



DISCLOSURE: A PROTOCOL FOR THE CONTROL AND MANAGEMENT OF UNUSED MATERIAL IN THE CROWN COURT

Introduction

1. Disclosure is one of the most important – as well as one of the most abused – of the procedures relating to criminal trials. There needs to be a sea-change in the approach of both judges and the parties to all aspects of the handling of the material which the prosecution do not intend to use in support of their case. For too long, a wide range of serious misunderstandings has existed, both as to the exact ambit of the unused material to which the defence is entitled, and the role to be played by the judge in ensuring that the law is properly applied. All too frequently applications by the parties and decisions by the judges in this area have been made based either on misconceptions as to the true nature of the law or a general laxity of approach (however well-intentioned). This failure properly to apply the binding provisions as regards disclosure has proved extremely and unnecessarily costly and has obstructed justice. It is, therefore, essential that disclosure obligations are properly discharged – by both the prosecution and the defence – in all criminal proceedings, and the court's careful oversight of this process is an important safeguard against the possibility of miscarriages of justice.
2. The House of Lords stated in R v H and C [2004] 2 AC 134, at 147:

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.
3. However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material.

4. The overarching principle is therefore that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations. The relevant test for disclosure will depend on the date the criminal investigation in question commenced (see the section on Sources below), as this will determine whether the common law disclosure regime applies, or either of the two disclosure regimes under the [Criminal Procedure and Investigations Act 1996 \(CPIA\)](#).
5. There is very clear evidence that, without active judicial oversight and management, the handling of disclosure issues in general, and the disclosure of unused prosecution material in particular, can cause delays and adjournments.
6. The failure to comply fully with disclosure obligations, whether by the prosecution or the defence, may disrupt and in some cases even frustrate the course of justice.
7. Consideration of irrelevant unused material may consume wholly unjustifiable and disproportionate amounts of time and public resources, undermining the overall performance and efficiency of the criminal justice system. The aim of this Protocol is therefore to assist and encourage judges when dealing with all disclosure issues, in the light of the overarching principle set out in paragraph 4 above. This guidance is intended to cover all Crown Court cases (including cases where relevant case management directions are made at the Magistrates' Court). It is not, therefore, confined to a very few high profile and high cost cases.
8. Unused material which has been gathered during the course of a criminal investigation and disclosed by the prosecution pursuant to their duties (as set out elsewhere in this Protocol) is received by the defence subject to a prohibition not to use or disclose the material for any purpose which is not connected with the proceedings for whose purposes they were given it (s. 17 CPIA). The common law, which applies to all disclosure not made under the CPIA, achieves the same result by the creation of an implied undertaking not to use the material for any purposes other than the proper conduct of the particular case (see *Taylor v Director of the Serious Fraud Office* HL [1999] 2

A.C. 177). A breach of that undertaking would constitute a contempt of court. These provisions are designed to ensure that the privacy and confidentiality of those who provided the material to the investigation (as well as those who are mentioned in the material) is protected and is not invaded any more than is absolutely necessary. However, neither statute nor the common law prevents any one from using or disclosing such material if it has been displayed or communicated to the public in open court (unless the evidence is subject to continuing reporting restriction), and moreover, an application can be made to the court for permission to use or disclose the object or information.

Sources

9. It is not the purpose of this Protocol to rehearse the law in detail; however, some of the principal sources are set out here.
10. The correct test for disclosure will depend upon the date the relevant criminal investigation commenced:
 - a. In relation to offences in respect of which the criminal investigation began prior to 1 April 1997, the common law will apply, and the test for disclosure is that set out in R v Keane [1994] 1 W.L.R. 746; (1994) 99 Cr. App. R. 1.
 - b. If the criminal investigation commenced on or after 1 April 1997, but before 4 April 2005, then the CPIA in its original form will apply, with separate tests for disclosure of unused prosecution material at the primary and secondary disclosure stages (the latter following service of a defence statement by the accused). The disclosure provisions of the Act are supported by the 1997 edition of the Code of Practice issued under section 23(1) of the CPIA ([Statutory Instrument 1997 No. 1033](#))
 - c. Where the criminal investigation has commenced on or after 4 April 2005, the law is set out in the CPIA as amended by Part V of the Criminal Justice Act 2003. There is then a single test for disclosure of unused prosecution material and the April 2005 edition of the Code of Practice under section 23(1) of the CPIA will apply ([see SI 2005 No. 985](#)).

