(i) the material itself

(ii) the category of the material

(iii) the fact that an application may be made

(d) the apparent significance of the material to the issues in the trial

(e) the involvement of any third parties in bringing the material to the attention of the police

(f) where the material is likely to be the subject of an order for disclosure, what the police view is regarding continuance of the prosecution

(g) whether it is possible to disclose the material without compromising its sensitivity.

176. To assist in determining the degree of sensitivity as above, consideration should be given to the fact that the public interest may be prejudiced either directly or indirectly through incremental or cumulative harm.

177. Examples of direct harm are:

(a) exposure of secret information to enemies of the state

(b) death of or injury to an intelligence source through reprisals

(c) revelation of a surveillance post and consequent damage to property or harm to the occupier

(d) exposure of a secret investigative technique.

178. Examples of incremental or cumulative harm are:

(a) exposure of an intelligence source that does not lead to a risk of death or injury, or any reprisal, to that intelligence source, but which discourages others from giving information in the future because they lose faith in the system

(b) revelation of a surveillance post leading to a reluctance amongst others to allow their premises to be used

(c) exposure of an investigative technique that makes the criminal community more aware and therefore better able to avoid detection

(d) exposure of material given in confidence, or for intelligence purposes, that may make the source of the material, or others, reluctant to cooperate in the future

(e) an active denial that a source was used in the instant case, leading to the inability to deny it in future cases where one was used, thereby impliedly exposing the use of a source. The Crown should neither confirm nor deny the use of a source.

179. The prosecutor must be satisfied that the risk is real, not fanciful. The prosecutor must be in a position to explain to the court the ground upon which it is asserted that there is a real risk of serious prejudice to an important public interest.

180. The examples of material that might attract public interest immunity (PII) in the Disclosure Code do not define classes of material; they are examples only and whether the disclosure of an individual document would be likely to give rise to a real risk of serious prejudice to an important public interest must be assessed in each case. Whilst some of the examples are always likely to carry that real risk, not all will and the prosecutor must assess the risk to the public interest of the disclosure of that document in the individual case, whilst also having regard to the risk of incremental or cumulative damage to the public interest.

181. The prosecutor must be satisfied that the prejudice that is anticipated from disclosure of a document is a serious, not a trivial, risk. Again, as with 'real risk', this is an assessment that must be made on an individual basis, having regard to the risk of incremental or cumulative damage to the public interest.

182. Where material is disclosed having been edited to protect the public interest the original itself should not be marked. The defence should be informed of the action taken, although this will normally be clear from the appearance of the document itself. Application will have to be made to the court to withhold the remainder if it requires disclosure under the Ordinance.

183. It may be possible to separate non-sensitive from sensitive parts of documents and describe them on different schedules. For example if the fact of surveillance is obvious from the evidence, an authorisation might neither be nor contain anything sensitive. It may therefore be scheduled on the MG6C. On the other hand, the application part of the document will invariably contain sensitive material and should be scheduled on the MG6D.

184. Where the prosecutor decides:

(a) that sensitive material requires disclosure to the accused because it satisfies the disclosure test, and

(b) in consultation with the police, that it is not possible to disclose in a way that does not compromise the public interest in question, and

(c) that disclosure should be withheld on public interest grounds,

the ruling of the court must be sought or the case abandoned.

185. Neutral material or material damaging to the accused need not be disclosed and, unless the issue of disclosability is truly borderline, should not be brought to the attention of the court (per the House of Lords in **R v H and C**). This places a heavy onus on the police and prosecutors to be aware of all factors which might affect the legality of or admissibility of evidence from sensitive sources or procedures.

Consultation

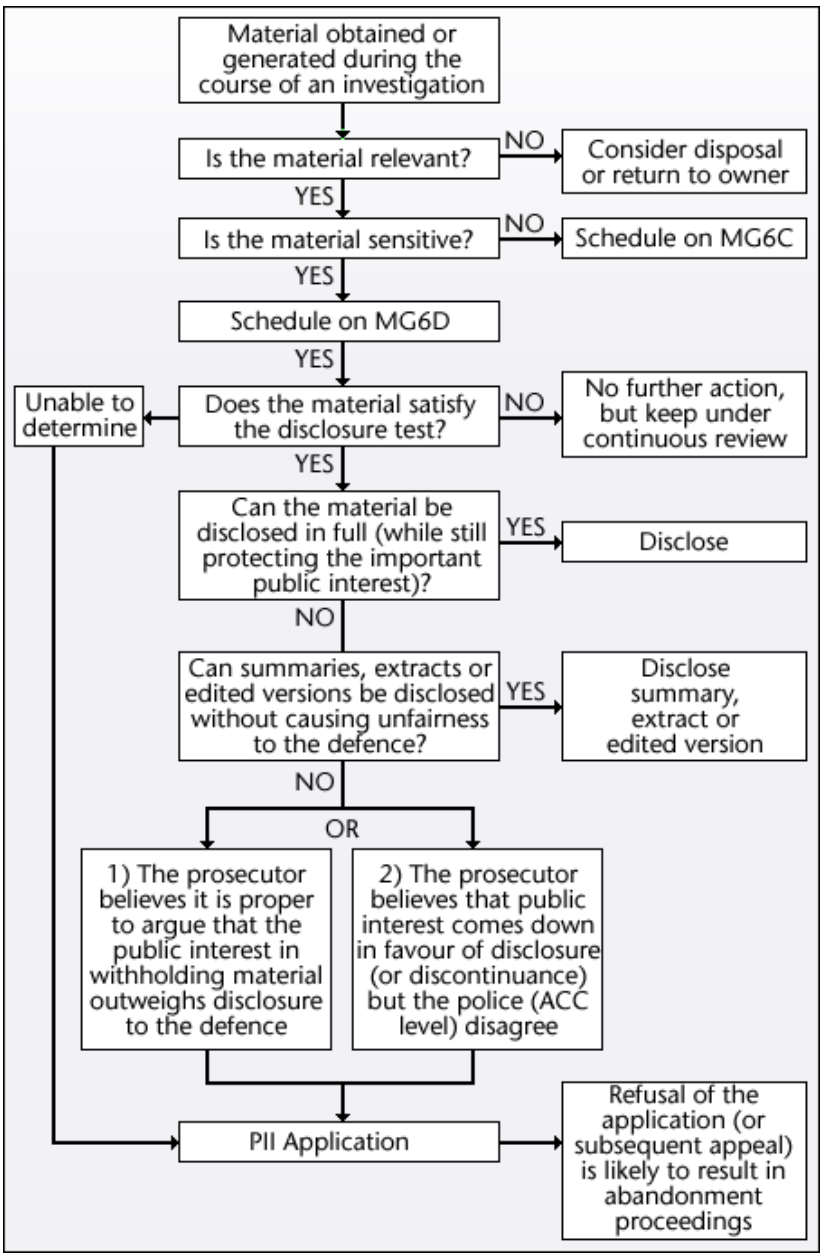
186. Before an application is made to the court, the prosecutor will need to consult the police. This should take place at a senior level, and a senior officer (who may be independent of the investigation) should be involved. Others may also be consulted, including the officer in charge of the investigation, and the prosecution advocate (if different from the prosecutor). In appropriate circumstances the Attorney General will be consulted directly.

187. Consultation will include a careful examination of the circumstances of the case and the nature of the sensitive material. Rather than apply to the court, the prosecutor may be able to disclose the material in a way that does not compromise the public interest in issue. Material may, be edited, summarised, or formally admitted.

188. For consultation to be effective, the officer in charge of the investigation should ensure that the prosecutor is provided with the information necessary to make a proper decision on how any application is to be made. This should be in documentary form, unless the information is so sensitive that it would be inappropriate to fully describe it in writing. See the section of the guidance that deals with handling highly sensitive material.

189. On the basis of the information provided at the consultation, the prosecutor will decide whether an application should be made, and the form of application required.

Flowchart of sensitive material and PII applications



15. Highly Sensitive and CHIS Material

Handling highly sensitive material

190. All relevant sensitive unused material should be included on the MG6D. Highly sensitive material should be also listed and described on a highly sensitive schedule, which will be handled in accordance with this Guidance.

191. Highly sensitive material is that which, should it be compromised, would:

(a) lead directly to the loss of life

(b) directly threaten national security.

192. The small number of such cases where this situation may arise are likely to involve investigations into organised crime or into terrorist offences. This material is likely to be in the **Secret** or **Top Secret** categories.

193. There may be material that, whilst its compromise would not be likely to lead directly to the loss of life or directly threaten national security, relates to a covert human intelligence source (CHIS) who, or whose family, may be injured, threatened or harassed if the material is compromised. The RFIP may wish to apply the same procedures to CHIS material as for highly sensitive material.

194. Where, exceptionally, the police consider material to be too sensitive even for a reference to its existence to be included on the principal MG6D, or consider it too sensitive to reveal its existence to the disclosure officer, the person holding the material should prepare a highly sensitive schedule and make contact with the Attorney General to discuss the material.

195. The Chief of Police and the Attorney General should agree handling procedures for highly sensitive material and CHIS material.

196. The arrangements must ensure as a minimum that:

(a) where sensitive material is revealed to the prosecutor other than by detailing that material on the principal MG6D, that material must itself be scheduled on a separate 'highly sensitive' MG6D

(b) this separate highly sensitive MG6D must contain the same level of detail as these instructions requires in relation to any other MG6D

(c) the officer submitting this separate highly sensitive schedule, should also submit an MG6E

(d) only in the most exceptional circumstances will the lead disclosure officer not be told of the existence of the additional schedules and should record their existence (but not their content of which he or she will be unaware) on the principal MG6D.

197. The material and all schedules, statements of sensitivity and any other documents bearing highly sensitive material will remain at all times under the control of the police.

198. As noted above, highly sensitive material may be brought to the Attorney General's attention on a highly sensitive schedule by individual investigators without the details being known to the disclosure officer. This is the responsibility of the individual investigator, but prosecutors should be alert to the possible existence of such material in appropriate cases.

199. Where there is material that falls within this Guidance, consultation between the police and the Attorney General should take place as soon as possible. The consideration of highly sensitive material obtained from the intelligence or security services should not normally be delegated.

200. Inspection should be at an appropriate location having regard to the sensitivity of the material.

201. Prosecutors should take care to ensure that file endorsements relating to the consultation do not inadvertently identify the nature of the material.

Handling and security arrangements

202. During consultation on sensitive material marked as **Confidential** or above, any copies of the items discussed or notes taken which could identify the material should be kept separate from the file and in secure conditions. Access to the material or notes should be restricted to those prosecuting the case or advising upon it. If the material is taken to court, it must not be left in an unattended court file. Where the advice of the prosecution advocate is sought, appropriate storage and handling arrangements must be made to ensure the security of the material.

203. At the conclusion of a case, all sensitive material retained by the Prosecutor should be returned to the police and a receipt should be maintained. The police officer authorised to collect the items should be handed all copies of the material, together with any notes that may refer to the nature of the material. Before the file is sent to be archived, the Prosecutor must be satisfied that it does not contain anything that may identify the nature of the material.

16. Disclosure Report

The contents of the MG6E

204. The disclosure officer should use the MG6E to bring to the prosecutor's attention any material that could reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused. This also applies to sensitive material. Examples include:

(a) records of previous convictions and cautions for prosecution witnesses

(b) any other information which casts doubt on the reliability of a prosecution witness or on the accuracy of any prosecution evidence

(c) any motives for the making of false allegations by a prosecution witness

(d) any material which may have a bearing on the admissibility of any prosecution evidence

(e) the fact that a witness has sought, been offered or received a reward

(f) any material that might go to the credibility of a prosecution witness

(g) any information which may cast doubt on the reliability of a confession. Any item which relates to the accused's mental or physical health, his intellectual capacity, or to any ill-treatment which the accused may have suffered when in the investigators custody is likely to have the potential for casting doubt on the reliability of a purported confession

(h) information that a person other than the accused was or might have been responsible or which points to another person whether charged or not (including a co-accused) having involvement in the commission of the offence.

205. The disclosure officer should also explain on form MG6E (by referring to the relevant item's number on the schedule) why he or she has come to that view. The MG6C itself should not be marked or highlighted in any way, as it will be provided to the defence.

206. This will include anything that may weaken an essential part of the prosecution case. Any material that supports or is consistent with a defence put forward in interview or before charge or which is apparent from the prosecution papers should be supplied to the prosecutor. It also includes anything that points away from the accused, such as information about a possible alibi.

207. If the disclosure officer believes that material satisfies the disclosure test it should be brought to the prosecutor's attention even though it suggests a defence inconsistent with or alternative to any already advanced by the accused. Items of material viewed in isolation may not satisfy the test, however several items together can have that effect.

208. Such material should be brought to the prosecutor's attention regardless of any views about the accuracy or truth of the information, although where appropriate the disclosure officer may express a reasoned opinion on whether in fact the prosecutor should disclose it.

209. A wide interpretation should be given when identifying material that might satisfy the disclosure test. A thorough and careful check when the duty to reveal arises may save time later on. The disclosure officer should consult with the prosecutor where necessary to help identify material that may require disclosure, and must specifically draw material to the attention of the prosecutor where the disclosure officer has any doubt as to whether it might satisfy the disclosure test.

Revelation of the material to the prosecutor

210. Revealing material to the prosecutor does not mean automatic disclosure to the defence. The prosecutor will only disclose material to the defence if it satisfies the disclosure test set out in the Ordinance. If the material is sensitive, and satisfies the disclosure test, the prosecutor will either disclose the material after consultation with police, apply to the court for a ruling as to whether the public interest requires disclosure or withdraw the prosecution.

211. The disclosure officer should:

(a) promptly send the completed schedules to the prosecutor

(b) identify on form MG6E any material which might satisfy the disclosure test

(c) copy material to the prosecutor for example material which in the opinion of the disclosure officer satisfies the disclosure test and material which is required routinely to be revealed

(d) allow the prosecutor to inspect material.

212. As an aid to prosecutors in their case review function, copies of the crime report and the log of messages should be routinely copied to the prosecutor in every case in which a full file is provided.

213. Copies of the crime report and log of messages should be edited (if necessary) by the police before they are sent to the prosecutor. If it is impossible to edit any sensitive parts of the material, then it should be listed on the MG6D and be sent to the prosecutor with that schedule.

214. In large or complicated cases or in any case where particular difficulties are anticipated, an early discussion between the disclosure officer or the officer in charge of the investigation, and the prosecutor and prosecution advocate, if instructed, may be extremely beneficial. For example, they may agree to look at the material together before the schedules are prepared. In such circumstances the disclosure officer or the officer in charge of the investigation should not hesitate to contact the prosecutor for early advice.

Certifications by the disclosure officer

215. The officer in charge of the investigation must ensure that all relevant material that has been retained is either revealed to the disclosure officer, or in exceptional circumstances revealed on a highly sensitive schedule directly to the prosecutor.

216. If the disclosure officer is uncertain whether all the relevant retained material has been revealed, enquiries should be made of the officer in charge of the investigation to resolve the matter.

217. The disclosure officer must provide different certifications in the course of the disclosure process, to cover:

(a) revelation of all relevant retained material

(b) whether material satisfies the disclosure test

(c) whether material satisfies the disclosure test following a defence statement as part of continuing duty.

218. The case against each accused must be considered and certified separately.

219. The disclosure officer is required to certify to the prosecutor that:

'To the best of my knowledge and belief, all relevant material which has been retained and made available to me has been inspected, viewed or listened to and revealed to the prosecutor in accordance with the Criminal Procedure and Evidence Ordinance 2014, the Disclosure Code and the Attorney General's Guidelines.'

220. The purpose of certification is to provide an assurance to the prosecutor on behalf of the police investigating team that all relevant material has been identified, considered and revealed to the prosecutor.

221. Where the disclosure officer believes there is no material that satisfies the disclosure test, the officer should endorse the MG6E in the following terms:

'I have reviewed all the relevant material which has been retained and made available to me and there is nothing to the best of my knowledge and belief that might reasonably be considered capable of undermining the prosecution case against the accused or assisting the case for the accused'.

Subsequent actions

222. Disclosure officers must deal expeditiously with requests by the prosecutor for further information on material which may lead to it being disclosed.

223. A prosecutor may ask to inspect material, or request a copy of material where one has not been sent. The disclosure officer is responsible for arranging this. Material should be copied to the prosecutor on request unless it is too sensitive or too bulky, or can only be inspected. This applies to disclosure throughout the life of the case.

224. After considering the schedule(s), the prosecutor will endorse them with the decisions as to whether each item described will be disclosed to the defence. A copy of the endorsed schedule(s) should be sent to the disclosure officer.

Amending the schedules

225. On occasions it may be necessary to amend the schedules. When the schedules are first submitted with a full file, the disclosure officer may not know exactly what material the prosecutor intends to use as part of the prosecution case. The prosecutor may create unused material by extracting statements or documents from the evidence bundle, in which case the prosecutor may disclose material that satisfies the disclosure test directly to the defence without waiting for the disclosure officer to amend the schedule. However where this is done, the prosecutor should advise the officer accordingly. Police officers should ensure that obviously non-evidential material is not included in the evidence bundle.

226. The prosecutor is required to advise the disclosure officer of:

(a) items described on the MG6C that should properly be on the MG6D and vice versa

(b) any apparent omissions or amendments required

(c) insufficient or unclear descriptions of items

(d) or a failure to provide schedules at all.

227. The disclosure officer must forthwith take all necessary remedial action and provide properly completed schedules to the prosecutor. Failure to do so may result in the matter being raised with a senior officer.

228. The Disclosure Code places the responsibility for creating the schedules and keeping them accurate and up to date on the disclosure officer. Consequently, the prosecutor should not amend schedules. In these circumstances the prosecutor should inform the disclosure officer of the changes required, and return the schedules for amendment where appropriate.

229. The disclosure officer should effect the amendments promptly and return the amended or fresh schedules to the prosecutor as soon as possible with a further MG6E as appropriate.

Continuing duty to disclose

230. The duties of revelation to the prosecutor and disclosure to the accused are continuing obligations. Any new material coming to light after initial disclosure has been completed should be treated in the same way as earlier material. The new material should be described on a further MG6C, MG6D or a continuation sheet. To avoid confusion, numbering of items submitted at a later stage must be consecutive to those on the previously submitted schedules.

231. A further MG6E should also be submitted irrespective of whether or not any of the new material is considered by the disclosure officer to satisfy the disclosure test.

17. Receipt and Review

232. Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice. Prosecutors must also be alert to the need to provide advice to disclosure officers on disclosure issues and to advise on disclosure procedure generally.

233. In order to carry out the duties set out in the Ordinance the prosecutor will need to consider the schedules of unused material and copies of any items supplied by the police to see if the disclosure test is satisfied.

234. The prosecutor must apply the disclosure test contained in the Ordinance. The test is an objective one.

235. To comply, the prosecutor must disclose to the accused any prosecution 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, save to the extent that the court, on application by the prosecutor, orders it is not in the public interest to disclose it.

236. Prosecution material is defined in the Ordinance in section 216(2) and is material which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or which the prosecutor has inspected under the provisions of the Disclosure Code in connection with the case against the accused.

237. The disclosure officer is the first point of contact for all enquiries regarding the contents of the schedules and access to the material which has not been copied. It is important to liaise closely with the disclosure officer, and to consult regularly during the disclosure process.

238. When a full file is submitted the prosecutor should expect to receive from the police:

(a) an MG6

(b) an MG6B where required

(c) a schedule of non-sensitive material (MG6C)

(d) a schedule of sensitive material (MG6D) or nil return

(e) copies of disclosable sensitive material (where appropriate)

(f) copies of the crime report and log of messages (edited where appropriate)

(g) all material that the disclosure officer believes satisfies the disclosure test and a brief explanation for that belief (on the MG6E)

(h) certification by the disclosure officer (on the MG6E).

239. The schedules and any accompanying material should be brought to the attention of the prosecutor as soon as possible. The prosecutor should carry out a review of the schedules and the material received in accordance with the procedures set out below.

240. The prosecutor should examine the schedules carefully to check for possible omissions from them. If there are any omissions, the prosecutor should ask the disclosure officer to provide a continuation schedule, but should not delay disclosure. Where there are apparent errors on the schedules, the prosecutor should seek further details from the disclosure officer, and return the schedules for correction. If, following this, the prosecutor remains dissatisfied with the quality or content of the schedules, the matter must be raised with a senior officer and persisted with if necessary.

241. The date of receipt of the schedules and any accompanying material must be recorded on the prosecution file.

242. Where the sensitive material has been given a protective marking of **Confidential**, **Secret** or **Top Secret**, the material and/or schedule should be kept securely off file. A note should be made on the file identifying the existence and location of the material stored off file. It is suggested that where there is both **Restricted** and **Confidential** sensitive material, then all sensitive material should be kept together off file.

243. If copies of sensitive material are sent by the disclosure officer with the MG6D, care must be taken to ensure that the material is handled in accordance with its protective marking category. Appropriate arrangements will need to be made for the handling of any sensitive material that is given to the prosecution advocate.

244. Where the prosecutor considers that material that has been described on the form MG6D is not in fact sensitive and should be described on the form MG6C, the disclosure officer must be consulted to ensure that the matter is resolved.

245. The prosecutor should always inspect the material, whether sensitive or non-sensitive where:

(a) it satisfies the disclosure test

(b) the description (or the reasons given as to its sensitivity) remain inadequate despite requests for clarification

(c) the prosecutor is unsure if the material satisfies the disclosure test.

246. A record should be made of all decisions, enquiries or requests and the date upon which they are made, relating to:

(a) the disclosure of material to the defence

(b) withholding material from the defence

(c) the inspection of material

(d) the transcribing or recording of information into a suitable form.

247. This information should be noted on the file. All actions and events that occur in the discharge of prosecution disclosure responsibilities must be noted on the file.

248. The review and preparation of unused material for disclosure to the defence should start as soon as possible after it becomes apparent that disclosure will be required.

249. For most cases this means the review of unused material should take as soon as possible after a full file has been received. If the file received from the police does not contain all unused material schedules, these should be requested immediately in all cases.

Reviewing sensitive material

250. Where the prosecutor considers that the sensitive material should be disclosed to the defence because it satisfies the disclosure test, the police (or any person having an interest in the material) should be consulted before any final conclusions are reached.

251. Where the prosecutor determines that an application to the court is necessary, consultation with the police must take place to establish the proper basis for the application.

252. Material may be edited, summarised or formally admitted without compromising its sensitivity. Police and prosecutors should consider at an early stage whether this is possible.

253. However, if the prosecutor in editing, summarising or formally admitting holds back any material that satisfies the test, an application to the court should be made and the approval of the court obtained for any such partial disclosure.

254. If any third party, such as Social Services or the Prison Officer has an interest in the sensitive material, the prosecutor must ensure that the third party is consulted by the police before a final decision is made.

255. A note should be made on the file of any consultation that takes place, and of the conclusions reached, taking care that this note does not exceed the **Restricted** classification.

256. There should be consultation between the prosecutor and the prosecution advocate (where applicable) where there is any question of an application being made to the court to withhold unused material. A record of that consultation should be made on the file. PII applications are dealt with under another section in this guidance.

257. There will always be a need to consult regarding sensitive material unless the prosecutor is satisfied on the basis of the information provided on the schedule that the material clearly could not satisfy the test for disclosure. Special considerations will apply to the handling of highly sensitive material.

258. The file note should be used to record the way in which sensitive unused material has been handled. The purpose is to record events rather than reasons and entries therefore should not contain sensitive information. Notes of decisions and reasons should be endorsed on the MG6D, or if necessary, on a continuation sheet. Notes of discussions about sensitive material or of PII applications should be kept with the MG6D and the material itself, but there should be a cross-reference on the file.

259. The file must record all events and actions, which will include the following:

(a) receipt of the MG6D

(b) that a disclosure review has taken place (the outcome of such reviews will be recorded on the schedule itself)

(c) the receipt and review of any addenda to the MG6D

(d) contact with the disclosure officer or investigating officer in relation to sensitive unused material

(e) receipt of defence statements and further reviews

(f) any consultation with the prosecution advocate

(g) any discussions with any other parties regarding sensitive unused material such as the court, the defence advocate or third parties

(h) receipt of the prosecution advocate's advice in relation to sensitive unused material

(i) details of any informal disclosure, should it occur

(j) the fact of any PII applications.

260. Responding to defence requests for disclosure of sensitive material is dealt with under this heading elsewhere in the guidance. For CHIS disclosure issues, please see the relevant section in this guidance.

Handling and security arrangements

261. The handling and security arrangements set out in this Guidance should also be applied to handling sensitive material.

18. Applying the Disclosure Test

262. The prosecutor must always inspect, view or listen to any material that could reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused.

263. Where the prosecutor has reason to believe that the disclosure officer has not inspected, viewed or listened to material, a request that this be done should be made.

264. Additionally, where the prosecutor believes there are further reasonable and relevant lines of inquiry to pursue, the officer in charge of the investigation should be told as soon as possible.

265. What amounts to material which might satisfy the disclosure test will always involve considering:

(a) the nature and strength of the case against the accused

(b) the essential elements of the offence alleged

(c) the evidence upon which the prosecution relies

(d) any explanation offered by the accused, whether in formal interview or otherwise

(e) what material or information has already been disclosed.

The case against each accused must be considered separately.

266. Normally, the result of applying the disclosure test will mean that material disclosable to one accused is likely to be disclosable to all co-accused in the same proceedings. However, disclosure must be considered separately for all accused and where the particular circumstances dictate, disclosure of different material may have to be made. Depending on the nature of the material the prosecutor can disclose differentially, without the need to resort to the court (unless a PII application is required). If one accused seeks disclosure of material given to a co-accused, he or she can apply to the judge in the usual way (see the section Defence Applications for Further Disclosure).

267. In deciding what material satisfies the disclosure test the prosecutor must pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. Material can be considered to have such potential if it has an adverse effect on the strength of the prosecution case.

268. Material can have such an adverse effect:

(a) by the use made of it in cross-examination and

(b) by its capacity to support submissions that could lead to

(i) the exclusion of evidence

(ii) a stay of proceedings

(iii) a court or tribunal finding that any public authority had acted incompatibly with the accused's rights under the Constitution

(iv) by its capacity to suggest an explanation or partial explanation of the accused's actions.

269. Any material that can be considered to have an adverse effect on the strength of the prosecution case must be disclosed (subject to public interest immunity). This will include anything that goes toward an essential element of the offence charged and that point away from the accused having committed the offence with the requisite intent.

270. Anything that has potential to weaken the prosecution case or which is inconsistent with an essential part of it will amount to material that must be disclosed to the accused. Prosecutors are reminded that there is no category or class of material which is subject to "automatic" disclosure and the disclosure test must be applied on a case by case basis.

271. Previous accounts given by witnesses (particularly descriptions) must, however, be considered with scrupulous care and any doubts resolved in favour of disclosure.

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

(a) any material casting doubt upon the accuracy of any prosecution evidence

(b) any material which may point to another person, whether charged or not (including the co-accused) having involvement in the commission of the offence

(c) any material which may cast doubt upon the reliability of a confession

(d) any material that might go to the credibility of a prosecution witness

(e) 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

(f) any material which may have a bearing on the admissibility of any prosecution evidence

(g) any material that might assist the accused to cross-examine prosecution witnesses, as to credit and/or to substance

(h) any material that might enable the accused to call evidence or advance a line of enquiry or argument

(i) any material that might explain or mitigate the accused's actions.

273. 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. For detailed guidance on this issue see Annex C.

274. Prosecutors should also bear in mind that while items of material viewed in isolation may not satisfy the disclosure test, several items together could have that effect.

275. Material which satisfies the disclosure test is likely to be different in each case, and different for each accused.

276. Disclosure officers and prosecutors should give careful consideration to the type of material described below. Experience suggests that it has potential to satisfy the disclosure test where it relates to the defence being put forward either at the initial stage or in particular, following receipt of a defence statement. The material is:

(a) those recorded scientific or scenes of crime findings retained by the investigator which relate to the accused, and are linked to the point at issue, and have not previously been disclosed

(b) where identification is, or may be in issue, all previous inconsistent descriptions of suspects, however recorded, together with all records of identification procedures in respect of the offence(s) and photographs of the accused taken by the investigator around the time of his arrest

(c) information that any prosecution witness has received, has been promised or has requested any payment or reward in connection with the case

(d) plans of crime scenes or video recordings made by investigators of crime scenes

(e) names, within the knowledge of investigators, of individuals who may have relevant information and whom investigators do not intend to interview

(f) records which the investigator has made of information which may be relevant, provided by any individual (such information would include, but is not limited to, records of conversation and interviews with any such person).

277. Disclosure of video recordings or scientific findings by means of supplying copies may well involve delay or otherwise not be practicable or desirable, in which case the investigator should make reasonable arrangements for the video recordings or scientific findings to be viewed by the defence.