The CPIA also identifies the stage(s) at which the prosecution is required to disclose material, and the formalities relating to defence statements. The default time limit for prosecution disclosure is set out in [section 13](#) of the Act (see further at paragraph 13 below). The time limits applicable to defence disclosure are set out in the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Regulations) 1997 ([S.I. 1997 No. 684](#)).

10. Regard must be had to the Attorney General's Guidelines on Disclosure (April 2005). Although these do not have the force of law ([R v Winston Brown \[1995\] 1 Cr. App. R. 191; \[1994\] 1 WLR 1599](#)) they should be given due weight.
11. Part 25 of the Criminal Procedure Rules 2005 ([see SI 2005 No. 384](#)) sets out the procedures to be followed for applications to the court concerning both sensitive and non-sensitive unused material. Part 3 of the Rules is also relevant in respect of the court's general case management powers, and parties should also have regard to the Consolidated Criminal Practice Direction.
12. Parts 22 and 23 of the Criminal Procedure Rules are set aside to make provision for other rules concerning disclosure by the prosecution and the defence, although at the date of this Protocol there are no rules under those Parts.

The duty to gather and record unused material

13. For the statutory scheme to work properly, investigators and disclosure officers responsible for the gathering, inspection, retention and recording of relevant unused prosecution material must perform their tasks thoroughly, scrupulously and fairly. In this, they must adhere to the appropriate provisions of the CPIA Code of Practice.
14. It is crucial that the police (and indeed all investigative bodies) implement appropriate training regimes and appoint competent disclosure officers, who have sufficient knowledge of the issues in the case. This will enable them to make a proper assessment of the unused prosecution material in the light of

the test for relevance under paragraph 2.1 of the CPIA Code of Practice, with a view to preparing full and accurate schedules of the retained material. In any criminal investigation, the disclosure officer must retain material that may be relevant to an investigation. This material must be listed on a schedule. Each item listed on the schedule should contain sufficient detail to enable the prosecutor to decide whether or not the material falls to be disclosed. The schedules must be sent to the prosecutor. Wherever possible this should be at the same time as the file containing the material for the prosecution case but the duty to disclose does not end at this point and must continue while relevant material is received even after conviction.

15. Furthermore, the scheduling of the relevant material must be completed expeditiously, so as to enable the prosecution to comply promptly with the duty to provide primary (or, when the amended CPIA regime applies) initial disclosure as soon as practicable after:
 - the case has been committed for trial under section 6(1) or 6(2) of the Magistrates' Courts Act 1980; or
 - the case has been transferred to the Crown Court under section 4 of the Criminal Justice Act 1987, or [section 53 of the Criminal Justice Act 1991](#); or
 - copies of documents containing the evidence are served on the accused in accordance with the Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005 ([S.I. 2005 No. 902](#)), where the matter has been sent to the Crown Court pursuant to [section 51 or 51A of the Crime and Disorder Act 1998](#); or
 - a matter has been added to an indictment in accordance with [section 40 of the Criminal Justice Act 1988](#); or
 - a bill of indictment has been preferred under section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 or section 22B(3)(a) of the Prosecution of Offences Act 1985.
16. Investigators, disclosure officers and prosecutors must promptly and properly discharge their responsibilities under the Act and statutory Code, in order to

ensure that justice is not delayed, denied or frustrated. In this context, under paragraph 3.5 of the Code of Practice, it is provided “an investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect”.