278. Experience suggests that any material which relates to the accused's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered when in the investigator's custody is likely to have the potential for casting doubt on the reliability of an accused's purported confession, and prosecutors should pay particular attention to any such material in the possession of the prosecution.

279. It is not necessary, prior to the receipt of a defence statement, to speculate about every possible defence or submission that may be raised. Nevertheless, where a distinct explanation has been put forward by the accused, or is apparent from the circumstances of the case, it must be considered in the context of assessing whether there is any material requiring disclosure. This consideration should take place at the earliest opportunity, and does not need to await the receipt of a defence statement.

280. In deciding what material should be disclosed (at any stage of the proceedings) prosecutors must determine whether the material satisfies the disclosure test. Prosecutors should resolve any doubt they may have in favour of disclosure, unless the material is sensitive and to be placed before the court in a PII application. Prosecutors are reminded that the consideration whether material satisfies the disclosure test does not include an assessment as to whether such material is or could be admissible in a trial.

281. If material substantially undermines the prosecution case, assists the accused or raises a fundamental question about the prosecution, the prosecutor will need to reassess the case in accordance with the Code for Crown Prosecutors, and decide after consulting with the police whether the case should continue.

19. Disclosure Procedure

282. Disclosure means providing the defence with any prosecution material which has not previously been disclosed to the accused, and which satisfies the disclosure test. If there is no such material the prosecutor must inform the defence in writing. Specimen letters are included at Annex D. Disclosure to the defence must take place as soon as reasonably practicable after the duty arises.

283. The prosecutor is responsible for ensuring that effective disclosure of material falling to be disclosed under the Ordinance is made to the accused. Disclosure to the accused can be achieved by either copying the item, or where this is not practicable or desirable, by allowing the accused to inspect the item.

284. Where the item to be disclosed is an item that has been copied by the disclosure officer to the prosecutor, it will usually be appropriate for the prosecutor to copy the item on to the defence. However, there may be circumstances where this is not appropriate. For example where:

(a) the quality of the copy supplied to the prosecutor is inadequate, or

(b) it is in a form which requires specialist copying equipment (for example, audio or video discs/tapes, computer discs), or

(c) the prosecutor considers that the material is not suitable for copying for other reasons (for example, sexual content).

(d) where the material has yet to be edited by the police.

285. In these circumstances, the prosecutor should discuss with the disclosure officer how disclosure to the defence can best be achieved. This may be by arranging for the disclosure officer to edit the material, to copy the original item and send it to the defence direct, or by arranging for the defence to inspect the original item. The decision should be endorsed by the prosecutor on the MG6C and on the disclosure record sheet.

286. Where a copy of any disclosable item is given to the accused, the disclosure officer should inform the prosecutor, and supply a copy to the prosecutor, if one has not already been provided. It is important that a careful record is kept by the disclosure officer (and by the prosecutor on the file) of what items are inspected by or copied to the accused.

287. For information that is not recorded in writing, the disclosure officer may decide in what form the material should be disclosed. If a transcript is provided, the disclosure officer must ensure that the transcript is certified as a true record, for example by way of a short statement by the transcriber. It is not necessary for the disclosure officer personally to certify the accuracy of the transcript.

288. If the material that satisfies the disclosure test is sensitive, and the prosecutor considers that an application to withhold the material should be made, the application to the court should not delay disclosing non-sensitive material.

20. Schedule Endorsements

289. When considering the initial duty to disclose, the prosecutor should record decisions on form MG6C, giving brief reasons for the decisions in the comment column.

290. The MG6C should be signed and dated by the prosecutor upon completion and the disclosure record sheet noted accordingly.

291. Where an item is to be disclosed, the prosecutor should in the appropriate column of the MG6C enter:

(a) a **'D'**, and indicate in the comment section whether a copy is attached

(b) an **'I'** where the item is to be disclosed and the prosecutor considers that inspection is more appropriate.

and indicate in the reasons column why disclosure or inspection is necessary.

292. Items that are clearly not disclosable at this stage should be marked **'CND'** and reasons given**.**

293. However, where the schedule description of an item is inadequate and there is insufficient time for the schedule to be amended prior to the trial, the item should be viewed and then marked **ND** and the prosecutor must note in the reasons column that the disclosure test has been fully applied and that the item neither undermines the prosecution case nor assists the case for the defence.

294. An item which is available to the defence under the police detention provisions of the Ordinance but which does not satisfy the disclosure test must not be marked as disclosable D or I it should be marked as **CND** or **ND** and whilst a note may be made that it is available under those provisions, there should not be confusion between automatic entitlement and disclosure under the disclosure provisions.

295. In large cases with substantial amounts of unused material, items may be block marked where appropriate.

296. Occasionally, items of unused material may be incorporated into the prosecution case. This should be identified on the schedule by endorsing the word evidence alongside the item.

297. Copies of the following documents should be prepared after the initial duty to disclose arises:

(a) the endorsed MG6C

(b) copies of any documents which satisfy the disclosure test

298. These should be sent to the defence with the letter at Annex D1 or D2, as appropriate, signed by the prosecutor, as soon as possible after a not guilty plea in the Magistrates' or Summary court or immediately after service of the prosecution case in cases sent to the Supreme Court for trial.

299. Under no circumstances should the MG6D or MG6E be copied to the defence.

300. At the same time, a second copy of the endorsed MG6C should be sent to the disclosure officer with the memo at Annex D6, together with a copy of the letter sent to the defence. The MG6D should be used throughout the life of the case. The prosecutor should record the decision and any observations relating to the material on it. In particular the prosecutor's endorsement should contain the following:

(a) whether the scheduled item has been viewed

(b) whether the item satisfies the disclosure test (with reasons)

(c) whether PII attaches to the scheduled item (with reasons)

(d) whether an application to the court is required

301. The prosecutor should attach a continuation sheet where there is insufficient space on the MG6D for a full endorsement. Any subsequent endorsements on the schedules should be separately signed and dated.

302. Where the police have supplied an MG6D document stating that there is no sensitive unused material in the case, the prosecutor must record that this fact has been noted and considered (and challenged if incorrect) and the MG6D should still be signed and dated by the prosecutor.

303. Where the prosecutor has directed that the material should be inspected the prosecutor should be informed of any arrangements made with the defence and should also be informed of defence requests for copies of items. The disclosure officer must comply with defence requests for copies unless it is neither practicable (for example because the material consists of an object which cannot be copied or because the volume of the material is so great) nor desirable (for example because the material is a statement by a child witness in relation to a sexual offence).

304. Where the item to be disclosed has not been copied and sent to the prosecutor, the usual method of disclosure will be by allowing the defence to inspect it. The disclosure officer will make the arrangements for the defence inspection of the item, and should notify the prosecutor whether and when the inspection takes place. If the disclosure officer makes a copy of the item for the accused, he or she should also send a copy to the prosecutor.

305. Details of any unused material created by extracting statements or documents from the committal or trial bundle or by not using material which has been supplied by the police as part of the prosecution case should be notified to the disclosure officer. The disclosure officer is responsible for maintaining the accuracy of the schedules, and should supply an amended schedule listing the additional material as soon as reasonably practicable unless the prosecutor discloses the statement to the defence. The prosecutor should note the disclosure record sheet accordingly.

306. Where additional unused material created by the prosecutor requires disclosure because it satisfies the disclosure test, or in any other circumstances where the prosecutor has unused material that is disclosable but the schedule requires amendment, the prosecutor should disclose this material without waiting for the schedule to be amended. The disclosure officer must be informed in writing of this decision and the disclosure record sheet updated.

21. Public Interest Immunity Applications

307. Where sensitive material is identified as meeting the disclosure test and the prosecutor is satisfied that disclosure would create a real risk of serious prejudice to an important public interest, the options are to:

(a) disclose the material in a way that does not compromise the public interest in issue

(b) obtain a court order to withhold the material

(c) abandon the case

(d) disclose the material because the overall public interest in pursuing the prosecution is greater than in abandoning it.

308. If the disclosure test is applied in the robust manner applications to the court for the withholding of sensitive material should be rare. Fairness ordinarily requires that all material which weakens the prosecution case or strengthens that of the defence should be disclosed. There should only be derogation from this Golden Rule in exceptional circumstances.

309. There is no basis in law for making a PII application except where:

(a) the prosecutor has identified material that fulfils the disclosure test, disclosure of which would create a real risk of serious prejudice to an important public interest and the prosecutor believes that the public interest in withholding the material outweighs the public interest in disclosing it to the defence, or

(b) the above conditions are not fulfilled, but the police, other agencies or investigators, after consultation at a senior level, do not accept the prosecutor's assessment on this, or

(c) the prosecutor has pursued all relevant enquiries of the police and the accused and yet is still unable to determine whether sensitive material satisfies the disclosure test and seeks the guidance of the court.

310. In this last and exceptional circumstance, the material should be placed before the court for a determination as to disclosability. Material should only be placed before the court if the court's assistance is required to assess disclosability. Material should not be placed before the judge simply because the defence have provided inadequate information as to the nature of their case. Rather, the defence should be pressed to provide further particulars.

Arranging the application

311. Once it becomes clear that a PII application will be required, the prosecutor should write to the court (or telephone in urgent cases) asking for a hearing to be fixed. The letter should set out the following information:

(a) the case name

(b) the case number(s)

(c) the trial date where known

(d) the type of application to be made

(e) the estimated length of hearing of the application.

Specimen letters are attached at Annex E1 - E4.

312. The Rules distinguish between three classes of case:

Type One: the prosecutor must give to the defence notice of application and indicate at least the category of the material held. The defence must have the opportunity to make representations and there is an inter parties hearing conducted in open court.

Type Two: the prosecutor must give to the defence notice of application but the nature of material is not revealed because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed. The defence have the opportunity to address the court on the procedure to be adopted but the application is made to the court in the absence of the defendant or representative.

Type Three: the prosecutor makes an application to the court without notice to the defence because to do so would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed - a "highly exceptional" class.

313. The police and the prosecutor must be careful to maintain the confidence of the court by making the appropriate form of application. Type Two (ex parte on notice) and, most especially, type Three (ex parte without notice) applications should be considered exceptional and should only be made where it is genuinely necessary to protect confidentiality. Type Three applications require the express approval of the Attorney General or the Head of Legal Services in the absence of the Attorney General.

314. Where a Type One, Two or a 'mixed' hearing (Type One transitioning into Type Two after the defence have been heard) is sought, the prosecutor should serve a notice of hearing on the defence and the court which should contain the following information:

(a) the name of the case

(b) the case or indictment number

(c) the date, time and location of the hearing (Type One and 'mixed' applications only)

(d) in the case of Type One and 'mixed' Type One and Two applications, such information regarding the material to be placed before the court as the prosecutor is able to provide without revealing that which the prosecutor contends is not in the public interest to disclose.

315. Where a Type Two or Three application is sought, the letter should remind the court not to show the hearing on the published court list.

316. Where a Type Three application is sought, no notice of hearing should be served on the defence.

317. Any notice should also contain a request to the defence to provide such further written particulars of the defence case as the prosecutor sees fit, to better inform the court's assessment of the competing public interests. (Specimen forms giving notice are attached at Annex E5 - E6).

Responsibility for preparing the application

318. A written submission should be made to the court prepared either by the reviewing prosecutor or the prosecuting advocate (on the basis of clear written instructions from the reviewing prosecutor). In large cases where an additional counsel has been instructed to deal solely with disclosure issues, or where the prosecuting advocate has a junior dealing with disclosure issues, disclosure counsel or the prosecuting advocate's junior may prepare the submission. In all cases the written submissions should be signed by the prosecutor and countersigned by a police officer of at least substantive Inspector rank. The officer should state that to the best of his or her knowledge and belief the assertions of fact on which the submission is based are correct. The officer may be required to attend court to give evidence in support of the application.

319. Where the material which is to be the subject of an application emanates from MG6Ds from more than one agency e.g. where a separate MG6D has been submitted for intelligence material, an officer not below the rank of Inspector (or equivalent) for each of the agencies or units who have submitted material must endorse the written submissions.

320. Whatever part the prosecution advocate may have played in the drafting of the submissions, responsibility for their form and content rests with the prosecutor.

Contents of the written submissions

321. The written submissions should contain the material set out at 1) and 2) below:

1. A form of background submission, containing:

(a) a summary of the facts of the case. Where a case summary or prosecution opening note has been served and this is believed still to be accurate and adequate, the background submission should refer to this document which should be annexed to the submission

(b) a list of trial issues which the prosecutor has been able to identify

(c) a summary of the defence case which has been advanced in a defence statement, disclosure application or correspondence

(d) in relation to Type Two and Three applications, reasons why it is considered inappropriate for there to be a Type One (or Type Two) application. A specimen form of background submission is attached at Annex E7.

2. To satisfy the requirements of R v H and C, in relation to each item of material to be placed before the court for a ruling:

(a) the number of the item as it appeared on form MG6D. Where more than one MG6D has been submitted, e.g. where the case has generated 'highly sensitive' material and involves more than one disclosure officer, each MG6D should be given its own reference

(b) a detailed description of the material

(c) in the case of lengthy items, a summary of their content

(d) an assessment giving reasons why it is considered that the material satisfies the disclosure test, or why the reviewing prosecutor is unable to determine whether or not the disclosure test is satisfied

(e) why it is considered that disclosure of the material will cause a real risk of serious prejudice to an important public interest and the degree of sensitivity that attaches to the material

(f) why it would not be appropriate to provide to the accused a formal admission, summary, extract or edited version of the material

(g) why the prosecutor contends that the public interest in withholding the material outweighs the public interest in disclosing it and

(h) where the material is the subject of a Type Two application, why it is considered inappropriate to inform the defence of the category of material into which the material falls

(i) where, exceptionally, the material is the subject of a Type Three application, why it is considered inappropriate to inform the defence at all.

NB. Prosecutors should bear in mind that in particularly difficult cases, and as a last resort, the court may decide that it requires assistance from a special advocate. Prosecutors should therefore be prepared, when requested, to formulate submissions to assist with this aspect of the court's decision.

The form of the submission

322. The information required above should be prepared in respect of each item of material that the prosecutor intends to place before the court for a ruling. The court's ruling in relation to each should be endorsed on the written submissions. A specimen is attached at Annex E8.

323. In cases involving a large quantity of material to be placed before the court for a ruling, the prosecutor may prefer to present the representations in tabular form. A specimen is attached at Annex E10.