17. CPS lawyers advising the police pre-charge at police stations should consider conducting a preliminary review of the unused material generated by the investigation, where this is practicable, so as to give early advice on disclosure issues. Otherwise, prosecutors should conduct a preliminary review of disclosure at the same time as the initial review of the evidence. It is critical that the important distinction between the evidence in the case, on the one hand, and any unused material, on the other, is not blurred. Items such as exhibits should be treated as such and the obligation to serve them is not affected by the disclosure regime.
18. Where the single test for disclosure applies under the amended CPIA disclosure regime, the prosecutor is under a duty to consider, at an early stage of proceedings, whether there is any unused prosecution material which is reasonably capable of assisting the case for the accused. What a defendant has said by way of defence or explanation either in interview or by way of a prepared statement can be a useful guide to making an objective assessment of the material which would satisfy this test.
19. There may be some occasions when the prosecution, pursuant to surviving common law rules of disclosure, ought to disclose an item or items of unused prosecution material, even in advance of primary or initial disclosure under [section 3 of the CPIA](#). This may apply, for instance, where there is information which might affect a decision as to bail; where an abuse of process is alleged; where there is material which might assist the defence to make submissions as to the particular charge or charges, if any, the defendant should face at the Crown Court; and when it is necessary to enable particular preparation to be undertaken at an early stage by the defence. Guidance as to occasions where such disclosure may be appropriate is provided in R v DPP ex parte Lee (1999) 2 Cr App R 304. However, once the CPIA is triggered (for instance, by committal, or service of case papers following a section 51 sending) it is the CPIA which determines what material should be disclosed.

The judge's duty to enforce the statutory scheme

20. When cases are sent to the Crown Court under section 51 of the Crime and Disorder Act 1998, the [Crime and Disorder Act 1998](#) (Service of Prosecution Evidence) Regulations 2005 allow the prosecution 70 days from the date the matter was sent (50 days, where the accused is in custody) within which to serve on the defence and the court copies of the documents containing the evidence upon which the charge or charges are based (in effect, sufficient evidence to amount to a prima facie case). These time limits may be extended and varied at the court's direction. Directions for service of these case papers may be given at the Magistrates' Court.
21. While it is important to note that this time limit applies to the service of evidence, rather than unused prosecution material, the court will need to consider at the Magistrates' Court or preliminary hearing whether it is practicable for the prosecution to comply with primary or initial disclosure at the same time as service of such papers, or whether disclosure ought to take place after a certain interval, but before the matter is listed for a PCMH.
22. If the nature of the case does not allow service of the evidence and initial or primary disclosure within the 70, or if applicable 50, days (or such other period as directed by the Magistrates' Court), the investigator should ensure that the prosecution advocate at the Magistrates' Court, preliminary Crown Court hearing, or further hearing prior to the PCMH, is aware of the problems, knows why and how the position has arisen and can assist the court as to what revised time limits are realistic.
23. It would be helpful if the prosecution advocate could make any foreseeable difficulties clear as soon as possible, whether this is at the Magistrates' Court or in the Crown Court at the preliminary hearing (where there is one).
24. Failing this, where such difficulties arise or have come to light after directions for service of case papers and disclosure have been made, the prosecution should notify the court and the defence promptly. This should be done in advance of the PCMH date, and prior to the date set by the court for the service of this material.

25. It is important that this is done in order that the listing for the PCMH is an effective one, as the defence must have a proper opportunity to read the case papers and to consider the initial or primary disclosure, with a view to timely drafting of a defence case statement (where the matter is to be contested), prior to the PCMH.
26. In order to ensure that the listing of the PCMH is appropriate, Judges should not impose time limits for service of case papers or initial/primary disclosure unless and until they are confident that the prosecution advocate has taken the requisite instructions from those who are actually going to do the work specified. It is better to impose a realistic timetable from the outset than to set unachievable limits. Reference should be made to Part 3 of the Criminal Procedure Rules and the Consolidated Practice Direction in this respect.
27. This is likewise appropriate where directions, or further directions, are made in relation to prosecution or defence disclosure at the PCMH. Failure to consider whether the timetable is practicable may dislocate the court timetable and can even imperil trial dates. At the PCMH, therefore, all the advocates – prosecution and defence – must be fully instructed about any difficulties the parties may have in complying with their respective disclosure obligations, and must be in a position to put forward a reasonable timetable for resolution of them.
28. Where directions are given by the court in the light of such inquiry, extensions of time should not be given lightly or as a matter of course. If extensions are sought, then an appropriately detailed explanation must be given. For the avoidance of doubt, it is not sufficient merely for the CPS (or other prosecutor) to say that the papers have been delivered late by the police (or other investigator): the court will need to know why they have been delivered late. Likewise, where the accused has been dilatory in serving a defence statement (where the prosecution has complied with the duty to make primary or initial disclosure of unused material, or has purported to do so), it is not sufficient for the defence to say that insufficient instructions have been taken for service of this within the 14-day time limit: the court will need to know why sufficient instructions have not been taken, and what arrangements have been made for the taking of such instructions.

29. Delays and failures by the defence are as damaging to the timely, fair and efficient hearing of the case as delays and failures by the prosecution, and judges should identify and deal with all such failures firmly and fairly.
30. Judges should not allow the prosecution to abdicate their statutory responsibility for reviewing the unused material by the expedient of allowing the defence to inspect (or providing the defence with copies of) everything on the schedules of non-sensitive unused prosecution material, irrespective of whether that material, or all of that material, satisfies the relevant test for disclosure. Where that test is satisfied it is for the prosecutor to decide the form in which disclosure is made. Disclosure need not be in the same form as that in which the information was recorded. Guidance on case management issues relating to this point was given by Rose LJ in R v CPS (Interlocutory Application under sections 35/36 CPIA) [2005] EWCA Crim 2342.
31. Indeed, the larger and more complex the case, the more important it is for the prosecution to adhere to the overarching principle in paragraph 4 and ensure that sufficient prosecution resources are allocated to the task. Handing the defence the “keys to the warehouse” has been the cause of many gross abuses in the past, resulting in huge sums being run up by the defence without any proportionate benefit to the course of justice. These abuses must end.

The defence case statement

32. Reference has been made above to defence disclosure obligations. After the provision of primary or initial disclosure by the prosecution, the next really critical step in the preparation for trial is the service of the defence statement. It is a mandatory requirement for a defence statement to be served, where [section 5\(5\) of the CPIA](#) applies to the proceedings. This is due within 14 days of the date upon which the prosecution has complied with, or purported to comply with, the duty of primary or initial disclosure. Service of the defence statement is a critical stage in the disclosure process, and timely service of the statement will allow for the proper consideration of disclosure issues well in advance of the trial date.
33. There may be some cases where it is simply not possible to serve a proper defence case statement within the 14-day time limit; well founded defence

applications for an extension of time under paragraph (2) of regulation 3 of the [Criminal Procedure and Investigations Act 1996 \(Defence Disclosure Time Limits\) Regulations 1997](#) may therefore be granted. In a proper case, it may be appropriate to put the PCMH back by a week or so, to enable a sufficient defence case statement to be filed and considered by the prosecution.

34. In the past, the prosecution and the court have too often been faced with a defence case statement that is little more than an assertion that the Defendant is not guilty. As was stated by the Court of Appeal in [R v Patrick Bryant \[2005\] EWCA Crim 2079](#) (per Judge LJ, paragraph 12), such a reiteration of the defendant's plea is not the purpose of a defence statement. Defence statements must comply with the requisite formalities set out in [section 5\(6\) and \(7\)](#), or [section 6A](#), of the CPIA, as applicable.
35. Where the enhanced requirements for defence disclosure apply under section 6A of the CPIA (namely, where the case involves a criminal investigation commencing on or after 4 April 2005) the defence statement must spell out, in detail, the nature of the defence, and particular defences relied upon; it must identify the matters of fact upon which the accused takes issue with the prosecution, and the reason why, in relation to each disputed matter of fact. It must further identify any point of law (including points as to the admissibility of evidence, or abuse of process) which the accused proposes to take, and identify authorities relied on in relation to each point of law. Where an alibi defence is relied upon, the particulars given must comply with [section 6\(2\)\(a\) and \(b\) of the CPIA](#). Judges will expect to see defence case statements that contain a clear and detailed exposition of the issues of fact and law in the case.
36. Where the pre-4 April 2005 CPIA disclosure regime applies, the accused must, in the defence statement, set out the nature of the defence in general terms, indicate the matters upon which the defendant takes issue with the prosecution and set out (in relation to each such matter) why issue is taken. Any alibi defence relied upon should comply with the formalities in [section 5\(7\)\(a\) and \(b\)](#) of the Act.

37. There must be a complete change in the culture. The defence must serve the defence case statement by the due date. Judges should then examine the defence case statement with care to ensure that it complies with the formalities required by the CPIA. As was stated in paragraph 35 of R v H and C [2004]:

If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court.