324. A bundle should be prepared for the trial judge comprising the following:

(a) a front sheet listing the contents of the bundle. A specimen is attached at Annex E9

(b) the notice of hearing (not in Type Three applications)

(c) the background submission, including any case summary or prosecution opening note

(d) the specific submissions in respect of each item of material to be placed before the court for a ruling

(e) copies of any defence statements, and

(f) any further particulars of the defence case provided in response to the notice of hearing or in correspondence.

325. The front sheet to the bundle, or a covering letter, should emphasise the sensitivity of the attached documentation and request that it be stored in suitably secure conditions especially when the material is not being worked on. This is particularly important where a Type Two or Three application is being made.

The PII hearing

326. When the judge's bundle has been provided to the court, the prosecutor should contact the court to ascertain whether the judge wishes to view the material the subject of the application in advance of the hearing or whether the court is content for the material to be brought to the hearing.

327. The prosecutor must make arrangements to facilitate inspection of all sensitive and highly sensitive material by the prosecution advocate well ahead of the hearing.

328. Where the judge requests sight of the material in advance of the hearing, the disclosure officer with responsibility for the material should make the necessary arrangements with the judge's clerk or court manager. There may need to be detailed discussions as to the handling and storage arrangements for the material when it is in the court's possession. In some circumstances, the police may wish to remain in the court building whilst the material is being considered so that they can recover it once the judge has viewed it. This will be a matter for local arrangements on a case-by-case basis.

329. The oral representations in support of the written submissions may be made by the reviewing prosecutor, a prosecution advocate, his/her junior or disclosure counsel. In the event that an advocate independent of the Attorney General's chambers is instructed, then the prosecutor or representative from the Attorney General's chambers should be present at the hearing. The hearing should also be attended by the officer in charge of the investigation and all disclosure officers who have provided schedules listing items that are subject of the application.

330. The manner in which the hearing should be conducted will be a matter for the judge to determine.

Prosecution appeals

331. Parts 15 and 31 of the Ordinance provide an interlocutory right of appeal against certain rulings by a judge. Sections 250 and 670 relate, inter alia, to those rulings that are fatal to the prosecution case such that the prosecution proposes to treat them as terminating and, in the absence of the right of appeal, would offer no or no further evidence. An adverse ruling ordering disclosure in a PII application may fulfil this criterion. Leave to appeal must be obtained from the judge or the Court of Appeal.

332. The right of appeal applies in all courts after the date of commencement of the Ordinance.

333. This right must be exercised sparingly and judiciously. It is the responsibility of the Attorney General to decide whether the right of appeal should be exercised in the circumstances of any particular case.

334. Where an appeal is made, the rules set out the requirements for how the prosecutor should give notice of the appeal, but these requirements are qualified in PII hearings in line with the hearing Type that takes place.

Miscellaneous issues

335. Police and prosecutors should take all reasonable steps to ensure that they are aware of all factors which might affect the legality of or admissibility of evidence from sensitive sources or procedures.

336. Occasionally the defence may challenge the admissibility of prosecution evidence on the basis of lack of proof of an officer's belief, such as reasonable grounds for arrest, or a fact such as integrity of the source of evidential material. Such background evidence might be too sensitive to give in the presence of the defence.

337. The court might well be satisfied with the mere assertion by an officer in open court that he had credible information to justify an arrest but otherwise, and where objective proof is required, a voire dire, not a PII application, should be held. If in the course of the voire dire the officer is unable, on public interest grounds to answer questions, the judge has to consider how to resolve the problem, involving and informing the defence as far as possible without damaging the public interest unjustifiably. For example, the judge may ask the defence which questions they wanted answering and then put them ex parte to the police officer. Alternatively, the judge may invite submissions from both sides with a view to devising an alternative procedure.

338. An independent senior officer must be used in observation post. The officer may be required to give evidence in support of its use in the case.

339. Prosecutors and caseworkers should be alert to formal obligations imposed by Part xx of the Rules which state that:

(a) third parties with an interest in material which the prosecutor wishes to be put before the court must be notified of PII applications

(b) 'interested third parties' have the right to make representations about the disclosure of their material at the PII hearing

(c) the defence may formally request the court to review a PII ruling, and interested third parties will have to be notified if appropriate.

340. There may be cases where the prosecutor identifies material which satisfies the disclosure test and to which PII attaches (in other words, disclosure would create a real risk of serious prejudice to an important public interest) but the continuation of the prosecution would demand disclosure having regard to the overriding duty to ensure fairness in the trial process. In such cases if it is not possible to disclose the material in a way that does not compromise its sensitivity, the material should either be disclosed in full or the proceedings abandoned. Before either such action is taken there must be consultation between the prosecutor and police (and when appropriate, the owners of sensitive third party material) at a senior level. This consultation should involve the Attorney General or Head of Legal Services and the Chief of Police. The type of the application to be made to the court should also be considered as part of the consultation process. Where agreement cannot be reached as to the appropriate way forward, the material should be placed before the court for a ruling.

Security of sensitive material

341. Sensitive material should at all times be handled in accordance with its security marking.

Sensitive material and Summary Court trials

342. If a case before the summary court raises complex and contentious PII issues the court has discretion to send the case to the Magistrate's Court and should be invited to do so.

Ex parte notifications to a judge

343. The guidance under this heading, whilst not strictly relating to unused material, is included here for the sake of completeness. It must be emphasised that the court is not being asked to make a ruling on unused material, and that ex parte notifications must only be made if the criteria below are met.

344. However, it is recognised that other **exceptional circumstances** may arise in which the judge should be notified ex parte of otherwise non-disclosable sensitive material. The reason for this is not so that the judge can rule on borderline material or whether PII attaches, but so that he or she may be apprised of information which may reasonably be expected to have a practical effect on the judge's fair management of the trial. In other words, where not to reveal non-disclosable sensitive information to the judge would create a risk that the judge's fair management of the trial or a wider public interest would be prejudiced.

345. The judge must be told that the purpose of the hearing is to prevent the inadvertent mismanagement of the trial and that therefore he or she is not being asked for any ruling on disclosure.

346. In notifying the judge ex parte of sensitive material, the prosecution advocate should only put before the judge such information as is necessary to enable him or her to properly manage the trial process or protect the wider public interest. In order not to create unwarranted unfairness to the accused, the notification hearing should be used to do no more than flag areas of potential concern or sensitivity.

347. Initially, the judge should be informed only of the **category** of the otherwise non-disclosable material. Only such revelation as is strictly necessary to achieve the purpose set out should be made to the judge and only in **very rare** circumstances should the revelation go beyond headline information. It will be a matter for the judge to determine how much of the material, if any, needs to be viewed before he or she is in a position to best ensure the fair management of the trial.

348. The following are examples only of circumstances in which an ex parte notification could be conducted, so long as the criterion set out above is applied:

(a) where there is a CHIS whose name or identity appears on the face of the papers

(b) where the defendant is a CHIS, and particularly so where he is a participating CHIS

(c) where there are details of observation posts or the product from them that have been edited

Each case should however be examined on its own facts.

349. Notice of the intention to notify the judge ex parte should be given to the defence in all but exceptional circumstances. The extent of the detail that can be given about the subject of the ex parte notification should reflect that applicable for the different Types of PII hearings.

350. A suitable form of notice to the defence is suggested as follows:

'The prosecution are in possession of material [*categorise where appropriate*] which does not satisfy the disclosure test and which at present cannot be disclosed in the public interest. It is the prosecution's intention to alert the judge to the *existence* of material in this category so as to ensure that he/she is able to manage the trial in a way which is fair to all parties.'

351. Except in Type Three cases, where the judge has seen or been notified of non-disclosable material ex parte, it is suggested that the opportunity for uncertainty or challenge should be minimised, provided the prosecution advocate invites the judge to make it clear in open court that:

(a) the ex parte 'hearing' was not one where he or she was requested to rule on PII or decide a truly borderline issue of disclosability but was necessary for the fair management of the trial

(b) (further) submissions from the defence were not required

(c) he or she is aware of the basis on which material would be disclosable under the Ordinance and when PII would justify withholding it

(d) he or she is familiar with the principles set out in case law and that nothing done by the prosecution or the court was in breach of those cases.

22. Continuing Duty to Review Disclosure

352. Section 224 of the Ordinance imposes a continuing duty upon the prosecutor to keep under review at any time the question of whether there is any prosecution material which satisfies the disclosure test and which has not previously been disclosed. This duty arises after the prosecutor has complied with the duty to disclose or purported to comply with it and before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case.

353. If such material is identified, then the prosecutor must disclose it to the accused as soon as is reasonably practicable, subject to public interest immunity considerations.

354. The prosecutor should be alert to the possibility that further unused material may come to light or be generated after the point at which initial disclosure has been made, after further investigation as a result of the prosecutor's advice, or where material such as negative fingerprint and forensic results become available.

355. In particular, following the giving of a defence statement, the Ordinance requires that the prosecutor keeps under review whether there is any prosecution material that satisfies the disclosure test. The actions and procedures required upon receipt of a defence statement are dealt with more fully in the section headed Defence Disclosure.

Continuing duty to disclose: procedure

356. If any new material is obtained or generated after the schedules have been submitted by the police, the disclosure officer should submit a fresh schedule or a continuation sheet with material consecutively numbered together with an additional MG6E. If new material is not properly described, the prosecutor must request, and insist upon receiving the correctly completed schedules. The prosecutor should consider this new material and apply the disclosure test in exactly the same way as for material submitted earlier.

357. As part of the continuing duty of disclosure the prosecutor should endorse any new disclosure decisions and reasons on the MG6C, and the date those decisions were made. The MG6C should be signed and dated by the prosecutor upon completion and the file noted accordingly.

358. Where there is material to be disclosed, letter D1 or D4 should be used as appropriate. Items to be disclosed should be referred to by their number on the original schedule and marked as either copy attached or for inspection as appropriate.

359. Where no additional material requires disclosure, letter D2 or D5 as appropriate, should be used. The letter should be signed by the prosecutor and sent to the accused as soon as reasonably practicable, and in any event before the commencement of the trial. A copy should be sent to the disclosure officer. The date of dispatch should be recorded on the disclosure record sheet.

360. Where new material is received that changes the nature or strength of the prosecution case or throws greater light on the case for the accused, the prosecutor should re-assess the schedules and the material considered at an earlier stage. If the re-assessment results in a decision to disclose further material described on an earlier schedule, the schedule and disclosure record sheet should be endorsed with the updated decision. The updated decision should be communicated to the defence and the disclosure officer, along with the copies of the material itself, unless inspection is considered appropriate.

361. There may be further material, which may help or hinder the prosecution, in the hands of third parties. The police may seek advice on the need to obtain further material, even after a prosecution has reached the stage where there is a duty to disclose unused material to the defence.

23. Defence Disclosure

362. On a trial of any offence before Supreme Court and before the lower courts of a serious summary offence once the prosecutor has provided initial disclosure, or purported to, the accused must serve a defence statement on the prosecutor and the court. The accused must also provide details of any witnesses he or she intends to call at the trial.

363. Following service of initial disclosure by the prosecution, the time limit for service of the defence statement and service of the details of any defence witnesses is 14 days in the lower courts and 28 days in the Supreme Court, unless that period has been extended by the court: see section 228 of the Ordinance.

364. The date of receipt of anything which purports to be a defence statement provided under section 218 of the Ordinance or a Notification of Intention to call witnesses under section 221 should be recorded on the file and acknowledged in writing to the accused.

365. Defence disclosure:

(a) assists in the management of the trial by helping to identify the issues in dispute

(b) provides information that the prosecutor needs to identify any material that should be disclosed and

(c) prompts reasonable lines of enquiry whether they point to or away from the accused.

Statutory requirements

366. In the defence statement, the accused should:

(a) set out the nature of the defence, including any particular defences on which the accused intends to rely

(b) indicate the matters of fact on which the accused takes issue with the prosecution

(c) set out, in the case of each such matter, why the accused takes issue with the prosecution

(d) set out particulars of matters of fact on which he intends to rely for the purposes of his defence

(e) indicate any point of law (including any point as to the admissibility of evidence or an abuse of process) which the accused wishes to take, and any authority on which he or she intends to rely for that purpose, and

367. If the defence statement discloses an alibi the accused must give particulars of the alibi in the statement, including:

(a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given, and

(b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness if the above details are not known to the accused when the statement is given.

368. Evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

369. Where an accused's solicitor purports to give a defence statement on behalf of the accused, the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

Review of defence statements

370. Prosecutors should be open, alert and responsive to requests for disclosure of material where the request is supported by a comprehensive defence statement. Prosecutors should bear in mind that defence statements which make "general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good" are not adequate.

371. Prosecutors should also be proactive in identifying inadequate defence statements. It is not sufficient for the accused only to describe his defence in widely worded, ambiguous or limited terms, such as, self-defence, mistaken identity alibi or consent. An adequate statement must:

(a) where the defence differs from the facts on which the prosecution is based state, those differences and the reasons for them, in the defence statement; and

(b) set out particulars of fact on which the defendant intends to rely on in his/her defence.

372. This will ensure that the prosecution has a proper opportunity of investigating the facts giving rise to any differences.

373. Where there is no defence statement, or it is considered inadequate, the prosecutor should write to the defence (a specimen letter is set out at Annex D4a) indicating that further disclosure may not take place or will be limited (as appropriate) and inviting them to specify or clarify the defence case. Where the defence fails to respond or refuses to clarify the defence case, the prosecutor should consider raising the issue at a preliminary hearing to invite the court to give a statutory warning under section 223(2) of the Ordinance.

374. Section 218 of the Ordinance means that the defence is required to set out any positive assertions to be relied on, namely the details of the actual defence.

375. Where further details are provided late, and substantial additional costs are incurred (for example, where a trial has been adjourned or witnesses inconvenienced) an application for a wasted costs order against the accused should be considered in appropriate cases.

Defence statements: Prosecution procedure

376. A copy of the defence statement should be sent immediately to the disclosure officer using the memo at Annex D3. At the same time, the prosecutor should draw the attention of the disclosure officer to any key issues raised by the defence statement. The file should be noted with the date of dispatch. Where appropriate, the prosecutor should give advice to the disclosure officer in writing as to the sort of material to look for, particularly in relation to legal issues raised by the defence. Some of these issues may be known to the prosecutor as a result of matters mentioned by the defence during the progress for the case, for example, at bail hearings or committal proceedings. Such information should be communicated in the memo at Annex D3 or separately.

377. Advice to the disclosure officer may include:

(a) guidance on what material might have to be disclosed

(b) advice on whether any further lines of enquiry need to be followed (for example where an alibi has been given)

(c) suggestions on what to look for when reviewing the unused material

(d) suggestions on whether an alibi witness be interviewed

(e) the appropriate use of a defence statement in conducting further enquiries, particularly when this necessitates additional enquiries of prosecution witnesses.

378. Again, it may be necessary to ask for copies of items listed on the schedule(s) or to inspect material. This should be done in consultation with the disclosure officer, who may be able to help identify material which should be disclosed.

Defence statements: police actions and certification

379. The defence statement gives a valuable opportunity for the prosecution to confirm or rebut defence allegations and it is likely to point the prosecution to other lines of inquiry, for example, the investigation of an alibi, or where forensic expert evidence is involved. The disclosure officer should inform the officer in charge of the investigation and copy the defence statement to him or her, together with any advice provided by the prosecutor, if appropriate.

380. Further investigation in these circumstances should be considered. Evidence obtained as a result of inquiring into a defence statement may be used as part of the prosecution case or to rebut the defence.

381. An investigator should not show a defence statement to a non-expert witness. The extent to which the detail of a defence statement is made known to a witness will depend upon the extent to which it is necessary to clarify the issues disputed by the defence, assist the prosecutor to identify any further disclosable material and/or to identify any further reasonable lines of enquiry. The officer should seek guidance from the prosecutor if there is any doubt as how the defence statement should be used in conducting further enquiries. Guidance is likely to be required if a police officer is the victim in the instant case.

382. In any event, following receipt of a defence statement, the disclosure officer should promptly look again at the retained material and must draw the attention of the prosecutor to any material that satisfies the disclosure test. Both sensitive and non-sensitive material must be considered.

383. Whenever enquiries are carried out in response to the defence statement, the disclosure officer in consultation with the officer in charge of the investigation should always notify the prosecutor of the results of those enquiries. This should be done on an MG20, and given to the prosecutor together with any additional schedules as appropriate and a further MG6E. If no enquiries were made, the disclosure officer should explain why.

384. If there is no material that the disclosure officer believes satisfies the test, the disclosure officer should endorse the second MG6E in the following terms:

'I have considered the defence statement and further reviewed all the retained relevant material made available to me and there is nothing to the best of my knowledge and belief which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.'

385. The disclosure officer should ensure that it is clear that the MG6E has been completed in response to a defence statement. The disclosure officer and or each deputy must sign and date an MG6E. If material was previously referred to on an MG6E, it does not have to be listed again.

386. Any items that satisfy the disclosure test should be referred to by quoting the item number from the schedule(s). If material identified has not previously been supplied to the prosecutor, a copy should be forwarded by the disclosure officer, except where the material is considered to be too sensitive to copy and arrangements are to be made for the prosecutor to inspect the material.

Defence Statements: Further Prosecution Actions for Additional Revealed Material

387. The prosecutor must consider whether any further prosecution material supplied by the police satisfies the disclosure test. In considering afresh the disclosure schedules at this stage, the prosecutor must be proactive in identifying disclosable material. The prosecutor should also consider whether material that has not been included on the MG6E ought nevertheless to be disclosed.

388. The prosecutor should inspect, view or listen to any further material that he/she, or the disclosure officer, considers might satisfy the disclosure test.

389. Once the prosecutor has decided whether there is material that should be disclosed at this stage, a letter will be sent to the defence (see Annex D4). The disclosure officer will be sent a copy of the letter, which will contain details of any items that require disclosure.

390. Where, following receipt of the defence statement, the prosecutor is satisfied that no further material requires disclosure, he or she must certify this to the defence. Specimen letter D5 has been prepared for this purpose.

391. The defence statement of one accused may be disclosable to co-accused in the same prosecution. A defence statement should be supplied to co-accused if it satisfies the disclosure test. If a defence statement satisfies, or possibly satisfies the disclosure test but contains sensitive material, reference should be made to the guidance stated elsewhere on sensitive material. It is important to keep in mind the continuing duty of disclosure. A defence statement which may not at first sight help a co-accused may meet the disclosure test once the co-accused's defence statement is received. A duty to disclose may also arise when the accused give evidence, for example where there is a cut-throat defence and an accused departs from his defence statement.

392. Material should not be disclosed under this continuing duty if the court, upon application of the prosecutor has ordered that it is not in the public interest to disclose it.

Notification of intention to call defence witnesses

393. Section 221 of the Ordinance requires the accused to give the prosecutor and the court advance details (i.e. name, address and date of birth) of any witnesses he or she intends to call at trial.

394. The accused disclosure is triggered by initial disclosure by the prosecution. The time limit under the Ordinance is 14 days in the lower courts and 28 days in the Supreme Court. This mirrors the time limit for the service of the defence statement.

395. The defence requirement under section 221 is in addition to the defence requirement to provide details of alibi. The defence must provide the details of any witnesses irrespective of the reason why they are calling them at trial. The defence must also disclose details of an alibi in the defence statement (section 219(2)).

396. The defence must notify the court and the prosecutor of the details of any witnesses. The prosecutor must forward the details of any witnesses to the police as quickly as possible so that a decision can be made whether to seek to interview any of the witnesses.

397. A Code of Practice has been issued under Schedule 3 of the Ordinance which sets out guidance that police and other investigators must follow if they arrange or conduct interviews of proposed witnesses whose details are disclosed by the defence under section 221.

398. In brief, under the Interviewing of Witnesses Code of Practice, if the police wish to interview a witness, before any interview they must, obtain the consent of the witness to be interviewed and advise the witness that he/she is not obliged to attend. If they do decide to be interviewed

(a) He/she is entitled to be accompanied by a solicitor; and

(b) a record of the interview will be made.

399. In addition the police must notify the accused or his/her legal representative whether or not the witness consented to the interview, and if so, whether the witness also consented to having the defendant's solicitor present.

400. The identity of the person conducting the interview must be recorded and he/she have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge the functions effectively. That person must not conduct the interview if that is likely to result in a conflict of interest, e.g. if that person is the victim of the alleged crime which is subject of the proceedings. If there is any doubt advice from a senior officer should be sought. If that doubt continues, the advice of a prosecutor must be sought.

401. If the witness has indicated that he/she wishes to appoint a solicitor to be present, that solicitor must be permitted to attend.

402. The accused's solicitor may only attend the interview if the witness has consented to his/her presence and only as an observer. If the witness is under 18 or is mentally disordered or otherwise mentally vulnerable he or she must be interviewed in the presence of an appropriate person.

403. A recording of the interview must be made and a copy given to the witness within a reasonable time of the interview and if the witness consents a copy should be provided to the accused or his/her solicitor.

404. The requirement by the accused to provide the details of a witness, without interviewing the witness, will be sufficient to make enquiries as to whether that witness has any previous convictions and to consider any application for the admission of that witness's bad character. However, the purpose of section 221 and the Interviewing of Witnesses Code of Practice is not confined only to bad character, but also allows the police to interview the witness with their consent about the circumstances of the case and what evidence they propose to give at trial.

405. There is no requirement for the defence to supply any statement from the witness to the investigator or the prosecutor before the interview. The investigator and the prosecutor are unlikely to know what evidence the witness may give. In deciding whether to seek to interview any witness the investigator should take into account all the circumstances of the case. For example, the investigator may wish to interview a witness where that witness is likely to give evidence of alibi in a trial in the magistrates' court.

406. Where an accused fails to comply with the requirements to provide details of any witness the sanctions are the same as for a failure to comply with a defence statement.

Faults in defence compliance

407. The prosecutor should at all times consider the way in which the defence are fulfilling or purporting to fulfil their obligations in relation to disclosure to see whether there is a fault or faults in disclosure by the accused. Such fault or faults may attract an adverse inference under section 227 of the Ordinance at trial. To assist the court in deciding whether to allow comment to be made or whether the jury should be allowed to draw inferences, the prosecutor should put the contents of the defence statement to the accused in cross-examination to elicit the differences between it and the actual defence relied upon and any justification for those differences.

408. When considering whether there are faults in disclosure by the accused the prosecutor should to refer to section 227 of the Ordinance.

409. Pursuant to section 227, the prosecutor should remember that the court and any other party may make such comment as appears appropriate and the court or the jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence where the accused is required to provide a defence statement and:

(a) fails to do so

(b) does so out of time

(c) sets out inconsistent defences in the defence statement or at trial

(d) puts forward a defence not mentioned in or different from that in the defence statement

(e) relies on a matter which should have been mentioned in the defence statement but was not

(f) adduces alibi evidence not having previously given particulars in the defence statement or

(g) calls an alibi witness of whom the required details have not been supplied.

410. Leave of the court is necessary before comment can be made where the accused seeks to rely on a matter which should have been mentioned in the defence statement but was not and that matter is a point of law (whether on admissibility, abuse of process, an authority or otherwise).

Seeking inferences at trial

411. It should be noted that a court or jury must consider what inference would be appropriate in the course of their deliberations as to whether the accused is guilty of an offence. Where there are differences between an accused's defence at trial and that set out in the defence statement, the court or jury will have to consider the extent of the difference, and any justification for it. Clearly, where the difference is very minor, or where there is a particularly clear and plausible explanation for the fault, it is unlikely that the court or jury would draw an inference consistent with guilt, or find it of assistance in determining the verdict. The prosecution advocate must therefore take account of these matters when deciding whether to seek an inference.

Responding to defence requests for a time limit extension

412. If a defence statement is required or is to be given, a 14 or 28 day time limit applies from the time when the prosecution complies with or purports to comply with the duty to make initial disclosure. The defence must apply for an extension before the time limit has expired.

413. The court will not grant an extension unless it is satisfied that the accused cannot reasonably give a defence statement within the specified time. There is no limit to the number of applications that may be made.

414. The Rules require that the defence should make written application for extension to the appropriate officer of the court), and at the same time, serve a copy of the notice upon the prosecutor). The prosecutor then has 14 days from service of the notice to make written representations to the court. The court will consider representations and may require a hearing, although there is no obligation for a court to hear oral representations.

415. The prosecutor should respond to any application to extend the time limit for the service of a defence statement. The response should assist the court with any pertinent observations or other relevant points.

416. Factors relevant to the reasonableness of the defence application and whether to oppose it are:

(a) the amount of material served as part of the prosecution case and as unused material

(b) the complexity of the issues

(c) the timing of service of material upon the defence, and

(d) the time the prosecution would have left, before trial, to carry properly out its duty to re-review prosecution material and deal with any subsequent applications.

24. Applications for Further Disclosure

417. If at any time after the accused has provided a defence statement (and the prosecutor has complied, purported to comply or failed to comply with the obligations relating to further disclosure), and the accused has reasonable cause to believe that there is prosecution material that satisfies the disclosure test, the accused may apply under section 225 of the Ordinance to the court for an order requiring the prosecutor to disclose it.

418. Upon receipt of the notice of application, the prosecutor should consider afresh the items requested by the defence, in consultation with the disclosure officer. If necessary, the prosecutor should ask for copies of the items or inspect the material, as appropriate.

419. If, after considering the requested material, the prosecutor concludes that all or part of it should be disclosed, the decision should be communicated without delay to the defence using letter at Annex D4. The court should be notified of the further disclosure, and a copy of letter D4 sent.

420. Where the prosecutor decides that the material requested remains not disclosable and the accused does not accept that decision, (provided the accused has given a defence statement, the accused may apply to the appropriate court under section 225(2) of the Ordinance for an order requiring the prosecutor to disclose it. The prosecutor should ensure that any such application complies with the Rules that require the accused to serve notice on the court and the prosecutor specifying:

(a) the material to which the application relates

(b) that the material has not been disclosed to the accused

(c) the reason why it might be expected to satisfy the disclosure test and

(d) the date of service of the notice on the prosecutor.

421. The prosecutor has 14 days to give notice to the court that either:

(a) he wishes to make representations (specified in the notice) to the court, or

(b) he is willing to disclose the material.

422. If the prosecutor considers that the defence statement is inadequate and a proper view as to what satisfies the disclosure test cannot be formed, this should be brought to the attention of the court in the notice.

423. The prosecutor should be alert to cases in which some or all of the material to which the accused seeks access may attract PII. If the material has already been the subject of a PII ruling the prosecutor should where possible remind the accused to use the proper procedures. To apply for a review of PII without jeopardising the confidentiality of the material, it is preferable for the procedure specifically intended for reviews of non-disclosure rulings to be used.

424. There may be informal approaches by the defence at any stage for access to material which is claimed satisfies the disclosure test. The prosecutor should consider each approach on its merits, and wherever possible these issues should be explored and resolved without the need for a court hearing.

425. However, any disclosure made should be in accordance with the terms of the Ordinance and the instructions in this manual. The file should be updated accordingly.

426. The court may determine a defence application at a hearing (in public or in private) or without a hearing. However, the court cannot determine the issue without either giving the prosecutor 14 days to make representations, or having a prosecutor present.

427. Prosecutors should be aware that the rule could be read so as to allow the defence to make an application and for the court to seek to determine it immediately, but in the presence of a prosecutor. In the event that material has to be re-reviewed, in the light of a formal application, the prosecutor should not allow the court to expedite timescales without good reason; and should be firm in obtaining the necessary time to consider the matter properly.

Responding to defence requests for disclosure of sensitive material

428. The defence may request information about the nature and extent of sensitive material that exists in the case. At whatever stage such a request is made, the defence are not entitled to information about the existence or nature of undisclosed sensitive material except where the law requires it.

429. If requests are made, the standard response is to adopt a neither confirm nor deny (NCND) approach. Generally, this will mean the prosecutor can say that:

(a) material to which the accused is entitled will be disclosed under the Ordinance and Rules at the appropriate time and

(b) the prosecutor is satisfied that the duties under the Ordinance and Rules have been complied with, and

(c) disclosure will be the subject of continuing review.

For CHIS disclosure issues, see the relevant section of the guidance.

25. File Management

Unused material folder

430. For purposes of efficient file management, and to assist in maintaining a clear disclosure audit trail in every case, documentation relating to unused material should be kept in a separate folder within the main case file.

431. This documentation should include:

(a) all unused material (unless marked **Confidential** or above) if copies have been provided to the CPS (where volume allows)

(b) all disclosure schedules (unless marked **Confidential** or above)

(c) any defence statement(s)

(d) File notes relating to disclosure

432. In those cases where the large volume of unused material copied to the prosecutor does not allow for its storage in the unused material folder, a note of its location should be made on the folder.

Protective marking

433. Proper handling of sensitive material is of utmost concern to the police and prosecution. Protective markings will be applied by police to sensitive material that is revealed to the prosecutor. The relevant category of marking will be **Restricted**, **Confidential**, **Secret** or **Top Secret**. Once the prosecutor has considered and agreed the marking category appropriate to the level of sensitivity of the document's contents (whether it be the schedule or copy material), the material will be handled according to that classification.