38. If no defence case statement – or no sufficient case statement – has been served by the PCMH, the judge should make a full investigation of the reasons for this failure to comply with the mandatory obligation of the accused, under [section 5\(5\) of the CPIA](#).
39. If there is no – or no sufficient – defence statement by the date of PCMH, or any pre-trial hearing where the matter falls to be considered, the judge must consider whether the defence should be warned, pursuant to [section 6E\(2\) of the CPIA](#), that an adverse inference may be drawn at the trial. In the usual case, where section 6E(2) applies and there is no justification for the deficiency, such a warning should be given.
40. Judges must, of course, be alert to ensure that defendants do not suffer because of the faults and failings of their lawyers, but there must be a clear indication to the professions that if justice is to be done, and if disclosure to be dealt with fairly in accordance with the law, a full and careful defence case statement is essential.
41. Where there are failings by either the defence or the prosecution, judges should, in exercising appropriate oversight of disclosure, pose searching questions to the parties and, having done this and explored the reasons for default, give clear directions to ensure that such failings are addressed and remedied well in advance of the trial date.

42. The ultimate sanction for a failure in disclosure by the accused is the drawing of an inference under [section 11 of the CPIA](#). Where the amended CPIA regime applies, the strict legal position allows the prosecution to comment upon any failure of defence disclosure, with a view to seeking such an inference (except where the failure relates to identifying a point of law), without leave of the court, but often it will be helpful to canvass the matter with the judge beforehand. In suitable cases, the prosecution should consider commenting upon failures in defence disclosure, with a view to such an inference, more readily than has been the practice under the old CPIA regime, subject to any views expressed by the judge.
43. It is vital to a fair trial that the prosecution are mindful of their continuing duty of disclosure, and they must particularly review disclosure in the light of the issues identified in the defence case statement. As part of the timetabling exercise, the judge should set a date by which any application under section 8 (if there is to be one) should be made. While the defence may indicate, in advance of the cut-off date, what items of unused material they are interested in and why, such requests must relate to matters raised in the accused's defence statement. The prosecution should only disclose material in response to such requests if the material meets the appropriate test for disclosure, and the matter must proceed to a formal section 8 hearing in the event that the prosecution declines to make disclosure of the items in question. Paragraphs 4(iv) - (vi)(a) of the Lord Chief Justice's March 2005 Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases should be construed accordingly.
44. If, after the prosecution have complied with, or purported to comply with, primary or initial disclosure, and after the service of the defence case statement and any further prosecution disclosure flowing there from, the defence have a reasonable basis to claim disclosure has been inadequate, they must make an application to the court under [section 8 of the CPIA](#). The procedure for the making of such an application is set out in the Criminal Procedure Rules, Part 25, r 25.6. This requires written notice to the prosecution in the form prescribed by r 25.6(2). The prosecution is then entitled (r 25.6(5)) to 14 days within which to agree to provide the specific disclosure requested or to request a hearing in order to make representations

in relation to the defence application. As part of the timetabling exercise, the judge should set a date by which any applications under section 8 are to be made and should require the defence to indicate in advance of the cut-off date for specific disclosure applications what documents they are interested in and from what source; in appropriate cases, the judge should require justification of such requests.

45. The consideration of detailed defence requests for specific disclosure (so-called 'shopping lists') otherwise than in accordance with r 25.6, is wholly improper. Likewise, defence requests for specific disclosure of unused prosecution material in purported pursuance of [section 8 of the CPIA](#) and r 25.6, which are not referable to any issue in the case identified by the defence case statement, should be rejected. Judges should require an application to be made under section 8 and in compliance with r 25.6 before considering any order for further disclosure.
46. It follows that the practice of making blanket orders for disclosure in all cases should cease, since such orders are inconsistent with the statutory framework of disclosure laid down by the CPIA, and which was endorsed by the House of Lords in [R v H and C \(supra\)](#).

Listing

47. It will be clear that the conscientious discharge of a judge's duty at the PCMH requires a good deal more time than under the old PDH regime; furthermore a good deal more work is required of the advocate. The listing of PCMHs must take this into account. Unless the court can sit at 10am and finish the PCMH by 10.30am, it will not therefore usually be desirable for a judge who is part-heard on a trial to do a PCMH.
48. It follows that any case which raises difficult issues of disclosure should be referred to the Resident Judge for directions. Cases of real complexity should, if possible, be allocated to a specific trial judge at a very early stage, and usually before the PCMH.
49. Although this Protocol is addressed to the issues of disclosure, it cannot be seen in isolation; it must be seen in the context of general case management.