434. Sensitive material that is Restricted may remain on the file. It will be kept with the schedule and any copy material in the disclosure folder or a sealed envelope within it. Material that is **Confidential**, **Secret** or **Top Secret**, and all related documentation, must be kept off-file in secure storage. Notes of any discussions about sensitive material, with a police officer or the prosecution advocate for instance, should be stored according to the sensitivity of their content. **Top Secret** material can only be stored with the Chief of Police at Stanley Police station or at Government House.

PII applications log

435. A log should be kept of all PII applications. The log should record the name of the case, the nature, in general terms only, of the sensitive material, the date and type of application and the outcome. The log must be stored securely.

Confidentiality

436. The accused is prohibited from using material disclosed under the Ordinance or common law for any purpose other than the criminal proceedings concerned.

437. The only exceptions to this rule are where the permission of the court is obtained, or where the material has been displayed or communicated to the public in open court.

438. The accused will be guilty of an imprisonable offence if this prohibition on the use of unused material is breached. For these purposes, disclosure to the accused includes disclosure to his legal representative, and either may be in breach of the confidentiality provisions of the Ordinance.

439. All unused material that has been disclosed to the defence is subject to the provisions of section 237 of the Ordinance. The effect is to prevent the use of the disclosed material by the accused in anything other than the criminal proceedings that the material was originally disclosed. The material may be used in connection with appeals or any further criminal proceedings arising out of the original case, but anything else requires the approval of the court.

440. If the disclosed material is used outside these circumstances, an offence under section 238 of the Ordinance may have been committed. Schedule 4 of the Ordinance governs the procedure where the court is to consider the exercise of its power to punish for an unauthorised disclosure.

441. Schedule 4 of the Ordinance sets out the procedure for the notification and determining of applications by the accused to use the material for other purposes.

442. The court must not permit the use of the material subject to the application unless the prosecutor has had at least 28 days in which to make representations; and the court has taken adequate account of any rights of confidentiality that may apply to the material.

443. On receipt of an application, the prosecutor should obtain the material and consult the author or person who prepared the material, and any known rights holders, in order to properly formulate the prosecutor's response to the application.

Instructions to the prosecution advocate

444. The prosecutor has responsibility to ensure that the prosecution advocate is properly instructed on all disclosure issues. Instructions should address fully:

(a) any decision the prosecutor has made about the disclosure of material which satisfies the test where the reasons for disclosure are not readily apparent, and enclose copies of any such material or explanatory correspondence

(b) any decision the prosecutor has made about sensitive material.

(c) the prosecutor's comments on the defence statement

(d) the obligation for the prosecution advocate to consider the disclosure folder at all conferences and before all court hearings.

445. Instructions to the prosecution advocate in cases where there is sensitive unused material should, subject to Restricted, Confidential, Secret or Top Secret protective marking include the following:

(a) the MG6D

(b) the MG6E

(c) copies of any items of sensitive unused material supplied to the prosecutor

(d) any notes made by the prosecutor in relation to sensitive unused material

(e) any specific instructions to prosecution advocate in relation to sensitive unused material

(f) specific instructions on the handling and security of sensitive material consistent with its protective marking

(g) a note that the prosecution advocate should always check the disclosure folder prior to any hearings and at any case conference.

446. If the document contains relevant information that must be disclosed to the accused because it satisfies the disclosure test, the prosecutor and the disclosure officer will need to consider whether the document can be edited if it contains sensitive material.

Retention periods

447. The Disclosure Code provides for the periods of retention. These are minimum periods of retention and RFIP force policy may provide for a longer period.

448. Material seized under the provisions of Part s 2 and 3 of the Ordinance will be subject to the retention provisions of sections 30 and 38 of the Ordinance as applicable.

Annex A
Disclosure Manual

An explanatory note on the principles and procedures relating to third parties under the Criminal Procedure and Evidence Ordinance 2014 and the disclosure of material in their possession

Introduction

1. This note explains the procedures to be followed by the prosecution in seeking to obtain relevant material held by individuals and organisations that are regarded as third parties in criminal proceedings.

2. The law governing material held by third parties is contained in the Criminal Procedure and Evidence Ordinance 2014 ('the Ordinance'), the Attorney General's Guidelines and the Third Party Disclosure Protocol.

Who are third parties?

3. In the course of an investigation to determine whether an offence has been committed, the police may become aware of relevant material in the possession of persons or organisations which may have a bearing on the investigation. It is only the investigator and the prosecutor who have statutory duties of revelation and disclosure under the Ordinance. All other categories of persons are third parties so far as the conduct of the case is concerned.

The legal requirements of the prosecution

4. Every accused person has a right to a fair trial, a right enshrined in our law and guaranteed under the Constitution of the Falkland Islands. This right to a fair trial is fundamental and the accused's right to fair disclosure is an inseparable part of it.

5. The scheme set out in the Ordinance is designed to ensure that there is fair disclosure of material to the accused which may be relevant to an investigation and which does not form part of the prosecution case. This is known as 'unused material.' Fairness does, however, recognise that there are other interests that need to be protected, including those of the victims and witnesses who might otherwise be exposed to harm. The Ordinance protects those interests.

6. Investigators are under a duty to pursue all reasonable lines of enquiry, whether these point towards or away from the accused. What is reasonable in each case will depend on the particular circumstances. Investigators and prosecutors must do all they can to facilitate proper disclosure, as part of their general and professional responsibility to act fairly and impartially, in the interests of justice.

7. Where you possess material, which has not been obtained by the police, they are under a duty to inform you of the existence of the investigation and to invite you to retain the material in case they receive a request for its disclosure. Where the police inspect material with your agreement and do not retain it, they are under a duty to record details of that material and to reveal it to the prosecutor.

8. Where you do not allow the prosecution access to the material, the prosecution or defence may apply to the court for a witness summons, which if granted would require you to attend court to produce the material to the court. Application for a witness summons will only be made where the prosecution or defence considers that the material sought is likely to be material evidence in the proceedings. You do have the right to make representations to the court against the issue of a witness summons.

9. Where the relevant material held by you or owned by you but in the possession of the prosecution is sensitive, in that it is not in the public interest to disclose, then the prosecution will treat that material in confidence. Where that material satisfies the disclosure test a public interest immunity application must be considered to prevent disclosure to the defence. Where you have an interest in that material and an application is considered appropriate, the prosecution is under a duty to notify you in writing of the time and place of any public interest immunity application. You have a right to make representations to the court.

10. If a Court, on hearing an application for public interest immunity determines that the material in question should be disclosed to the defence, the interests of justice require, in appropriate cases the prosecution to terminate the proceedings rather than make such disclosure.

Specimen letter A1 - Letter to third parties

Dear Sir/Madam

REQUEST FOR DISCLOSURE OF MATERIAL HELD BY ( )

( ) Police are conducting a criminal investigation into allegations made against (*name and address, if appropriate, of the alleged offender*).

The allegations being investigated are, in general terms, that (*set out the nature of the allegations and the issues in the case*).

I believe that you hold material that may be relevant to the investigation, namely (*set out what material it is believed the third party holds*).

The reasons why I am seeking access to this material are because I believe that (*list the reasons which may include material which might affect the credibility and reliability of a witness, or material which might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused*).

I would be grateful if you could confirm whether

- you hold any such material
- you are prepared to supply it or allow me to inspect it for the purposes of the investigation
- you consider the material to be sensitive and the reasons for any sensitivity.

Please also

- list all additional material that you hold in relation to this case so that I may assess whether it too is relevant material that I should inspect
- tell me whether you object to allowing me access to any of the material
- specify your reasons for any objections
- retain the material in case the court requires you to disclose some or all of the material.

I enclose for your assistance, an explanatory note that sets out the role of the prosecution in dealing with material in the possession of third parties and a pro forma reply that may assist you in your response. Please feel free to amend it as appropriate.

Please could you reply by (*insert date*).

If you wish to discuss this request, or require any further information, please contact me on the above number.

Yours faithfully,

Specimen letter A2 - Proforma response to investigators to include with letter to third parties

Dear (*insert name of requesting officer*)

R v (*insert name of case*) - REQUEST FOR MATERIAL

I acknowledge receipt of your letter dated ... requesting material held by (name of organisation) that may be relevant in the above criminal proceedings.

I confirm that:

- We do/do not hold material that may be relevant to the investigation as set out in the above-mentioned letter. (*Please list material*)
- We are/are not prepared to supply it or allow you to inspect it for the purposes of the investigation. (*Please give reasons as appropriate.*)
- We do/do not consider the material to be sensitive. The reason the material is sensitive is because (*please set out any reason why you consider the material to be sensitive)*.

Further, we hold the following additional material so that you may assess whether it too is material that is relevant to your investigation: (*Please list material*)

We object to allowing you access to any of our material because (*set out reasons as appropriate*).

We will retain the material in case the court requires us to disclose some or all of the material.

Yours sincerely,

For and on behalf of
(*name of organisation*).

delete as appropriate

Annex B

Examples of unused material that may be created or used during an investigation

Crime reporting and suspect identification

MG6C

999 voice recording

Exhibits not referred to in statements

Post arrest photographs

Details of other suspects arrested interviewed or questioned but not charged

Audio/video recordings of interviews of witnesses

Potential witnesses' details where no MG11 given

CCTV or other videos

Media releases by police

Fingerprint forms
Witness album documentation

ID procedure forms (except participant lists)

Crime reports
Incident log of messages

Pocket books

MG6D

CHIS report

Offender profiles
Port warnings

Wanted/missing circulations

Force intelligence bureau material

Sensitive material in police possession from Social Services or other departments

Administration

MG6B

Police misconduct material (disciplinary findings/ convictions etc)

MG6C

Road traffic crash reports

Vulnerable victim or witness profile

Record of property recovered from crime scenes

Record of searches
Custody record

Post charge photograph

Lay visitors report

Family liaison logs*

Property recovered from crime scenes forms*

Custody records

Letter of complaint of crime

First description of all suspects however and wherever recorded

Material in police possession from third party

Plans or video of crime scene

Details of whether any witness has sought or received a reward*

Investigation	Forensic and medical records	Third party
MG6C	**MG6C**	**MG6**
Scientific or SOCO findings not used as evidence	SOCO/IDO work sheets	Note existence of medical and dental records
Draft statements or preparatory notes	File records	Media material
DNA or other forensic material not used as evidence	Pathologists' records	Special procedure applications
MG11s from unwilling or unhelpful witnesses	Dental records	Records held by other agencies
Prompt notes for interviews	Forensic scientist's records lab forms	Records/material held by Social Services or local authority
Medical Examiner reports for suspect or witnesses	Hospital records relating to the condition which is the subject of the offence charged+	
Records of information provided e.g. in conversation		
House to house enquiries*		
Audiotape or written note of interview with witnesses notified by the accused		
MG6D		
Operational briefing/debriefing sheets		
Policy files		
Information in support of search or arrest warrants		
Observations/surveillance logs		

*Enter on MG6C unless would reveal sensitive material in which case list on MG6D, or consider editing. Edit sensitive entries from copies to be disclosed to defence e.g. address telephone numbers.

Annex C

Disclosure of Previous Convictions of Prosecution Witnesses

Introduction

This guidance sets out current policy in relation to the disclosure of previous convictions and cautions of prosecution witnesses.

The Attorney General and RFIP have agreed that the policy relating to the disclosure of previous convictions of witnesses should be consistent with a strict application of the disclosure provisions of the Criminal Procedure and Evidence Ordinance 2014 ('the Ordinance').

The current policy requires prosecutors to disclose previous convictions or cautions of prosecution witnesses where such convictions or cautions satisfy the test for disclosure under the Ordinance, by being reasonably capable of undermining the case for the prosecution against the accused, or assisting the case for the accused.

Undermining or Assisting Material

The prosecution is under a duty to disclose to the accused prosecution material which is reasonably capable of undermining the prosecution case against the accused or assisting the case for the accused.

Material which is capable of being "undermining" would have the potential to weaken the prosecution case, or be inconsistent with it, irrespective of the particular defence being advanced by the accused, or indeed whether a defence is being advanced at all.

Material has such potential if it could have an adverse effect on the strength of the prosecution case.. The material might include, for example, material which could properly found an application to exclude evidence advanced as part of the prosecution's case or which could support an application to stay proceedings as an abuse of process.

Material which is capable of "assisting" the case for the accused has a closer relationship to the defence, or the account of relevant matters, put forward by the accused, either when questioned by officers during the course of the instant investigation, or otherwise advanced in the body of a defence statement served in the course of the proceedings.

"Assisting" material might be capable of supporting that defence, or supporting the account or explanation put forward by the accused.

It is not appropriate for prosecutors to make disclosure on an entirely speculative basis. If material is not reasonably capable of "undermining" the prosecution case, in the sense outlined above, then the question of whether it is reasonably capable of "assisting" the case for the accused will turn on the nature of the case actually put forward by the accused.

Previous convictions or cautions of witnesses

The *Attorney General's Guidelines on Disclosure* states that:
Examples of material that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused are:
i. Any material casting doubt upon the accuracy of any prosecution evidence.
ii. Any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence.
iii. Any material which may cast doubt upon the reliability of a confession.
iv. Any material that might go to the credibility of a prosecution witness.
v. Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers
vi. Any material which may have a bearing on the admissibility of any prosecution evidence.

Previous convictions of prosecution witnesses may fall within a number of the above categories. It is possible, for instance, that a conviction or convictions might be of such a nature as to support a contention, by the accused, that the offence being tried was committed by someone else, possibly even by the witness. This is the sort of situation which arose in the case of *R v Vasilou* [2000] Crim. L.R. 845, where it subsequently came to light that one of the witnesses who gave disputed evidence of recovering the proceeds of the alleged robbery from the defendant, close to the scene of the offence, had undisclosed previous convictions for offences of robbery (and other offences of dishonesty).

Some convictions might, in themselves, go to the credibility of the witness, but not all convictions would do so, and the question of whether they could do so will turn, in part, on the nature of the convictions themselves and the particular matters at issue in the proceedings (including the specific evidence given by the witness) see *R v Underwood* [2003] EWCA 1500.

In *R v Weir and others* [2005] EWCA Crim 2866, the Court of Appeal considered a situation where a defence witness had been cross-examined in relation to a caution administered to her for an offence of possessing a controlled drug, subsequent to the incident of alleged assault being tried. They held that the trial judge was wrong in concluding that the caution had substantial probative value in relation to the witness's credibility.

Hence, the mere fact of a conviction or caution may not be capable of going to the accuracy, reliability or credibility of the witness's evidence. However, convictions for offences involving dishonesty, or fraud/forgery are arguably more likely to do so on a more general basis, as would a conviction for doing an act or series of acts with a tendency to pervert the course of public justice, or like offence (e.g. wasting police time, interfering with or intimidating a prosecution witness, obstructing a constable in the execution of his duty, or similar matters).

Another sort of conviction which would be likely to do so would be a finding which resulted in a disposal under the Mental Health Ordinance.

Therefore, where a witness has a conviction for one of the offences (or similar type offences) as mentioned, it should normally be disclosed (satisfying the disclosure test) because it may affect the accuracy, reliability or credibility of the witness.

An example of a situation in which previous convictions might be capable of affecting the court's assessment of the credibility of a witness's evidence, or the accuracy of that evidence, might be where the witness provides evidence involving visual identification of the accused, where the identification is disputed and the circumstances in which the initial observation occurred are bound to come under scrutiny. The witness has a number of previous convictions for possession of controlled drugs, and this might found legitimate examination of the witness as to whether regular use of such drugs has affected the witness's memory, ability to concentrate, etc.

Revelation to the Prosecutor

It has been agreed by the police that they will continue to reveal to the prosecutor all previous convictions and cautions of witnesses (other than convictions for certain minor road traffic offences).

The Disclosure Manual defines the test of relevance under the Ordinance and provides that all items of material, which may be relevant to the investigation, must be described on either the MG6C or MG6D.

Although it is possible that in a few cases, previous convictions and cautions of witnesses (other than convictions for certain minor road traffic offences) might not be relevant, it is very likely that in the vast majority of cases the previous convictions and cautions will meet the relevance test under the Ordinance.

Therefore, to ensure consistency and to avoid any mistakes in the process of revealing previous convictions and cautions, the disclosure officer must indicate the fact of the previous conviction(s) or caution(s) on the MG6C. The disclosure officer should not list the details of the convictions or cautions on the MG6C.

The disclosure officer must send a copy of all previous convictions or cautions of witnesses to the prosecutor in order for the prosecutor to assess whether or not to disclose the previous convictions or cautions to the accused. This should be done at the time the MG6C schedule is sent to the prosecutor unless they have already been revealed to the prosecutor and disclosed to the defence e.g. bail applications see *R v DPP ex parte Lee* [1999] 2 All ER 737.

The disclosure officer should use the MG6E to bring to the prosecutor's attention whether the previous convictions and cautions of a witness could reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused.

The Disclosure Officer should provide details, if possible, of the previous convictions/cautions listed on the MG6E so that the prosecutor can assess whether they meet the disclosure test.

Applying the test

Prosecutors have a duty to decide whether unused prosecution material satisfies the disclosure test, but must always resolve any doubts they have in favour of disclosure to the accused, subject to public interest immunity considerations.

This general principle, in particular, the need to always to err on the side of caution in cases of genuine doubt, will apply to disclosure of previous convictions and cautions of prosecution witnesses.

The following staged approach should be applied to the decision-making process.

Stage 1

At the stage of initial disclosure, consider firstly whether the actual conviction(s) or caution(s) would be reasonably capable, alone or taken together, of *undermining* the prosecution case or assisting the case for the accused.

As a general rule, convictions or cautions for offences involving dishonesty, fraud/forgery, perjury, perverting the course of justice, or a like offence (e.g. wasting police time, interfering with or intimidating a prosecution witness, or similar matters), or a conviction resulted in a disposal under the Mental Health Ordinance should be deemed to satisfy that test, regardless of their age, or whether they are spent.

If they do not fall within the above paragraph, then the prosecutor should consider whether, in the light of the particular matters at issue in the proceedings, including the nature of the witness' own evidence (and its relationship to other evidence), the conviction(s) would be reasonably capable of undermining the prosecution case.

Stage 2

The next step is to consider whether the material in question would be reasonably capable of assisting the case for the accused, as put forward by the accused (1) at the time of arrest (2) when interviewed while in custody at the police station and/or (3) at the time of being charged.

Where the accused has not commented at any of these stages, it is inappropriate to speculate about potential defences, with a view to making disclosure on a purely speculative basis. The appropriate step would be to await service of a defence statement by the accused, and to consider any matters or issues raised within it (see Stage 3).

An important, although not in itself conclusive, factor in this exercise will be the extent to which the witness's evidence is challenged by the accused. The fact that the witness's evidence is challenged may put the witness's credibility more squarely at issue, and careful consideration should be given to whether the conviction(s) or caution(s) would assist the accused to better challenge the evidence of the witness.

The effect of section 374 of the Ordinance

In the course of considering this sort of issue, to what extent is it appropriate to consider whether the conviction could arguably be admissible in evidence under section 374 of the Ordinance, the provision relating to bad character of a non-defendant?

The effect of section 374 is that bad character evidence relating to non-defendants will be admissible in fewer cases than would previously have been the position. The narrow scope of admissibility of previous convictions of non-defendants supports the argument that where witnesses' convictions are clearly irrelevant they need not be disclosed.

If the evidence of the witness is challenged, then there is a **presumption** in favour of disclosure, although one needs to consider whether the nature of the conviction(s)/caution(s) (and other bad character) is such that it would be reasonably capable of assisting the defence to effectively challenge the evidence of the witness.

This is demonstrated by the decision of the Administrative Court in *S v DPP* [2006] EWHC 1207 (Admin), where the DPP conceded that information relating to pending proceedings for affray against the complainant (who had no previous convictions) in an assault case (where the appellant was raising self defence) should have been disclosed. Material relating to the affray proceedings may also arguably have had a bearing on the complainant's propensity for violence or general credibility as a witness.

Therefore, whenever the bad character in question would provide the defence with at the very least an arguable application for leave to give evidence of the bad character of the witness under section 374, the bad character should be disclosed.

It is important to bear in mind that the admissibility of evidence is a matter which is to be determined either by the judge or by agreement between the parties. Moreover, prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused need not be evidence which is admissible at trial.

The case for the accused need not simply be the evidence which the accused will present at trial. Disclosure is also required to assist a defendant in a bail application, an application to stay proceedings as an abuse or to enable the defence to approach eye witnesses while their memories are fresh see *R v DPP ex parte Lee* (as referred to above).

It would therefore be wrong for prosecutors to assume that simply because a conviction would clearly not be admissible in evidence it need not be disclosed.

Stage 3

If the decision is to disclose the previous conviction(s) or caution(s), the prosecutor should endorse the MG6C and disclose it in the normal way. In addition, the details of previous convictions, if sent by post, should be addressed for the personal attention of a solicitor acting in the case and marked "In Confidence".

The defence should be reminded that the confidentiality of previous conviction(s) and caution(s) of witnesses disclosed under the Ordinance is protected by sections 237 and 238.

If the decision is that the conviction(s) or caution(s) does **not** fall to be disclosed, then this decision should be endorsed on the file and the MG6C.

Stage 4

The prosecutor will have a duty to keep the matter under continuing review, and must particularly review the position upon receipt of a defence statement served by or on behalf of the accused. The defence statement may clarify the extent to which the evidence of the witness is in dispute, and the basis upon which it is disputed.

The information therein may result in the prosecutor reconsidering the previous decision to withhold disclosure at the initial disclosure stage. If the prosecutor determines that the material, in the light of the matters raised in the defence statement, does fall to be disclosed, then disclosure should follow in the normal way.

However, if the prosecutor takes the provisional view that, even in the light of the matters raised in the defence statement, the material does **not** fall to be disclosed, there should be a further endorsement of the reasons on the file.

Where the defence seeks specific disclosure of material relating to the previous conviction(s) or caution(s) of witnesses, it will be inappropriate to disclose simply in response to general 'fishing expeditions'.

If the defence wishes to seek specific disclosure, the appropriate route is via a section 225 application, in accordance with the Criminal Procedure Rules, rule xx, which requires a written notice specifying the reason why material might be expected to assist the applicant's defence as disclosed by the defence statement.

The prosecutor should consider any section 225 application and decide whether or not, in the light of the application, the undisclosed material now falls to be disclosed. If so, then disclosure can be made without the need for the matter to proceed to a hearing.

However, if an insufficient basis for disclosure is made out, then it is appropriate for the prosecutor to request a hearing under rule xx, whereupon the defence will need to show that there is a reasonable cause to believe that there is prosecution material which now falls to be disclosed, following the service of the accused's defence statement.

The review of disclosure should continue in light of issues raised during the proceedings. For this reason the trial advocate should always be made aware of any undisclosed previous convictions. Should issues occur during the course of the trial that render them disclosable, the trial advocate should confer with the reviewing lawyer (where applicable) before proceeding to make disclosure, unless the delay in seeking to confer would be such as to unduly disrupt the trial or otherwise be contrary to the interests of justice.

Annex D
Non-Sensitive Material Specimen Letters and Forms

D1 - Letter to defence where there is material to disclose

Dear Sirs

R v ACCUSED'S NAME, COURT AND NEXT HEARING DATE

I am required to disclose to you any prosecution material which has not previously been disclosed, and which might reasonably be considered capable of undermining the case for the prosecution or of assisting the accused's case.

Attached to this letter is a copy of a [*an additional*] schedule of non-sensitive unused material. The disclosure officer in this case is (*name*)

Where the word 'evidence' appears alongside any item, the items listed on the schedule are intended to be used as part of the prosecution case. You will receive a written notice should the position change.

Where indicated, copies of the items listed are attached. Material marked as available for inspection can be viewed by arrangement with the disclosure officer.

[In addition, the following material not listed on the schedule is disclosed to you: (*insert any non-scheduled material e.g. witness previous convictions or statements removed from the bundle of evidence*)]

This material is disclosed to you in accordance with the provisions of the Criminal Procedure and Evidence Ordinance 2014, and you must not use or disclose it, or any information recorded in it, for any purpose other than in connection with these criminal proceedings. If you do so without the permission of the court, you may commit an offence.

You must supply a written defence statement to me and to the court within 14 days. In accordance with my continuing duty to consider disclosure, I will review the information you provide in the statement to identify any remaining material which has not already been disclosed. The statement will also be relied on by the court if you later make an application under section 225 Criminal Procedure and Evidence Ordinance. If you do not make an Ordinance-compliant defence statement or do so late, the court may hear comment and/or draw an adverse inference.

It is essential that you preserve this schedule in its present form, as access to any material will only be granted upon its production to the disclosure officer.

D2 - Letter to defence where there is no material to be disclose

Dear Sirs,

R v ACCUSED'S NAME, COURT AND NEXT HEARING DATE

I am required to disclose to you any prosecution material which has not previously been disclosed, and which might reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused.

Attached to this letter is a [*a further*] copy of a schedule of non-sensitive unused material. The disclosure officer in this case is (*name*).

Where the word 'evidence' appears alongside any item, the items listed on the schedule are intended to be used as part of the prosecution case. You will receive a written notice should the position change.

At this stage, there is no [*additional*] prosecution material which requires disclosure to you.

You must supply a written defence statement to me and to the court within 14 days; any undisclosed material will be further reviewed in the light of that statement. In accordance with my continuing duty, I will review the information you provide in the statement to identify any remaining material which has not already been disclosed. The statement will also be relied on by the court if you later make an application under section 225 Criminal Procedure and Evidence Ordinance 2014 ('the Ordinance').

If you do not make an Ordinance-compliant defence statement where one is required or provided, or do so late, the court may hear comment and/or draw an adverse inference.

Yours faithfully

Delete as appropriate
Delete if defence statement already supplied

D3 - Memorandum to disclosure officer enclosing defence statement

NB This is not a 'standard response' letter. Correspondence should always include free text where appropriate to convey the issues relevant in each case.

TO:

R v ACCUSED'S NAME, URN, COURT AND NEXT HEARING DATE

I attach a copy of a defence statement on behalf of (*name*)

I am considering whether there is any further unused material that ought to be disclosed.

In the light of the defence statement, and all other relevant factors known to you please carry out a further review of the material listed on the MG6 schedules and in your possession, and consider whether there is any material, not already disclosed, 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 been disclosed to the accused.

Please ensure that a copy of this defence statement is supplied to any to any Forensic Service Provider as appropriate, together with instructions as to any further work required.

A: I look forward to receiving a further MG6E in response to this defence statement.

Or

B: I have written to the defence because the defence statement is inadequate (see my letter attached). Please complete your review as well as you are able and send a further MG6E in response to this defence statement.

***FREETEXT**: in either case, make observations or requests to the disclosure officer drawing specific attention to the issues raised in the defence statement. This should include advice on any reasonable enquiries to pursue or work required.*

Please reply by (*date*)

D4 - Letter to defence disclosing material at following a defence statement

Dear Sirs,

R v ACCUSED'S NAME, COURT AND NEXT HEARING DATE

I have considered your defence statement dated (*date*). I am required to disclose to you any prosecution material which has not been previously disclosed and which might reasonably be considered capable of undermining the case for the prosecution or of assisting your case.

A copy of a schedule of non-sensitive unused material has already been sent to you. The items listed below fulfil that test. The numbers refer to the numbers on the schedule previously provided. Where indicated, copies of the items listed are attached. Material marked as available for inspection can be viewed by arrangement with the disclosure officer.

Item Description Copy Inspect

This material is disclosed to you in accordance with the provisions of the Criminal Procedure and Evidence Ordinance 2014, and you must not use or disclose it, or any information recorded in it for any purpose other than in connection with these criminal proceedings. If you do so without the permission of the court, you may commit an offence.

If you have reasonable cause to believe that there is other prosecution material which might reasonably be considered capable of undermining the prosecution case or assisting your defence and which has not already been disclosed, please let me know and I will reconsider my decision in the light of any further information that you provide. Alternatively, you may apply to the court under section 225 Criminal Procedure and Evidence Ordinance 2014.

It is essential that you preserve this letter in its present form, as access to any material will only be granted upon its production to the disclosure officer.

Yours faithfully

D4a - Letter to defence where there is an inadequate defence statement

NB This is not a 'standard response' letter. Communications should always include free text where appropriate to convey the issues relevant in each case.