Public Interest Immunity

50. Recent authoritative guidance as to the proper approach to PII is provided by the House of Lords in R v H and C (supra). It is clearly appropriate for PII applications to be considered by the trial judge. No judge should embark upon a PII application without considering that case and addressing the questions set out in paragraph 36, which for ease of reference we reproduce here:

“36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(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 be 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 (see paragraph 22 above). 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?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.”

51. In this context, the following matters are emphasised:

- a. The procedure for making applications to the Court is as set out in the Criminal Procedure Rules 2005, Part 25 (r 25.1 – r 25.5);
- b. Where the PII application is a Type 1 or Type 2 application, proper notice to the defence is necessary to allow them to make focused submissions to the court before hearing an application to withhold material; the notice should be as specific as the nature of the material allows. It is appreciated that in some cases only the generic nature of the material can properly be identified. In some wholly exceptional cases (Type 3 cases) it may even be justified to give no notice at all. The judge should always ask the prosecution to justify the form of notice given (or the decision to give no notice at all).
- c. The prosecution should be alert to the possibility of disclosing a statement in redacted form by, for example simply removing personal details. This may obviate the need for a PII application, unless the redacted material in itself would also satisfy the test for disclosure.
- d. Except where the material is very short (say a few sheets only), or where the material is of such sensitivity that to do so would be inappropriate, the prosecution should have supplied securely sealed copies to the judge beforehand, together with a short statement of the reasons why each document is said to be relevant and fulfils the

disclosure test and why it is said that its disclosure would cause a real risk of serious prejudice to an important public interest; in undertaking this task, the use of merely formulaic expressions is to be discouraged. In any case of complexity a schedule of the material should be provided showing the specific objection to disclosure in relation to each item, leaving a space for the decision.

- e. The application, even if held in private or in secret, should be recorded. The judge should give some short statement of reasons; this is often best done document by document as the hearing proceeds.
- f. The tape, copies of the judge's orders (and any copies of the material retained by the court) should be clearly identified, securely sealed and kept in the court building in a safe or stout lockable cabinet consistent with its security classification, and there should be a proper register of all such material kept. Some arrangement should be made between the court and the prosecution authority for the periodic removal of such material once the case is concluded and the time for an appeal has passed.

Third party disclosure

52. The disclosure of unused material that has been gathered or generated by a third party is an area of the law that has caused some difficulties: indeed, a Home Office Working Party has been asked to report on it. This is because there is no specific procedure for the disclosure of material held by third parties in criminal proceedings, although the procedure under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Courts Act 1980 is often used in order to effect such disclosure. It should, however, be noted that the test applied under both Acts is not the test to be applied under the CPIA, whether in the amended or unamended form. These two provisions require that the material in question is material evidence, ie, immediately admissible in evidence in the proceedings (see in this respect R v Reading Justices ex parte: Berkshire County Council [1996] 1 Cr. App. R. 239, R v Derby Magistrates' Court ex parte B [1996] AC 487; [1996] 1 Cr App R 385 and R v Alibhai and others [2004] EWCA Crim 681).

53. Material held by other government departments or other Crown agencies will not be prosecution material for the purposes of [section 3\(2\)](#) or [section 8\(4\)](#) of the CPIA, if it has not been inspected, recorded and retained during the course of the relevant criminal investigation. The Attorney General's Guidelines on Disclosure, however, impose a duty upon the investigators and the prosecution to consider whether such departments or bodies have material which may satisfy the test for disclosure under the Act. Where this is the case, they must seek appropriate disclosure from such bodies, who should themselves have an identified point for such enquiries (see paragraphs 47 to 51, Attorney General's Guidelines on Disclosure).
54. Where material is held by a third party such as a local authority, a social services department, hospital or business, the investigators and the prosecution may seek to make arrangements to inspect the material with a view to applying the relevant test for disclosure to it and determining whether any or all of the material should be retained, recorded and, in due course, disclosed to the accused. In considering the latter, the investigators and the prosecution will establish whether the holder of the material wishes to raise PII issues, as a result of which the material may have to be placed before the court. [Section 16](#) of the CPIA gives such a party a right to make representations to the court.
55. Where the third party in question declines to allow inspection of the material, or requires the prosecution to obtain an order before handing over copies of the material, the prosecutor will need to consider whether it is appropriate to obtain a witness summons under either section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Court Act 1980. However, as stated above, this is only appropriate where the statutory requirements are satisfied, and where the prosecutor considers that the material may satisfy the test for disclosure. [R v Alibhai](#) and others supra makes it clear that the prosecutor has a "margin of consideration" in this regard.
56. It should be understood that the third party may have a duty to assert confidentiality, or the right to privacy under article 8 of the ECHR, where requests for disclosure are made by the prosecution, or anyone else. Where issues are raised in relation to allegedly relevant third party material, the