Dear Sirs,

R v DEFENDANT'S NAME, COURT AND NEXT HEARING DATE

I acknowledge receipt of your defence statement dated (*date*), I am required to disclose to you any prosecution material which has not been previously disclosed 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 defence statement you have submitted does not comply with the requirements of section 219 of the Criminal Procedure and Evidence Ordinance 2014 because it does not: (*the letter should cite only those parts which are relevant; lists struck through are not appropriate*):

- set out the nature of the defence, including any particular defences on which the accused intends to rely,
- indicate the matters of fact on which the accused takes issue with the prosecution,
- set out, in the case of each such matter, why the accused takes issue with the prosecution, and
- indicate the point of law (including any point as to the admissibility of evidence or an abuse of process) which the accused proposes to take, and any authority on which he intends to rely for that purpose
- in relation to the alibi disclosed in the defence statement, provide particulars of
-
    - the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
    - any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned above are not known to the accused when the statement is given.

(***FREETEXT****: specify* ***any further details for*** *the reasons why the defence statement does not comply*).

As a consequence, I may not be able to identify material that should be disclosed. Please therefore provide a compliant defence statement. Failure to do so may lead to the court making an appropriate direction. [A copy of this letter has been sent to the court, for its information.]

Yours faithfully,

D5 - Letter to defence where there is no Material to be disclosed following a defence statement

Dear Sirs

R vACCUSED'S NAME, COURT AND NEXT HEARING DATE

I have considered your defence statement dated (*date*). In accordance with section 224 Criminal Procedure and Evidence Ordinance 2014 please accept this letter as notice that I consider that I am not required to make any further disclosure following its receipt.

If you have reasonable cause to believe that there is other prosecution material which might reasonably be considered capable of undermining the prosecution case or assisting your case and which has not already been disclosed, please identify it and notify me with your reasons.

Yours faithfully

D6 - Memorandum to police enclosing MG6C

TO:

R v ACCUSED'S NAME, URN, COURT AND NEXT HEARING DATE

I have reviewed the unused material in this case and return a copy of the MG6C endorsed with my review decisions [together with a copy of the letter sent to the defence]

Please ensure that the person appointed to supervise any access to unused material by the defence has a copy of the schedule.

delete as appropriate

D7 - Letter to defence disclosing police misconduct material

Dear Sirs

R v ACCUSED'S NAME, COURT AND NEXT HEARING DATE

DISCLOSURE: POLICE DISCIPLINARY PROCEDURES/CONVICTIONS

In accordance with section 216 Criminal Procedure and Evidence Ordinance 2014, I write to inform you of the following matters relating to [*name*] who is a police officer/police support employee who has made a statement in this case.

a. Current disciplinary finding of guilt: (*Insert details of finding*)
b. Disciplinary matter not yet completed: (*Insert nature and details of allegations*)
c. Criminal conviction/criminal caution/penalty notice for disorder: (*Enclose printout*)
d. Criminal matter not yet completed: (*Insert nature and details*)
e. Other: (*Insert nature and details*)

Please note that in accordance with the judgements in *R v Edwards* (1991) *R v Guney* (1998) and *R v Zomparelli* (unreported, CA 23 March 2000) the prosecution will object to any cross-examination of the officer based upon the information at (b) and (d) above, unless it can be shown to have substantial relevance to the issues in the case.

Yours faithfully

D8 - Letter to defence disclosing material about an expert

Dear Sirs

R v ACCUSED'S NAME, COURT AND NEXT HEARING DATE

DISCLOSURE: EXPERT WITNESS FURTHER INFORMATION

In accordance with section 216 Criminal Procedure and Evidence Ordinance 2014, I write to inform you of the following matters relating to *[name]* who is an expert witness who has made a statement in this case.

a. Criminal conviction/criminal caution/penalty notice for disorder: (*Enclose printout*)
b. Criminal or civil proceedings not yet completed: (*Insert nature and details*)
c. Adverse judicial findings against expert: (*Insert details of finding*)
d. Adverse findings by a professional or regulatory body: (*Insert details of finding*)
e. Disciplinary proceedings, referrals or investigations pending: (*Insert nature and details of allegations*)
f. Other: (*Insert nature and details*)

In disclosing the above, no concessions are made by the prosecution as to the extent to which this material may be deployed in cross-examination. This will be a matter for the trial judge to determine on the particular facts of this case.

Yours faithfully

Annex E

Sensitive Material Letters and Forms

E1 - Letter to court requesting listing for PII hearing - Type I Applications

Dear Madam,

R v [*insert name(s) of defendant(s)*]
[*insert court details*] Court
Case no. [*insert case number*]
Date of trial: [*insert trial date where known*]

In the case against the above named the prosecution wish to make application to assert PII in relation to sensitive material which has been retained. It is intended to provide notice of the application to the defence and to advise them of the categories of the material which will be the subject of the application.

I would be grateful if you could arrange for the application to be listed before the trial judge, HHJ. [*Insert details of trial judge where known*] and provide me with details of the hearing so that I can serve notice on the defence.

The estimated length of the hearing is [*insert time estimate*]

Yours faithfully,

E2 - Letter to court requesting listing for PII hearing - Type II applications

Dear Madam,

R v [*insert name(s) of defendant(s)*]
[*insert court details*] Court
Case no. [*insert case number*]
Date of trial: [*insert trial date where known*]

In the case against the above named the prosecution wish to make application to assert PII in relation to sensitive material which has been retained. It is intended to provide notice of the application to the defence but not to advise them of the categories of the material which will be the subject of the application.

I would be grateful if you could arrange for the application to be listed before the trial judge, HHJ [*insert details of trial judge where known*] and provide me with details of the hearing.

Details of the hearing should not be included on any published court list for the day of the hearing.

The estimated length of the hearing is [*insert time estimate*]

Yours faithfully,

E3 - Letter to court requesting listing for PII hearing – Mixed Type I & Type II applications

Dear Madam,

R v [*insert name(s) of defendant(s)*]
[*insert court details*] Court
Case no. [*insert case number*]
Date of trial: [*insert trial date where known*]

In the case against the above named, the prosecution wish to make application to assert PII in relation to sensitive material which has been retained. It is intended to provide notice of the application to the defence and to advise them of the categories of some, but not all, of the material which will be the subject of the application.

I would be grateful if you could arrange for the application to be listed before the trial judge, HHJ [*insert details of trial judge where known*] and provide me with details of the hearing so that I can serve notice on the defence.

The estimated length of the hearing is [*insert time estimate*]

Yours faithfully,

E4 - Letter to court requesting listing for PII hearing - Type III applications

CONFIDENTIAL

Dear Sir,

R v [*insert name(s) of defendant(s)*]
[*insert court details*] Court
Case no. [*insert case number*]
Date of trial: [*insert trial date where known*]

In the case against the above named the prosecution wish to make application to assert PII in relation to sensitive material which has been retained. The nature of the material which the court will be asked to consider is such that notice of the application cannot be given to the defence.

I would be grateful if you could arrange for the application to be listed before the trial judge, HHJ. [*insert details of trial judge where known*] and provide me with details of the hearing.

Details of the hearing should not be included on any published court list for the day of the hearing. **The defence must not be notified of the prosecution application.**

The estimated length of the hearing is [*insert time estimate*]

Yours faithfully,

E5 - Notice of application in relation to a PII hearing - Type II applications

IN THE COURT [*insert details*]

CASE/INDICTMENT NO: [*insert Indictment number*]

REGINA

V

[*insert names of defendants*]

TAKE NOTICE that the prosecution will apply to HHJ [*insert details of judge*] sitting in the [*insert details of court*] Court for a ruling that certain material retained by the prosecution is subject to public interest immunity from disclosure and should be withheld from the defence.

In relation to this material, the prosecution propose to make submissions to the court ex parte. The prosecution are unable to provide any further information in relation to this material.

The defence are invited to provide further particulars of their case to inform the prosecutor and the judge in their assessment of the potential value of the retained material to the defence case.

Signed.....
Name [insert name of reviewing prosecutor]
Dated this day of

E6 - Notice of application in relation to a PII hearing - Type I and 'mixed' Type I & Type II applications

IN THE COURT AT [*insert court details*]

CASE/INDICTMENT NO: [*insert Indictment number*]

REGINA

V

[*insert names of defendants*]

TAKE NOTICE that the prosecution will apply to HHJ [*insert details of judge*] sitting in the [*insert details of court*] Court on [*insert date*] at [*insert time*] for a ruling that certain material retained by the prosecution is subject to public interest immunity from disclosure and should be withheld from the defence.

In relation to the following items of unused material, the prosecution agree that the defence should be permitted to attend the hearing and make representations inter partes:

[*Insert here such details in relation to the material which you are able to provide without revealing that which you contend it is not in the public interest to disclose.*]

In addition to these items, there are further items of retained unused material in respect of which the prosecution propose to make submissions to the court ex parte. The prosecution are unable to provide any further information in relation to these items.

The defence are invited to provide further particulars of their case to inform the prosecutor and the judge in their assessment of the potential value of the retained material to the defence case.

Signed.....
Name [insert name of reviewing prosecutor]
Dated this day of

delete if inapplicable

E7 - Specimen background submission in support of application for PII

CONFIDENTIAL

IN THE COURT AT [*insert court details*]

CASE/INDICTMENT NO: [*insert Indictment number*]

REGINA

V

[*insert names of defendants*]

SUBMISSION IN SUPPORT OF APPLICATION FOR PUBLIC INTEREST IMMUNITY

BACKGROUND

The defendants are charged with ...[*set out charges*]

The prosecution case is ...[*summarise nature of case, and what the principal evidence is or is based upon*].

The full circumstances of the evidenced case are set out in the draft Opening Note, a copy of which is attached.

CHRONOLOGY OF RELEVANT EVENTS

Set out a detailed chronology listing key people and events so the court has an accurate picture of the context in which PII is said to arise.

MATERIAL TO BE WITHHELD

The prosecution seek to withhold from disclosure...

[*List the items of material that the prosecution seek PII immunity*]

WHETHER THE MATERIAL SATISFIES THE DISCLOSURE TEST

Prosecution material is disclosable, subject to arguments as to PII, if it might reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused. Such material will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution (Attorney General's Guidelines).

Material can be considered to be disclosable by the use that could be made of it in cross-examination or by its capacity to support submissions which could lead to the exclusion of evidence, a stay of proceedings or a court or tribunal finding that any public authority had acted incompatibly with a defendant's rights under the Constitution, or by its capacity to suggest an explanation or partial explanation of the accused's actions.

Set out details of why it is considered that material satisfies the disclosure test.

Set out details of any apparent defence by reference to the defence statement, the record of interview or from any other source, and how this impacts on the assessment of what material satisfies the disclosure test.

PUBLIC INTEREST IMMUNITY (PII)

Where the identity of a CHIS is material sought to be withheld then the following paragraphs may be used.

It is a long established principle that the prosecution should not be required to disclose material which would reveal the identity of an intelligence source unless not to do so might give rise to a miscarriage of justice by denying the defence a legitimate opportunity to cast doubt on the case against them.

The prosecution contend that there is nothing in the material sought to be withheld that would enable the defence to cast doubt on the case against them. Thus, the public interest in protecting the anonymity of intelligence sources is not overridden.

Where other public interests are in play, set out the nature of that interest.

DEFENCE STATEMENTS

Set out details of any defence(s) in the defence statement(s).Where no defence statement has been received, the following may be used:

Defence statements have not been received from the defendant(s) and the Crown has written to the defence reminding them of the requirement to provide a defence statement and pointing out the possible consequences of failing to do so. Nevertheless it has been possible to discern that the above material might satisfy the test for disclosure as outlined above.

TYPE OF APPLICATION

Set the Crown's assessment of what type of hearing is required and giving reasons why. In Type II cases the following may be used:

A Type II application is required in relation to the material to be considered by the judge. In relation to all items, the defence cannot be told anything about these documents without revealing that the prosecution contend it is not in the public interest to disclose.

E8 - Specimen PII submission (item specific)

CONFIDENTIAL

Item No: [*insert MG6D reference number*]

DESCRIPTION

Insert concise and accurate details of the material

WHETHER THE ITEM SATISFIES THE DISCLOSURE TEST

Set out why the material is said to satisfy the disclosure test

PUBLIC INTEREST IMMUNITY

The prosecution contend that it is not in the public interest to disclose [*insert details of why it is contended the material is sensitive and why it is said the material should be withheld, in other words, why the public interest in withholding it outweighs the public interest in disclosure. This should include the prosecutor's assessment of the value of the material to the defence case.*]

Item No: [*insert MG6D reference number*]

List any further items in the same way

OUTCOME

Record outcome of the judge's ruling and any reasons given here

E9 - Specimen front sheet to judges bundle on PII application

Specimen form

REGINA

V

[*List defendant(s) here*]

APPLICATION IN RELATION TO PUBLIC INTEREST IMMUNITY

Enclosures:

1. Notice of Hearing
2. Background submission
3. Specific submissions
4. Copy defence statement(s)
5. Copy further particulars of defence case submitted on behalf of [*insert details of any defendants who have provided further details of their case for the purpose of securing disclosure*.]
6. [*Insert details of any further documents submitted.*]

.....
[*Insert here the name of the person who has prepared the written submission.*]

Date .....

.....
[*Insert here the name of the Attorney General or Head of Legal Services who has approved the written submission if different from the person who has prepared it.*]

Date .....

I confirm that to the best of my knowledge and belief the factual assertions on which the attached submissions are based are true.

.....
[*Insert name of senior officer - Inspector or above - who has approved the submissions.*]

Date .....

The court is asked to note the **Confidential**/**Secret**/**Top Secret** classification applied to this material and to ensure that the material is kept securely at all times. *delete if inapplicable*

E10 - PII submissions - table format

CONFIDENTIAL

R v [*Insert name(s) of defendant(s)*]

PII SUBMISSIONS

ITEM	DESCRIPTION	DISCLOSABILITY	PUBLIC INTEREST IMMUNITY	OUTCOME
D[ ]	*Insert concise and accurate details of the material.*	*Set out why the material is said to satisfy the disclosure test.*	*The prosecution contend that it is not in the public interest to disclose [insert details of why it is contended the material is sensitive and why it is said the material should be withheld, in other words why the public interest in withholding it outweighs the public inters in disclosure. This should include the prosecutor's assessment of the value of the material to the defence case].*	*Record outcome of judge's ruling and any reasons given here.*

Document Control

Further copies of this document and information about alternative languages and formats are available from the Law and Regulation Directorate.

Law and Regulation Directorate
Attorney General's Chambers
PO Box 587
Stanley
Falkland Islands
FIQQ 1ZZ

This document is also available online at: **http://www.fig.gov.fk/legal/**

Document Reference:	AGG7: The Attorney General's Guidance on Disclosure
Issue Date:	August 2019
Ownership and Review:	The Attorney General is the document owner for this document and the next scheduled review date is 2021