judge must ascertain whether inquiries with the third party are likely to be appropriate, and, if so, identify who is going to make the request, what material is to be sought, from whom is the material to be sought and within what time scale must the matter be resolved.

57. The judge should consider what action would be appropriate in the light of the third party failing or refusing to comply with a request, including inviting the defence to make the request on its own behalf and, if necessary, to make an application for a witness summons. Any directions made (for instance, the date by which an application for a witness summons with supporting affidavit under section 2 of the 1965 should be served) should be put into writing at the time. Any failure to comply with the timetable must immediately be referred back to the court for further directions, although a hearing will not always be necessary.
58. Where the prosecution do not consider it appropriate to seek such a summons, the defence should consider doing so, where they are of the view (notwithstanding the prosecution assessment) that the third party may hold material which might undermine the prosecution case or assist that for the defendant, and the material would be likely to be 'material evidence' for the purposes of the 1965 Act. The defence must not sit back and expect the prosecution to make the running. The judge at the PCMH should specifically enquire whether any such application is to be made by the defence and set out a clear timetable. The objectionable practice of defence applications being made in the few days before trial must end.
59. It should be made clear, though, that 'fishing' expeditions in relation to third party material – whether by the prosecution or the defence - must be discouraged, and that, in appropriate cases, the court will consider making an order for wasted costs where the application is clearly unmeritorious and ill-conceived.
60. Judges should recognise that a summons can only be issued where the document(s) sought would be admissible in evidence. While it may be that the material in question may be admissible in evidence as a result of the hearsay provisions of the [CJA \(sections 114 to 120\)](#), it is this that determines whether an order for production of the material is appropriate, rather than the wider

considerations applicable to disclosure in criminal proceedings: see R v Reading Justices (supra), upheld by the House of Lords in R v Derby Magistrates' Court (supra).

61. A number of Crown Court centres have developed local protocols, usually in respect of sexual offences and material held by social services and health and education authorities. Where these protocols exist they often provide an excellent and sensible way to identify relevant material that might assist the defence or undermine the prosecution.

62. Any application for third party disclosure must identify what documents are sought and why they are said to be material evidence. This is particularly relevant where attempts are made to access the medical reports of those who allege that they are victims of crime. Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by the mere fact of making a complaint against the accused. Judges should be alert to balance the rights of victims against the real and proven needs of the defence. The court, as a public authority, must ensure that any interference with the article 8 rights of those entitled to privacy is in accordance with the law and necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused. If material is held by any person in relation to family proceedings (eg, where there have been care proceedings in relation to a child, who has also complained to the police of sexual or other abuse) then an application has to be made by that person to the family court for leave to disclose that material to a third party, unless the third party, and the purpose for which disclosure is made, is approved by Rule 10.20A(3) of the Family Proceedings Rules 1991 ([SI 1991 No. 1247](#)). This would permit, for instance, a local authority, in receipt of such material, to disclose it to the police for the purpose of a criminal investigation, or to the CPS, in order for the latter to discharge any obligations under the CPIA.

Conclusion

63. The public rightly expects that the delays and failures which have been present in some cases in the past where there has been scant adherence to sound disclosure principles will be eradicated by observation of this Protocol.

The new regime under the Criminal Justice Act and the Criminal Procedure Rules gives judges the power to change the culture in which such cases are tried. It is now the duty of every judge actively to manage disclosure issues in every case. The judge must seize the initiative and drive the case along towards an efficient, effective and timely resolution, having regard to the overriding objective of the Criminal Procedure Rules (Part 1). In this way the interests of justice will be better served and public confidence in the criminal justice system will be increased.